

BRANCH OFFICE  
JUDGE ADVOCATE  
GENERAL  
OF THE ARMY

---

BOARD OF REVIEW  
OPINIONS

---

NORTH AFRICAN  
THEATRE  
MEDITERRANEAN  
THEATRE

---

VOL. 3  
1944

B  
12  
LAW DIV.  
JAG BR  
MIL

HOLDINGS OPINIONS AND REVIEWS

# BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

**NORTH AFRICAN THEATER OF OPERATIONS  
MEDITERRANEAN THEATER OF OPERATIONS**



VOLUME 3 B.R. (NATO-MTO)  
CM NATO 1183-CM NATO 2190

**CONFIDENTIAL**

CLASSIFICATION CANCELLED  
AUTH: TJAG 4/15/46 BY: A&K.

OFFICE OF THE JUDGE ADVOCATE GENERAL  
WASHINGTON, D. C.



R  
16

B63n

v.3

Downgraded  
Authority of  
TJAG May 20, 1954

Judge Advocate General's Department

Holdings Opinions and Reviews

BOARD OF REVIEW

Branch Office of The Judge Advocate General

NORTH AFRICAN THEATER OF OPERATIONS

MEDITERRANEAN THEATER OF OPERATIONS

Volume 3 B.R. (NATO-MTO)

including

CM NATO 1183 - CM NATO 2190

(1944)

LAW LIBRARY  
JUDGE ADVOCATE GENERAL  
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington : 1946

04273

**CONTENTS OF VOLUME 3 (NATO-MTO)**

<u>NATO No.</u>	<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
1183	272372	Garner	3 Jan 1944	1
1184	266581	Wilson	6 Jan 1944	5
1185	270088	Oswald	10 Jan 1944	9
1186	270951	Holmes	15 Jan 1944	13
1187	272982	Annunziato	11 Jan 1944	19
1188	272100	Clementi	7 Jan 1944	23
1242	254759	Jeffers, Orange	15 Jan 1944	27
1243	272553	Evans	11 May 1944	33
1259	259274	Crance	15 Jan 1944	37
1267	254753	Denson	28 Jan 1944	41
1279	268693	Alex	18 Jan 1944	57
1283	271048	Guest	17 Jan 1944	61
1329	254990	Robinson, Garrett, Jones	2 Feb 1944	65
1330	271927	Donofrio	27 Jan 1944	73
1366	272987	Anderson	4 Mar 1944	77
1383	254994	Bell	22 Feb 1944	85
1406	272813	Bell, Smith	15 Mar 1944	91
1420	266546	Whitmire	21 Feb 1944	101
1432	267740	Herbert	15 Feb 1944	107
1461	259306	Sulewski	24 Feb 1944	115
1470	259308	Hall, Lewis	15 Mar 1944	119
1489	270227	Timbers, Minor, McKeithen, Williams	8 Mar 1944	127
1490	267450	Johnson, Brookin, Whitaker	1 Apr 1944	135
1556	267065	Boudreaux	29 Mar 1944	145
1566	271928	Donohue	10 Mar 1944	151
1603	272402	Cimental	28 Mar 1944	157
1614	267114	Langer	24 Mar 1944	167
1618	258814	Majorana	15 Apr 1944	175
1626	281511	Harris	30 May 1944	185
1627	272550	Espinosa, Navrocky	25 Mar 1944	193
1631	270550	Lucky	23 Mar 1944	199
1635	267062	Harris, Miller, Penn	1 May 1944	207
1647	262313	Kirinich	6 Apr 1944	215
1661	262279	Berkowitz	20 Apr 1944	219
1672	267110	Spears	1 Apr 1944	229
1702	269382	Reynolds	24 Apr 1944	237
1707	267177	Faircloth	8 Apr 1944	241
1715	270716	Kinlow	11 Apr 1944	249
1723	270727	Knight	12 Apr 1944	255

<u>NATO No.</u>	<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
1758	262572	Doss	6 Apr 1944	261
1792	270676	Kasalonis	1 May 1944	265
1793	270843	Hunter	10 May 1944	271
1799	270020	Quist	29 Apr 1944	281
1800	270923	Burgoyne	19 Apr 1944	287
1801	272430	Fay	5 May 1944	295
1840	267428	Billings	18 Apr 1944	301
1856	266468	Younge	21 Apr 1944	307
1925	263556	Cofield, Jackson, James, Shepard, Gorham	29 Apr 1944	313
1975	268381	Laster, Moore	29 May 1944	319
1978	267108	Mercier, Griffin, Johnson	8 May 1944	327
2012	268915	Frain	6 May 1944	335
2013	262465	Weissinger	3 May 1944	339
2022	262462	Donnelly	9 May 1944	343
2023	262466	Walker	20 May 1944	351
2045	267560	Sanders	12 May 1944	359
2046	270796	Jamruska	9 May 1944	363
2047	269900	Plante	20 May 1944	367
2114	272874	Burgess	13 May 1944	373
2121	267067	Fields	22 May 1944	377
2139	268916	Grabowski	18 May 1944	383
2171	266993	Tatko	23 May 1944	387
2190	266691	Venable	2 Jun 1944	391

**CONFIDENTIAL**

(1)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
3 January 1944.

Board of Review

NATO 1183

U N I T E D   S T A T E S	)	NINTH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Cefalu, Sicily, 14 September 1943.
Private BRUCE B. GARNER (99064986), Company H, 39th Infantry, Ninth Infantry Division.	)	Dishonorable discharge and confinement for 20 years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

-----

**REVIEW by the BOARD OF REVIEW**

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Bruce B. Garner, Company "H", 39th Infantry, did, at French North Africa, on or about July 9, 1943, desert the military service of the United States by absenting himself without proper authority from his organization located 5 miles west of Bizerte, French North Africa, with intent to shirk hazardous duty, to wit: Action against the enemy, and did remain absent in desertion until he surrendered himself at Headquarters Service Command, APO # 512, U.S. Army, on or about July 16, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was

**CONFIDENTIAL**

**CONFIDENTIAL**

(2)

sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for thirty years, three fourths of the members present concurring. The reviewing authority approved "only so much of the findings of guilty of the specification of the charge and charge as involves a finding of guilty of desertion at the time and place and under the circumstances as alleged, and terminated in a manner not proven at the time and place alleged". He approved the sentence but remitted so much thereof as involves confinement in excess of twenty years. He designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on or about 9 July 1943, accused was a member of the mortar platoon of Company H, 39th Infantry, which was then stationed near Bizerte, Tunisia, in French North Africa. It was common knowledge in the company that they were preparing to embark for an unknown destination for the purpose of engaging in combat with the enemy (R. 6). The platoon leader had personally given this information to the platoon at a time when accused was present. On 9 July 1943, accused was absent from the reveille formation (R. 6,8). A check up was made within the platoon and the area but he could not be found (R. 8). Accused's organization embarked from French North Africa on or about 13 July 1943, landed in Sicily and engaged the enemy. Accused was not present when they landed (R. 6,8). He was not seen again until about 15 August 1943, when he was returned to the company from North Africa by an officer with other replacements (R. 7). Accused made no statement upon his return to the organization (R. 8). An extract copy of the morning report showing the initial unauthorized absence was received in evidence without objection (R. 9).

Accused elected to remain silent and no evidence was offered in his behalf.

4. It thus appears from the evidence that at the time and place alleged accused absented himself from his organization without proper leave and that it was done at a time when embarkation to engage with the enemy was impending. The nature of the operations involved and accused's knowledge of what was imminent were clearly established. The facts and circumstances justify the inference that when accused left the organization he did so to avoid hazardous duty as alleged (MCM, 1928, par. 130a).

5. There was no evidence that accused's absence without leave was terminated by surrender as alleged. The reviewing authority properly approved only so much of the findings as involved a finding of guilty of desertion at the time and place and under the circumstances as alleged and terminated in a manner not proven at the time and place alleged. The manner of termination is immaterial.

6. The charge sheet shows that accused is 25 years old and was inducted into the Army 21 July 1941, having had no prior service.

7. The court was legally constituted. No errors injuriously affecting

**CONFIDENTIAL**

**CONFIDENTIAL**

(3)

The substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

Ronald H. Ellingsen, Judge Advocate.

D. G. Gable, Judge Advocate.

Howard Durrance, Judge Advocate.

**CONFIDENTIAL**



Branch Office of The Judge Advocate General  
with the

North African Theater of Operations

**CONFIDENTIAL**

AGO 534, U. S. Army.  
6 January 1944.

Board of Review

NATO 1184

U N I T E D   S T A T E S	)	M I N T H   I N F A N T R Y   D I V I S I O N
	)	
V.	)	Trial by G.C.M., convened at
Private DELMA (NMI) WILSON	)	Cefalu, Sicily, 20 September
(34084816), Company A, 39th	)	1943.
Infantry.	)	Dishonorable discharge and
	)	confinement for 20 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks, Beckman,
	)	New York.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----  
1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Delma Wilson, Company "A" 66581  
39th Infantry, did, at Bizerte, French North Africa,  
on or about July 8, 1943, desert the service of the  
United States by absenting himself without proper  
leave from his organization, with intent to avoid  
hazardous duty, to wit: "Action against the enemy",  
and did remain absent in desertion until he returned  
to his organization in the vicinity of Randazzo, Sicily,  
on or about August 15, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 30 years, all members of the court present concurring in the sentence. The reviewing authority approved "only so much of the findings of guilty of the specification of the charge and charge as involves a finding of guilty of

**CONFIDENTIAL**

(6)

desertion at the time and place and under the circumstances as alleged. ~~CONFIDENTIAL~~  
and terminated in a manner not proven at the time and place alleged. He approved the sentence but remitted so much thereof as involved confinement in excess of 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Beckman, New York, as the place of confinement and forwarded the record of trial for action under Article of War 504.

3. The evidence shows that about 5 July 1943, accused was with his company which was stationed in a "number one staging area" at Bizerte, Tunisia, where, as the first sergeant of the company expressed it, they "were standing by for hazardous duty" (R. 6). The battalion commander addressed the company at a retreat formation about this time, and, according to two noncommissioned officers, told the men they were going into combat (R. 6,7,14). One of the company officers testified that the battalion commander told the formation they "had a mission to perform" and would leave in a "day or so" (R. 9,10). Accused was present at that formation (R. 9,14). There had been an enemy bombing raid on the "outer edge" of the staging area shortly before the battalion commander addressed the men (R. 8,10). The first sergeant of accused's company testified that it was common knowledge among members of the organization that the unit was facing "hazardous duty" (R. 6) and that, after the formation addressed by the battalion commander, "if anybody was not at this meeting they were sure to hear about it through the company" (R. 8). On 8 July 1943, accused asked the executive officer of his company if "we would leave in the next day or so" (R. 9). He absented himself without leave on the same day and did not rejoin his company until 17 August 1943 (R. 6,7,9,10,17,18; Ex. 1). A search of his effects after he had left his organization showed accused had taken his "ODs" and toilet articles and had left his combat equipment behind (R. 10).

Accused's company left the staging area 14 July 1943, and the Sicilian campaign had been completed before he rejoined it (R. 7,10).

About fifteen days before accused unauthorizedly absented himself, another soldier overheard him say that "he was fed up with the Army and that he was going over the hill" (R. 11). Accused had been a good soldier in previous campaigns (R. 12,17).

Accused testified that when he left his organization about 2100 hours on 8 July 1943, his "destination was to go to a town about 30 miles down the road" and that he and a companion wanted to get "some food and drinks and pleasure" and then return to the company. They boarded a truck operated by "Navy boys" about three miles from the staging area. The driver told them to "knock on the cab" when they were ready to alight (R. 17). They fell asleep in the truck, rode all night and arrived at Constantine the next morning (R. 17,19). They then went to "see the town Major at Setif and the MPs" whom they knew. These military policemen would not take them into custody but sent them back to Constantine where accused "turned into

260581

- CONFIDENTIAL

the police" some six days later (R. 17,20). Accused testified further that he remained at Setif until 12 July where "we had a few drinks in town and slept in the hotel a great portion of the time". Also he testified that "since we had gone that far and a long ways from the outfit we decided to have a few drinks and go back" (R. 20,21); that he left his companion on 12 July and "took off" for Constantine. Accused did not have permission to leave his company on 8 July. He "didn't know exactly" that his organization was "prepared for a move". He testified that if he was present when the battalion commander advised the unit it was preparing to move, he did not remember it (R. 18). Nor did he "remember well" asking the company executive how long the company was going to be in the Bizerte area (R. 19).

4. It thus appears from the uncontradicted evidence including the testimony of accused that at the place and time alleged, he absented himself without leave from his organization and did not rejoin it until 38 days later. During the period of accused's absence, his command participated in the Sicilian campaign which upon his return had been concluded. Before he unauthorizedly absented himself, the evidence shows that accused's company was in a staging area and that at a formation at which accused was present, it had been advised that it was going into combat against the enemy. Immediately after this announcement accused left his command and when it embarked for the Sicilian invasion five days later, he was still absent and admitted he was at the time loitering and drinking about a town "a long ways" from his command. The court was fully warranted in concluding from these and the other circumstances in evidence that accused was motivated by an intent to avoid participating with his command in imminent combat against the enemy when he absented himself from his organization. The place where accused returned to his organization was not shown but this omission is immaterial. He was properly found guilty as specified (MCM, 1928, par. 130a).

5. The charge sheet shows that accused is 25 years old. He was inducted into the Army 9 July 1941. No prior service is indicated.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

Paul D. Blaylock, Judge Advocate.  
O. J. G. de [illegible], Judge Advocate.  
Gordon Simpson, Judge Advocate.

**CONFIDENTIAL**

260581



**CONFIDENTIAL**

(9)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
10 January 1944.

Board of Review

NATO 1185

U N I T E D   S T A T E S	)	NINTH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at
Private FRELAND J. OSWALD	)	Cefalu, Sicily, 18 September
(15012646), Company C, 39th	)	1943.
Infantry, Ninth Infantry.	)	Dishonorable discharge and
Division.	)	confinement for 20 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Beekman, New York.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Freland J. Oswald, Company "C", 39th Infantry, did, in the vicinity of Cerami, Sicily, on or about August 2, 1943, run away from his Company which was then engaged with the enemy and did not return until after the engagement had been concluded September 3, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 30 years, all members of the court present concurring. The reviewing authority approved the sentence but remitted so much thereof as involves confinement in excess of 20 years. He designated the Eastern Branch, United States Disciplinary Barracks,

276033

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(10)

Beeckman, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows on 2 August 1943, Company C, 39th Infantry, was "in battle at Troina" (R. 8), in the vicinity of Cerami, Sicily. It was being reorganized and was preparing to go forward to engage the enemy upon rejoining the remainder of the battalion which was then in combat (R. 6,7, 8,9,10). Accused was a member of the weapons platoon (R. 7) and was told by the platoon commander that he was to be the ammunition bearer for a reorganized mortar squad (R. 8), that he should get ammunition ready, stay in the vicinity and be ready to go up when the company joined the battalion "sometime in the evening" (R. 6,8). A hot meal was to be served before the company joined Company B of the regiment. After accused had drawn his rations a sergeant told him to "go up on the hill and wait until we moved out" (R. 9). When it was time for the company to leave accused was reported missing. He had no permission to leave (R. 6,9). A search was made for him but he could not be found (R. 6,8,9). He was not seen again until he rejoined the company early in September (R. 6,8,9). An extract copy of the morning report showing the initial unauthorized absence was received in evidence without objection (R. 7).

Accused did not testify or make any unsworn statement. No evidence was offered in his behalf.

4. It is thus established by uncontradicted evidence that at the time and place alleged accused absented himself without leave from his company while it was "in battle" and in the process of reorganization preparatory to moving forward to join other units of the battalion which were then in combat with the enemy. He returned about 3 September 1943. The Specification alleges that accused ran away from his company "which was then engaged with the enemy". It sufficiently appears that although the company was being reorganized and was not at the moment exchanging fire with the enemy, it was in a battle area as a part of a larger tactical organization units of which were in actual combat, and the company was preparing again to go forward for combat. These circumstances suffice to support the allegation that the company was engaged with the enemy. The proof required was that accused was serving "before the enemy" and that he misbehaved himself by running away (MCM, 1928, par. 141b). The words "before the enemy" as employed in Article of War 75, have been commented on as follows:

"If he is confronting the army or in its neighborhood, though separated from it by a considerable distance, and the service upon which the party is engaged, or which he is especially ordered or properly required by his military obligation to perform, be one directed against the enemy, or resorted to in view of his movements, the misbehaviour committed will be 'before the enemy' in the sense of the Article" (Winthrop's, reprint, pp. 623,624).

And further,

270088

~~CONFIDENTIAL~~

"Whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation. For example, where accused was in the rear echelon of his battery about 12 or 14 kilometers from the front, the forward echelon of the battery being at the time engaged with the enemy, he was guilty of misbehavior before the enemy by leaving his organization without authority although his echelon was not under fire" (MCM, 1928, par. 141a).

The company to which accused belonged was here in close tactical relationship with the other units of the battalion and by absenting himself under the circumstances the accused clearly came within the condemnation of Article of War 75, as alleged. It was reasonable to infer that by going absent when he did accused "ran away" and that his running away was, under the circumstances, misbehavior before the enemy.

There was no evidence to show that the engagement with the enemy had been concluded, as alleged, at the time when accused returned to his company. The gravamen of the offense committed by accused was running away from his company at a time when he was required to perform a special duty directed against the enemy. The circumstances attending his return to the company are of no material consequence. The essential elements of the offense charged are amply established by the evidence.

5. The charge sheet shows that accused is 25 years old. He enlisted in the Army 13 September 1940. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

Daniel Holmgren, Judge Advocate.  
O. G. Tde, Judge Advocate.  
Horace Simpson, Judge Advocate.



**CONFIDENTIAL**

(13 )

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
15 January 1944.

Board of Review

NATO 1186

U N I T E D   S T A T E S	)	NINTH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
Private EARLE W. HOLMES	)	Cefalu, Sicily, 9 September
(32057653), Company H, 47th	)	1943.
Infantry, Ninth Infantry	)	Dishonorable discharge and
Division.	)	confinement for 20 years.
	)	United States Disciplinary
	)	Barracks, Fort Leavenworth,
	)	Kansas.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private Earle W. Holmes, Company H, 47th Infantry, did, at or near Troina, Sicily, on or about 7 August 1943, misbehave himself before the enemy by refusing to advance with his command, which had then been ordered forward by Major James D. Johnston, 47th Infantry, to engage with enemy forces, which forces the said command was then opposing.

Specification 2: In that Private Earle W. Holmes, Company H, 47th Infantry, did, at or near Cesaro, Sicily, on or about 9 August 1943, misbehave himself before the enemy by refusing to advance with his command, which had then been ordered forward by Captain Ray L. Inzer, 47th Infantry, to

**CONFIDENTIAL**

**CONFIDENTIAL**

(14)

engage with enemy forces, which forces the said command was then opposing.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 30 years. The reviewing authority approved the sentence but remitted so much of the confinement at hard labor adjudged as involved confinement for more than 20 years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 7 August 1943, accused was a member of the motor squad of Company H, 47th Infantry, and driver of a quarter-ton jeep in the motor pool (R. 7). His company and regiment were engaged at that time with the enemy, near Troina, Sicily, and were under enemy artillery fire (R. 6,9). It was a matter of general knowledge among the members of the company that it was under fire (R. 6,8,9); shells came over about every ten minutes, up to about 30 or 50 rounds for ten minutes and then it would "lay off" for about ten minutes (R. 6). As the 2d Battalion, commanded by Major James D. Johnston (R. 6), moved forward, the road from just outside Troina, over which it was moving, was under heavy artillery fire overhead (R. 6,7,9). While the entire battalion was advancing toward the enemy (R. 17), Major Johnston issued the order to his staff officers and S-3 to have all vehicles of Company H move forward (R. 6). At that time the vehicles were in the rear echelon, to the rear of the battalion train (R. 6,7) and were loaded with weapons (R. 7,9).

The order to move the vehicles forward was relayed from Major Johnston through a Captain Maness to Corporal Arvid J. Youngs, Company H, 47th Infantry, a transport corporal for the machine gun platoon (R. 8,9,12,14). At that time accused was driving a jeep, directly under the control and instructions of Corporal Youngs (R. 8,10), who, with Staff Sergeant Harlie R. Loring, of the company, was directing the forward movement of trucks over a hill and down into a ravine (R. 9,13). Accused was personally instructed by Corporal Youngs to take his truck down the winding road through the ravine, which was then under artillery fire, unload and come back (R. 12,14). Corporal Youngs gave the order directly to accused, "to take his truck down, same as anybody else" and was "right with him, showing him where to go" (R. 10-13). Accused was instructed to move his truck forward and understood the instructions given (R. 11); he made no effort to comply, said nothing, walked back to his truck (R. 13), and stayed at the point they were moving from (R. 10). Sergeant Loring went back twice to get accused and showed him

"the exact spot where to go\*\*\*He hesitated about it until Captain Maness kept telling us to get the jeeps down there. We told Private Holmes to get his jeep started and take off. He kept hesitating about it until about three or four times he was told, and he says that he just couldn't do it\*\*\*When I came back Private Holmes hadn't gone and

**CONFIDENTIAL**

(15)

he said I would just have to get somebody else. I went back to see if the trucks was coming up and Youngs went ahead and got another driver" (R. 14).

Accused had not asked to be relieved prior to this time, and Corporal Youngs would not say that "he was physically incapable of going forward" (R. 10,11); he gave one request to accused and that was all; "he was still there not doing anything" (R. 11). Corporal Youngs secured another driver for accused's jeep (R. 10), and accused did not take it forward (R. 15). Captain Ray L. Inzer, 47th Infantry, testified he could not recall accused's saying anything to him about a nervous feeling during combat. The only ailment accused had complained about was broken glasses "back at Sedjenane". He said nothing to the witness about relief from his vehicle (R. 8,9).

On 9 August 1943, the 2d Battalion, 47th Infantry, was located "in a position in the town of Cesaro, Sicily" and was under "an occasional shelling" (R. 8). The rear echelon was two and one half miles from the front and accused was still driving a vehicle (R. 8). Captain Inzer ordered his "executive to have water and rations brought up to the men" and the motor sergeant who received the orders told accused "to go get his jeep and bring it up to the kitchen and go get rations" (R. 8,15). Accused brought the vehicle to the kitchen but did not go forward; he "went in a little room and sat down on the side of a cot". The sergeant tried to persuade him to go up but "accused said he was too nervous". Another soldier took his vehicle forward (R. 16). The company was under artillery fire at the time (R. 17); "they were up around Cesaro. They were not fighting, they were down in a wadi\*\*\*within artillery range" (R. 16).

The accused elected to remain silent (R. 22).

Private First Class Andrew J. Orent, Company H, 47th Infantry, a witness for the defense, testified that on 7 August 1943, he was near accused and could observe him when he had a conversation with Corporal Youngs (R. 18). They were moving up the vehicles and witness noticed that accused's vehicle "was handled in an unusual manner\*\*\*He was nervous and was driving nervously" (R. 19). Accused appeared to witness to be incapable of driving the vehicle. He spoke to Corporal Youngs "just before the vehicle went down\*\*\*He said he couldn't make it and asked Corporal Youngs to relieve the driver" (R. 19).

Another defense witness was riding as a passenger in the jeep driven by accused, and was present on 7 August 1943, when Corporal Youngs told accused to take the vehicle forward. Accused "said he didn't believe it would make a damn" (R. 20). Then Corporal Youngs went after another driver (R. 20), who drove the vehicle from there (R. 21). The witness did not hear accused refuse to take the vehicle forward. Witness had noticed no "unusual actions on the part of the accused in driving the vehicle" and had seen nothing unusual in his appearance when he "rode to the top of the hill with him" (R. 20,21).

First Lieutenant James E. Leopold, 47th Infantry, was called as a

**CONFIDENTIAL**

# CONFIDENTIAL

(16)

character witness for the accused. He testified that during the Tunisian Campaign a patrol was selected, from volunteers, to go toward Bald Hill, Tunisia, which was believed to be very heavily held by German troops, to draw the German fire. One more man was needed for the patrol and accused volunteered. He got permission from his company commander, went with the patrol and handled himself very well. The patrol did not come under fire but it was "remarkably successful" (R. 22,23).

4. It thus appears from the evidence that at the time and place alleged in Specification 1 of the Charge accused refused to advance with his command, which had been ordered forward by the commanding officer named in the Specification. The command was at that time under heavy artillery fire and was moving forward to engage with the opposing enemy forces. Although ordered to drive his vehicle forward towards the enemy accused refused, said that he "just couldn't do it", and another driver had to be obtained in his place.

It also appears from the evidence that at the time and place alleged in Specification 2 of the Charge accused refused to advance with his command which had been ordered forward by the commanding officer named in the Specification. Accused was with his company, which was within artillery range of the enemy, and, although not fighting, was under fire. Accused refused to obey the order to take up rations, said he was "too nervous" to go and another driver had to take his vehicle forward. It is aptly stated that,

"Misbehavior is not confined to acts of cowardice. It is a general term, and as here (75th Article of War) used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. \*\*\* Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1928, par. 141a).

It is not to be inferred that accused was charged under this Specification with refusing to engage the enemy; his duties were to drive his vehicle as and where ordered and he refused to drive it forward. This was an act of palpable insubordination. His company, though not actually fighting, was before the enemy and within range of their artillery. "Actual engagement with the enemy at the time of the commission of the offense is not an essential prerequisite to conviction under A. W. 75, as long as there was a real 'contact with the enemy', as the term is reasonably used" (Dig. Op. JAG, 1912-40, sec. 433 (2), C.M. 126528 (1919)).

5. When charged with misconduct before the enemy, the accused may "show that he was suffering under a genuine or extreme illness or other disability at the time of the alleged misbehaviour" (Winthrop's, reprint, p. 624). In an endeavor to explain or extenuate accused's conduct, defense counsel sought to develop the conversation accused had with Corporal Youngs when the order to advance was given. The law member sustained the

# CONFIDENTIAL

# CONFIDENTIAL

(17)

prosecution's objection to the conversation, but the record shows that subsequently the same witness was permitted to testify that accused was nervous and was driving nervously, that accused made a statement to Corporal Youngs, said that "he couldn't make it and asked Corporal Youngs to relieve the driver". The testimony excluded by the law member was clearly not objectionable under the hearsay rule, as it related to a statement made by accused himself and at the very moment the order was given. However, the error was subsequently cured for the same testimony defense had previously attempted to introduce was admitted without controversy. It was shown that accused was nervous and unable to drive, it was shown that he made a statement to Corporal Youngs, and the substance of the statement was shown. There was thus brought before the court all that the defense desired to show in the first instance.

6. In the course of the trial the defense attempted to show that the investigation of the charges against accused was improper, for the reason that he was not present at the time the investigating officer examined the witnesses and was given an opportunity to cross-examine them "only after the testimony was brought out as a finished product". The record shows that after Sergeant Loring made a statement to the investigating officer the accused was called in, the investigating officer repeated witness' statement and asked accused if he wanted to question witness on it. Private First Class Orent testified that he gave his statement in the presence of the accused, who was called in and given a chance to cross-examine him. It thus appears that Article of War 70 was complied with, for under the Manual for Courts-Martial, the requirements of the statute are fulfilled if the substance of the expected testimony of an available witness is made known to the accused and he is accorded or affirmatively waives his right to cross-examine that witness (Dig. Op. JAG, 1912-40, sec. 478 (4), C.M. 185756 (1929)). The Board of Review is of the opinion that there was a substantial compliance with the requirements of Article of War 70 and of paragraph 35a of the Manual for Courts-Martial.

7. In response to a protest by the trial judge advocate against all inquiry as to the sufficiency of the investigation of the charges, the court stated: "The court will take judicial notice of the fact that the accused was present when all witnesses were examined at the investigation" (R. 21). While it was manifestly improper for the court to attempt to take judicial notice of such a matter, it could indulge a presumption that the investigating officer performed his duties properly (MCM, 1928, par. 112a), the contrary not having been shown. No harm to accused resulted from the action of the court.

8. The record discloses that the President of the court ruled on a matter of evidence (R. 13) and on the motion by the defense for findings of not guilty (R. 21). While such matters were properly within the province of the law member to rule upon in the first instance (MCM, 1928, par. 51d), it does not appear that any objection thereto was made on the part of the defense, and it is not perceived that the substantial rights of accused were injuriously affected thereby.

9. The charge sheet shows that accused is 25 years of age and that

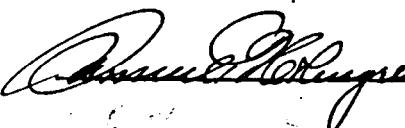
# CONFIDENTIAL

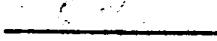
~~CONFIDENTIAL~~

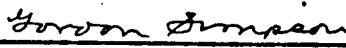
(18)

he was inducted into the Army 27 January 1941. No prior service is indicated. In his argument the defense counsel stated that the prosecution had agreed to stipulate that accused had been "wounded in battle and received a Purple Heart" (R. 23).

10. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

 Donald W. Burgess, Judge Advocate.

 \_\_\_\_\_, Judge Advocate.

 Gordon Johnson, Judge Advocate.

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~

(19)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
11 January 1944.

Board of Review

NATO 1187

U N I T E D   S T A T E S	)	NINTH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at
Private First Class LUCIAN A.	)	Cefalu, Sicily, 7 September
ANNUNZIATO (32003592), Company	)	1943.
L, 47th Infantry, Ninth	)	Dishonorable discharge and
Infantry Division.	)	confinement for 20 years.
	)	United States Disciplinary
	)	Barracks, Fort Leavenworth,
	)	Kansas.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private First Class Lucian A. Annunziato, Company "L", 47th Infantry, did, near Troina, Sicily, on or about 7 August 1943, run away from his Company, which was then engaged with the enemy, and did not return thereto until 8 August 1943.

Specification 2: In that Private First Class Lucian A. Annunziato, Company "L", 47th Infantry, did, near Troina, Sicily, on or about 9 August 1943, run away from his Company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded, 12 August 1943.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced

~~CONFIDENTIAL~~

(20)

to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, remitted so much thereof as involves confinement in excess of 20 years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that near Troina, Sicily, on 7 August 1943 the third squad, 1st platoon, Company L, 47th Infantry Regiment, of which accused was a member, was proceeding on an "approach march" to establish contact with the enemy (R. 6,7,9). The squad had been told by its leader as they "were leaving" that from "then on" they could expect to meet the enemy. Accused was present when this information was given to the men and left the bivouac area with his squad (R. 7). The platoon came under shell fire shortly after daybreak and immediately took cover. After about half an hour the shell fire slackened and the column again moved forward. Accused was then reported missing. The platoon was reorganized and checked and accused was not there. A search was made for him and he "wasn't to be found" (R. 7,10). Accused had neither asked nor received permission to be absent (R. 11,12). Not yet having reached its objective, the platoon resumed its advance and about noon encountered more enemy shelling (R. 10). Accused rejoined his organization about 1630 hours the following day (R. 11).

Upon his return, accused complained to his squad leader that "his legs wasn't carrying him, that he was giving out" (R. 16). Report of this complaint was made to the platoon sergeant. Accused was not examined by medical personnel, nor was the fact of his complaint reported to the platoon leader (R. 16,17).

After returning to his company, accused was transferred to the weapons platoon where he was assigned the duties of ammunition carrier. On 9 August the company was preparing again to engage the enemy and moved out during the afternoon "to make a night attack" (R. 7,12). As they were marching forward, accused told the platoon sergeant "that he was sick and had better drop out". The sergeant "told him he better come ahead" (R. 12). Accused "just set the ammunition down beside the road" and left (R. 12,13). The sergeant "hollered" at accused and told him "you had better come on because we need you, we are short a man now", but accused "continued on his way" (R. 13). The platoon was under enemy artillery fire when accused left. He was not with his company again until 12 August. He had neither asked nor been given permission to leave his command (R. 13). Upon leaving he did not "indicate whether he wanted to go to the medics" (R. 14). During this absence, accused's battalion had taken its objective and when he returned, was bivouacked "on the other side" of Cesaro (R. 13). After leaving his command in the afternoon of 9 August, accused attached himself to the 2d Battalion, 47th Infantry, and explained that "he had got lost" from his company. The next day he helped move some pack mules up to the 2d Battalion command post (R. 15). On 12 August, he was returned to his own organization (R. 13,15,16).

Accused elected to make an unsworn statement (R. 17). He stated that

on 7 August when his company was on the march about three kilometers from Troina "all of a sudden" they were shelled and it was "all so unexpected that almost everybody scattered all over the road and everything was disorganized at that time". He stated that he "figured" the company would not "move out" and when "they did move out, nobody had informed me that they had moved out". He "caught up" with his organization the following day.

He stated further that upon his return he was transferred to the "ammunition platoon and made ammunition carrier". He complained to a sergeant that he "couldn't make it the first time" and repeated the complaint "a little while later" whereupon, the sergeant said "All right, give me the box of ammunition" and accused stated he "took it for granted" and "fell out". He then "continued on" his way and "ran into this mule outfit of the 2nd Battalion" where he inquired where his own battalion was but "no one seemed to know". He asked a corporal to find where the 3d Battalion was and "he called up the 2nd Battalion" and a "jeep" came for him the next morning (R. 18).

4. It thus appears from the evidence that at the place and time alleged in Specification 1 of the Charge, accused left his company while it was under fire and as it was advancing to make contact with the enemy and did not rejoin it until the following day. His absence was unauthorized. In his unsworn statement, although he did not explicitly so claim, accused implied that he was left behind on 7 August because he did not know when the company resumed its march. There is evidence that accused's platoon was regrouped and checked when the enemy shell fire slackened and a search was made for accused before the unit continued its advance. He was not to be found. The circumstances fully warranted the court in concluding that accused had run away from his company during an engagement with the enemy as here specified (MCM, 1928, par. 141a).

It further appears from the evidence that at the place and time alleged in Specification 2 of the Charge, accused again left his company when it was still engaged with the enemy and again under shell fire and did not return until the engagement was concluded. He admitted leaving during this engagement but claimed that he thought he had permission to go. He had complained of an illness but did not request medical aid nor did he claim to have gone to a medical aid station when he left his platoon. He later attached himself to another battalion and claimed he was lost. His explanation presents no defense but implicit in it are inferences of his guilt. There is direct proof that accused deliberately cast away the ammunition which it was his duty to carry and in spite of the remonstrances of his platoon sergeant, ran away in the sense that he abandoned his command and took refuge in the rear. He was properly found guilty as here specified (MCM, 1928, par. 141a).

5. The charge sheet shows that accused is 23 10/12 years old. He enlisted in the Army of the United States 28 January 1941 and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the

CONFIDENTIAL

(22)

opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

James O'Halloran, Judge Advocate.

O. J. Goe, Judge Advocate.

Gordon Simpson, Judge Advocate.

**CONFIDENTIAL**

(23)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
7 January 1944.

## Board of Review

NATO 1188

UNITED STATES  
v.  
Private JOSEPH L. CLEMENTI  
(32029933). Company B, 39th  
Infantry, Ninth Infantry  
Division.

NINTH INFANTRY DIVISION

Trial by G.C.M., convened at  
Cefalu, Sicily, 18 September  
1943.  
Dishonorable discharge and  
confinement for 25 years.  
United States Disciplinary  
Barracks, Fort Leavenworth,  
Kansas.

**REVIEW by the BOARD OF REVIEW**

Holmgren, Ide and Simpson, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
  2. Accused was tried upon the following Charges and Specifications:

**CHARGE I: Violation of the 58th Article of War.**

**Specification:** In that Private Joseph L. Clementi, Company "B", 39th Infantry, did, at French North Africa, on or about July 7, 1943, desert the service of the United States by absenting himself without proper leave from his organization located 5 miles west of Bizerte, French North Africa; with intent to avoid hazardous duty, to wit: "Action against the enemy", and did remain absent in desertion until he returned to his organization located in the vicinity of Randazzo, Sicily, on or about August 10, 1943.

**CHARGE II: Violation of the 75th Article of War.**

Specification: In that Private Joseph L. Clementi, Company  
272100

## ~~CONFIDENTIAL~~

**CONFIDENTIAL**

(24)

"B", 39th Infantry, did, in the vicinity of Randazzo, Sicily, on or about August 13, 1943, run away from his Company, Company "B", 39th Infantry, which was then engaged with the enemy, and did not return until after the engagement had been concluded August 23, 1943.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved the sentence but reduced the period of confinement to 25 years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50f.

3. The evidence shows that on 7 July 1943 the organization to which accused belonged was in a staging area about five miles west of Bizerte, Tunisia. The men had been told by the company commander on numerous occasions that they were to depart for action against the enemy (R. 6,9) and it was a matter of general knowledge among members of the company that they would soon enter combat (R. 9,10). Accused was absent from reveille formation on that date. A search was made of the area but he could not be found (R. 6,9; Ex. 1). He was next seen on 10 August 1943 when he reported back to the first sergeant at a regimental forward assembly area between Randazzo and Troina, Sicily (R. 7,9; Ex. 1).

On 12 or 13 August 1943 (R. 7,10), accused's company was leading the attack from Buick Hill to Chrysler Hill, in Sicily. As they started down Buick Hill accused, who was carrying ammunition, was seen lagging. He stopped on several occasions and was told to "catch up". They got to Chrysler Hill at about 1300 hours and the enemy began shelling their position. Accused was present at the time. The shelling continued until 1700 hours when they started to the flats along the Cesaro-Randazzo Road. They were shelled by enemy tanks to the right and by mortar fire on their left. The fourth platoon sergeant called for ammunition bearers and called accused by name but he was not to be found and his ammunition was gone. The company moved forward and occupied some high ground and got into position for the night. At 2400 hours another check was taken and accused was missing (R. 7,11). He had not asked for nor was he given permission to leave the company. He returned to the company on 23 August 1943 after the combat had been completed.(R. 8,10,11). An extract copy of the morning report of accused's company showing the two unauthorized absences was received in evidence without objection (R. 6,7).

Accused testified "I did go AWOL" on 7 July 1943, and that he "turned himself in" to the replacement center the day Sicily was invaded and was sent to Sicily. He testified he was in the battle referred to by the prosecution witnesses but that after the firing on the hill "my ear couldn't hear, I was dizzy and had a headache". He walked about a half mile to an "aid station" and the doctor told him to "come back in a couple of days".

272100

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(25)

He went back to look for the company and got "lost in the hill". He finally "had to leave the ammunition and stuff go". He put it down and got a ride in a jeep to Seventh Army Headquarters where he "turned in" (R. 12). He had turned himself in at the replacement center because he wanted to get back with "my outfit". He did not know that his company was in combat but he "had a feeling that if they did leave me there, it would be bad for me. So I turned in." He testified that on 13 August (accused had his ammunition with him when he went to the rear to see the medical officer) he realized that his company might need the ammunition he was carrying and added "But how was I to get it to them from the first-aid station?" He testified further that he had been in the Army five years and had no intention of deserting (R. 13).

4. It thus appears from the uncontradicted evidence including the testimony of accused that at the place and time alleged in the Specification, Charge I, he absented himself without leave from his organization and did not rejoin it until 34 days later. During the period of accused's absence, his command had departed for Sicily and had engaged in combat against the enemy. Before he absented himself without leave, the evidence shows that accused's company was in a staging area and had been told by the company commander that it would soon depart to engage in combat duty. The court was warranted in concluding from these and the other circumstances in evidence that accused was motivated by an intent to avoid participating with his command in imminent combat against the enemy when he absented himself from his organization. He was properly found guilty as alleged in this Charge and Specification (MCM, 1928, par. 130a).

It further appears from the uncontradicted evidence that at the place and time alleged in the Specification, Charge II, accused left his company which was then engaged with the enemy in active combat and did not return until after the engagement had been concluded. His absence was unauthorized. He did not claim he had permission to leave but testified that he went to a medical aid station because he was dizzy, had a headache and his hearing was affected. According to his explanation, the medical officer then told him to "come back in a couple of days" and although he tried, he was unable to find and rejoin his company which was only about half a mile away. This explanation was improbable and the court was fully warranted in rejecting it. Accused was properly found guilty as here specified (MCM, 1928, par. 141a).

5. The charge sheet shows that accused is 24 years old and was inducted into the Army of the United States on 16 January 1941. While no prior service is shown accused testified that he had had two years previous service (R. 14).

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. The sentence is authorized by Article of War 58 and Article of War 75.

272100

*James O'Hanlon*, Judge Advocate.  
O. G. 9 de

~~CONFIDENTIAL~~ 3 *Gordon Simpson*, Judge Advocate.



**CONFIDENTIAL**

(27)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
15 January 1944.

Board of Review

NATO 1242

U N I T E D   S T A T E S	)	EASTERN BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
Private WILLIAM R. JEFFERS	)	Bizerte, Tunisia, 17 December
(17161386) and BILLY D. ORANGE	)	1943.
(33089742), both of Battery D,	)	As to each: Dishonorable
638th Coast Artillery Battalion	)	discharge and confinement for
(Antiaircraft).	)	life.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----  
**REVIEW by the BOARD OF REVIEW**

Holmgren, Ide and Simpson, Judge Advocates.  
-----

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were jointly tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private William R. Jeffers, Battery D, 638th Coast Artillery Battalion (AA), and Private Billy D. Orange, Battery D, 638th Coast Artillery Battalion (AA), acting jointly and in pursuance of a common intent, did, at Depienne, Tunisia, on or about 6 December 1943, forcibly and feloniously, against her will, have carnal knowledge of Malyuba Bent Ahmed Berradia.

Each pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his

254750

**CONFIDENTIAL**

**CONFIDENTIAL**

(28)

natural life, three fourths of the members present concurring. The reviewing authority approved each of the sentences, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 6 December 1943, at about 1430 or 1530 hours, the two accused with a Private Paris V. Austin, all of Battery D, 638th Coast Artillery Battalion, left their gun crew position near Zaghouan, Tunisia, and drove in a 2½-ton truck to the village of Sminja, in the vicinity of Depienne, Tunisia (R. 6,14,34,36). Before arriving at Sminja they stopped at an Arab village where they talked to the Arabs about getting eggs and "zig zig". They arrived at Sminja ten minutes later (R. 7,13) and stopped the truck near an Arab house (R. 17,36). Four Arab women nearby were told by an Arab to go inside the "gourbi" or house (R. 14,16). The soldiers then asked the Arab for eggs and for "zig zig". When he told them "there is no zig zig", Jeffers pulled a knife. The Arab thereupon ran and hid himself behind some cactus about 100 meters from the house and watched the soldiers (R. 14,15,16). The house had one door and no windows (R. 16).

Orange took an iron bar, 18 or 20 inches long and about one inch in diameter from the truck (R. 8,15) and with Jeffers went to the house. Austin remained in or about the truck (R. 9,26). With the iron bar they broke down the door of the house (R. 16,18,26,27). Four women and two small children were in the house (R. 19). One woman was holding a baby. Jeffers took the baby from her arms and "sat" it down (R. 27,36) and "grabbed" the woman. Then, after some conversation with Orange, he left her and "grabbed" Malyauba Bent Ahmed Berradia and put her on the bed (R. 23,27).

Malyauba testified that the soldier sat on the bed beside her, removed a pin that was holding her clothing, played with the pin and threw it on the floor - "That is the only time he touched me" (R. 19,25). At this time the other soldier was standing by the door with a knife in one hand and a bar in the other. The first soldier left her and the other one seized her (R. 20), removed some of her clothes (R. 24,25), opened her legs with his hands and got between them "by force" (R. 20). She was lying on her back and he had intercourse with her (R. 24). His penis penetrated her (R. 21,25). She screamed "Please, please, please for God's Sake and with my hands up" (R. 23). She did not kick him or scratch him but tightened her legs and "closed up". She twice attempted to turn on her side but he turned her back. He was very heavy on her and she was very tired (R. 24) and was "begging, begging, begging". While this was going on the other soldier was "guarding" the door (R. 21) with the bar and the knife (R. 22). The other women in the house were standing beside the bed but could do nothing to help her (R. 23). After the intercourse he put her on the truck (R. 20). She identified the two accused as the two soldiers involved (R. 25).

Austin testified that he got out of the truck while the two accused were at the house. He saw Orange standing in the door of the hut with the iron bar in his hand (R. 9,11) and ten minutes later he saw Jeffers standing in the door with the bar (R. 10,11). Upon their return to the truck they made no statement as to what happened at the house. That night Jeffers remarked that he "didn't do much" (R. 10).

254759

254759

**CONFIDENTIAL**

**CONFIDENTIAL**

(29)

One of the Arab women in the house testified that she saw the soldier force Malyauba's legs apart. Malyauba "was begging, screaming and pushing away" and telling him she would give him "eggs, chicken, anything he wants". She did not hit him.

"we grabbed him by the hand and pleaded with him to give him chicken or eggs or anything but the other one with the knife and the iron bar in his hands sort of wanted to hit us with a knife" (R. 28).

He did not cut anyone with the knife but threatened them (R. 29).

During the investigation, after having been advised of the contents of Article of War 24 and told that whatever they said could be used against them (R. 32,35), both accused made voluntary sworn statements to a military police officer, which were received in evidence without objection. Jeffers stated that on the day in question he, Austin and Orange were looking for eggs and went to the Arab hut. They tried to open the door but could not get it open. It further states that,

"Orange pushed it in with his shoulder and I helped him. When we got in we saw about three or four Arab women. They were talking excitedly, but I don't know what they said. Orange was standing in the door and pointing out to a young Arab girl. She was standing by the bed and I pushed her over. She tried to keep me away from her. I had the intention to lay her, but I changed my mind let off her. She seemed scared. The other women were standing in a corner. Orange was still standing in the door with a jack handle, and was talking them in a threatening voice. He asked me, whether I was doing any good and I answered I did not. I never opened my pants. I got up from the girl and went to the door, where Orange gave me the iron bar. Then he went in after telling me to watch. I was standing outside the door and set the bar on the inside. I could see what was going on inside. He told me to keep a good watch. I said O.K. I saw him walk over to the same girl, but I did not watch what he was doing. He hollered to Austin from the inside to take a sack and cover up the 638 on the bumper. When we later got back on the truck I saw the bumper covered up. Austin was all the time at the truck. Austin saw an Arab coming across the field on a horse and told me about it. I warned Orange and he asked me how close he was. I said 'pretty close', to which he answered 'hold the door' and I said 'O.K. I got it' \*\*\* When Orange came out a few minutes later, I saw him buttoning up his pants. I saw Orange with the girl but I can not safely say that he was on her" (R. 34).

Orange stated that before they left the gun position he, Jeffers and another soldier had two quarts of wine. When they got to the Arab hut  
254709

**CONFIDENTIAL**

**CONFIDENTIAL**

(30)

Jeffers said "Let's do some zig zig". Together they pushed the door open. Jeffers took a baby out of a girl's arms, sat it down and took her over to a bed. Orange stood by the door five or ten minutes and did not see what Jeffers did. Jeffers came to the door and asked Orange if he wanted to come in. He found the girl on the bed where Jeffers left her.

"I opened my pants and tried to get her legs apart, but she just held her legs together. I finally got her legs apart and put my penis in. She did not put up much resistance. While I was laying her, Jeffers told me to hurry up, because an Arab on a horse was approaching. When I got through laying the girl we all got back on the truck."

While he was in the hut Jeffers was at the door watching. Before leaving the Arab hut he told Austin to cover up the bumpers of the truck, which he did. They did not take any women along when leaving. Later he went to a "pro station and got a pro" (R. 36).

Each accused elected to be sworn as a witness. Their testimony was in substantial agreement with their sworn statements as introduced by the prosecution. Jeffers said that he entered the house first. He laid his hand upon one woman's shoulder then went to the girl who was standing about two and a half feet from the bed, put his hands under her armpits and picked her off the floor and set her on the bed. She did not kick, fight or scratch him, "she just jabbered something". He laid her back on the bed and took the pin out from her dress and threw it on the floor. She did not get up and he did not hold her down nor take any of her clothes off (R. 40). He did not pull her clothes up nor lie upon her. He put his hand on her breast but did not caress her. She did not take his hand off her breast or try to push him away, "not much". He did not pull her legs apart or have intercourse with her (R. 41). He did not have his pants down nor have his penis out of his pants. He went outside the doorway and "thought" he asked Orange if he were going inside. He took the iron bar from Orange and took a knife from his pocket and was "wittling" a stick (R. 42,43). He set the bar down inside the house. He did not threaten the women in the house with either the knife or the bar. Austin, who was in the truck "between fifteen and twenty" feet from the door, called to him that an Arab was coming across the field on a horse and said to tell Orange to hurry. They did not put any woman in the truck (R. 43).

Orange testified that he did not remember having anything in his hands as he stood outside the door of the hut (R. 44). He did not see what Jeffers did inside the hut. When Jeffers came out he said to Orange "do you want to come in?" and he went in. A woman was lying on the bed with her clothes up to her waist. He went to the bed and she "caught my right hand and pulled it up and kissed it". Her legs were not apart and he separated them with his hands. She did not resist, "not as I can tell". Orange "crawled up on top of her" and had intercourse with her. She "just laid there". She did not hit, scratch, kick or push him away (R. 46). The other women were standing to the right of the door (R. 45). At no time did he threaten them.

254759

**CONFIDENTIAL**

**CONFIDENTIAL**

(31)

with a knife, iron bar or anything else. None of them came over or tried to pull him. He stayed with the girl two or three minutes then came back to the door. When they left they did not take a woman with them (R. 47). Upon cross-examination Orange testified he did not remember either his or Jeffers taking an iron bar from the truck or his having handed Jeffers an iron bar. He did not tell the investigating officer about the girl kissing his hand because "I never thought it would mean anything" (R. 45). He did not offer to pay the woman anything (R. 49). One of them remained outside while the other was in the hut to see if "somebody else was coming" (R. 50).

4. It thus appears from the evidence that at the time and place alleged the two accused broke down the door of an Arab hut and accused Orange had unlawful carnal knowledge of an occupant, Malyauba Bent Ahmed Berradia, the woman named in the Specification, by force and without her consent, while accused Jeffers threatened other women in the house with a knife and stood guard at the door, armed with a knife and an iron bar. The essential elements of rape were proved as charged. Accused testified, in substance, that the victim did not resist and that her actions were such as to indicate consent. The weight to be given this exculpatory testimony was a matter for the court.

5. Accused were jointly charged with having committed the offense of rape, acting jointly and in pursuance of a common intent.

Upon arraignment the defense, in behalf of each accused, made a motion for a severance upon the ground that the defense of each was antagonistic to the defense of the other (R. 5). At the close of the prosecution's case the defense made, in effect, a motion for a finding of not guilty in the case of Jeffers upon the ground that the proof showed that he had not himself had carnal knowledge of the woman (R. 37). Both motions were overruled (R. 5, 37).

Paragraph 27, Manual for Courts-Martial, 1928, provides that

"Two or more persons cannot join in the commission of one offense of a kind that can only be committed by one person."

It has been held that two or more persons cannot jointly and directly commit a single rape because by the very nature of the act individual action is necessary (52 C.J. 1036, sec. 50). One who aids and abets the commission of rape by another person is however chargeable with rape as a principal (52 C.J. 1049, sec. 72; CM NATO 385, Speed). It follows that the joinder of the several principals, including persons aiding and abetting in the commission of rape, is not improper (52 C.J. 1036, sec. 50; CM NATO 646, Simpson; NATO 779, Clark et al.).

It does not appear from the evidence that the defenses of the two accused were in fact antagonistic in any material respect. Neither does it appear that the substantial rights of either accused were materially affected by the joint trial. No abuse of discretion in denial of the motions is apparent.

254759

**CONFIDENTIAL**

**CONFIDENTIAL**

(32)

6. The charge sheet shows that accused Jeffers is about 20 years old. He enlisted in the Army 28 November 1942. He had no prior service. Accused Orange is 24 years old. He was inducted into the Army 11 September 1941, and had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as to each accused and the sentences. The death penalty or imprisonment for life is mandatory upon conviction of the offense of rape under Article of War 92. Penitentiary confinement is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

Paul O'Riley, Judge Advocate.

O. T. S. de J., Judge Advocate.

Edwin Simpson, Judge Advocate.

254759

**CONFIDENTIAL**

**CONFIDENTIAL**

(33)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
11 May 1944.

Board of Review

NATO 1243

U N I T E D   S T A T E S	)	EASTERN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private GEORGE EVANS (34 291 790),	)	Bizerte, Tunisia, 10 April
226th Quartermaster Company	)	1944.
(Salvage Collecting).	)	Dishonorable discharge and
	)	confinement for 20 years.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried, on rehearing, upon the following Charge and Specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private George (NMI) Evans, 226th Quartermaster Company (Salvage Collecting), did, at Gafsa, Tunisia, on or about November 10, 1943, with intent to commit a felony to wit, rape, commit an assault upon Miss Ethel Brookes by willfully and feloniously seizing the said Miss Ethel Brookes, striking and beating her about the face and head with his fists, choking her and threw her to the floor and tried to pull her step-ins off and tear the buttons therefrom.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due

**CONFIDENTIAL**

**CONFIDENTIAL**

(34)

or to become due and confinement at hard labor for 20 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 10 November 1943, Miss Ethel Brookes, an American missionary, occupied a small house in Gafsa, Tunisia, which she used as her home and mission (R. 7). This house was about three fourths of a mile from the camp of the 226th Quartermaster Company (R. 10). A little after 1800 hours on that date, accused, a colored soldier, knocked on her door and she invited him in. He appeared to be "absolutely sober". He sat in a chair against the wall in the dining room which was also used as a sitting room, while she sat in front of a table in the middle of the room (R. 7,8,9). Accused did not remove his hat (R. 12). He introduced himself as "Clyde" (R. 8,10) and said he had been told that she was a missionary and that he had come to make her acquaintance (R. 9). After a few minutes of general conversation accused asked Miss Brookes if she had seen the doctor. She said she knew the older doctor but had not met the new one. Accused replied "Well, you perhaps will meet him". Shortly afterwards accused said he must be going (R. 8). They went to the door which led to a "practically empty room" which she used for receiving Arabs. Miss Brookes testified that as they stood at that door accused said "Miss Brookes, I'm going to fuck you tonight" (R. 8,9); that he

"seized me, and I screamed. Then he grabbed my neck. When he released me, I screamed again. He grabbed my neck. I realized then, oh, he gave me a blow on the side of the face, and I realized my nose was bleeding. When he released my throat again, I called on God to help me. Again he took my throat, and when he released me another time, again I called on God to save me. Evidently I lost consciousness for a few seconds for when I came to, I was on the floor not wholly stretched out for I remember keeping myself flat. I was lying to this side on my glasses. I took them off, and then, he pulled on my step-ins, and then he left" (R. 8).

Miss Brookes got up from the floor and went to the house next door "still fighting for breath". The neighbors summoned two American medical officers and put Miss Brookes to bed in her own house. Her face was "all black" and her eyes were closed. She was putting cold packs on her face when the doctor arrived (R. 8). According to Miss Brookes her whole face was "absolutely swollen out of shape\*\*\*it was all black and blue". She was bleeding at the nose and ear and could not see out of one eye (R. 9). She testified that she bled very freely, the "floor was covered with it" (R. 12). She believed that accused inflicted the injuries with his open hand. He seized her underclothing and when she got up they slipped down. The buttons were found later (R. 9). She identified accused at the camp six days later when between 75 and 100 soldiers were marched past her with their hats on. They were all colored soldiers, with the exception of five or six

**CONFIDENTIAL**

**CONFIDENTIAL**

(35)

white men. The identification had been postponed because her eyes were so badly swollen (R. 11,12). She saw no one else who resembled accused. She had never seen him before and accused told her she had never before seen him. The man who attacked her had an "ordinary quiet voice" (R. 10). She was certain that it was accused who attacked her. She recognized him upon seeing him and later by the way he spoke (R. 11). Accused was in fatigues at the time of the assault.

It was stipulated that stipulated testimony of a medical officer, received in evidence at the original hearing, might be received in evidence at the rehearing, as follows:

"I examined Miss Ethel Brookes on November 10, 1943 and found her condition to be as follows: Physical Examination revealed a middle-aged woman in a very nervous state. Head, marked Edema and Ecchymosis of the left eye region to such a degree that she could not see out of her left eye. Right eye region moderate Edema and Ecchymosis; eye swollen half shut. Nose, Edema and Ecchymosis of bridge of nose. Ear, Edema and Ecchymosis left ear region. Neck, Multiple abrasions and Edema of the neck" (R. 20).

Private Owen Scott, of accused's company, testified that he had loaned accused his field jacket "about two or three days before the brothel was put off limits" (R. 13,16). The brothel in Gafsa, Tunisia, had been "declared off-limits" on 10 November 1943 (R. 12). Scott testified further that he went to Constantine and when he got back he found the jacket, which had been returned during his absence, rolled up at the foot of his bed "and it had spots on it, blood stains" (R. 14,17). Upon cross-examination Scott testified that he did not know "for sure" that the stains were caused by blood (R. 16).

The president of the court which had originally tried accused "late in November" testified that an "ordinary G.I. field jacket Government issue", had been introduced in evidence at the former trial (R. 20) and at the direction of this officer the jacket was sent to the "first medical laboratory" after which "a member" of that laboratory appeared in court and made "an oral presentation of the findings of the examination of the jacket" (R. 23).

A noncommissioned officer of First Medical Chemical Laboratory testified that about 30 November 1943, an officer had brought him a field jacket to have certain stains on the garment examined to determine whether they were blood (R. 23). He "ran a Bensidine test" which "was positive and that is usually considered specific for blood". He could not testify whether the blood was human or animal (R. 24).

Accused remained silent (R. 24,25,26).

4. It thus appears from uncontradicted evidence that at the place and

**CONFIDENTIAL**  
- 3 -

(36)

# CONFIDENTIAL

time alleged accused assaulted Miss Ethel Brookes, the person named in the Specification, with intent to commit the crime of rape. Immediately after declaring his intention of having sexual intercourse with her, accused seized his victim, slapped and choked her violently, threw her to the floor and undertook to remove her underclothing. She resisted and accused finally abandoned his efforts to accomplish the rape he had declared his intention of committing. The court was warranted in its conclusion that accused was guilty as alleged (MCM, 1928, par. 1491).

5. By stipulation between the prosecution and the defense, the testimony of Miss Brookes and of other witnesses as received at the original hearing were received in evidence at the rehearing, subject to specific objections. These witnesses did not testify in person at the rehearing. There was no legal impropriety in this procedure (MCM, 1928, pars. 117b, 126b).

6. The charge sheet shows that accused is 20 years old. He was inducted into the Army 23 April 1942, and had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. Penitentiary confinement is authorized for the offense of assault with intent to commit rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 455, Title 18, United States Code.

Arnold E. Hollingshead, Judge Advocate.

Harmon Simpson, Judge Advocate.

Donald W. Mackay, Judge Advocate.

# CONFIDENTIAL

~~CONFIDENTIAL~~

(37)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army.  
15 January 1944.

Board of Review

NATO 1259

U N I T E D   S T A T E S	)	FIRST ARMORED DIVISION
v.	)	Trial by G.C.M., convened at
Private WILLIAM F. CRANCE	)	APO 251, U. S. Army, 9 December
(32033784), Company A, 6th	)	1943.
Armored Infantry.	)	Dishonorable discharge and
	)	confinement for 20 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks, Beekman,
	)	New York.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification: In that William F. Crance, Private, Company "A" Sixth Armored Infantry, did, without proper leave, absent himself from his organization near El Krib, Tunisia, North Africa, from about 17 January 1943, to about 24 March 1943.

CHARGE II: Violation of the 58th Article of War.

Specification: In that William F. Crance, Private, Company "A" Sixth Armored Infantry, did, near Mknassy, Tunisia, North Africa, on or about 25 March 1943, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat duty, and did remain absent in desertion until he was apprehended at Kechie, French Morocco, North Africa, on or about 7 April 1943.

3271

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification, and was found guilty of both charges

~~CONFIDENTIAL~~

**CONFIDENTIAL**

(38)

and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 30 years. The reviewing authority approved the finding of guilty of the Specification, Charge II, except the words "was apprehended at Kechie, French Morocco, North Africa", substituting therefor the words "returned to military control", approved the sentence, remitted ten years of the confinement, designated the Eastern Branch, United States Disciplinary Barracks, Beckman, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50.

3. The evidence shows that on 17 January 1943, Company A, 6th Armored Infantry, of which accused was a member (R. 9) was stationed near El Krib, Tunisia (R. 8). The morning report of the company showing accused's unauthorized absence, as of that date, was admitted in evidence without objection. It also showed him as being carried "AWOL to desertion", 27 February; "from desertion to duty as of March 24th, 1943"; "duty to desertion as of March 25, 1943"; and "transferred to and joined Company from Second Replacement Depot 1000 hours", 16 October (R. 7,8; Pros. Ex. B).

On 23 March 1943, accused was turned over to a sergeant of his regiment at the administrative echelon by the personnel adjutant for transportation back to his organization. On 24 March 1943, accused was turned over to the motor officer of the regiment and was told that he was being sent back to the company (R. 9). The battalion maintenance officer talked to accused in the Service Company area and told him that he would take him back with him and turn him over to his first sergeant in Maknassy. Company A was then only "a few hundred yards from the front lines", about 20 miles forward from the Service Company, "in a place North East of Maknassy" (R. 10,11). The officer told accused that his company was then "up in the hills" and that on his regular round-up he would take him to his first sergeant. He testified that there was no doubt in his mind that accused understood him, "he couldn't have" misunderstood; there was no doubt in his "mind that the accused could not have known that his Company was engaged with the enemy" (R. 11). There was no enemy fire, however, in the Service Company area where they then were (R. 11,12). When the officer made his "regular round-up that night", he could not find accused; he made "a thirty minute search" for him before he made the run (R. 11).

In a "voluntary confession", dated 3 October 1943, admitted into evidence at the beginning of the trial without objection by defense (R. 7), accused stated that "On January 17, 1943 I got drunk and went AWOL from my unit." He then detailed his whereabouts until 24 March 1943, when he "was sent to the 5th Replacement Battalion in Tebessa, Algeria and was told that I was going to be sent to my original unit". As bearing upon Specification, Charge II, accused stated:

"I told a Lt. and the 1st Sgt. of Company A, 5th Replacement Battalion that I should be sent to any other unit on the front, or any other place except

259274

**CONFIDENTIAL**

**CONFIDENTIAL**

(39)

the 6th Armd. Inf. I was taken to the rear echelon of the 1st Armored Division on the 29th of March, 1943.

"I was then taken to the 6th Armored Infantry Reg. Maintenance, and was told that I was going to be sent back to my original unit, 6th Armd. Inf. I had been in combat with the 6th Armd. Inf., Company A, and my squad leader did not know his job and naturally I was scared at times. On the morning of March 30, 1943 about 1200 hours I left the 6th Armd. Inf. Reg. Maintenance thinking if I got far enough to the rear that I would be placed in a different unit. I rode on trains and in truck convoys coming down to Keibia, French Morocco, where I stayed for one day and a night at the railroad station.

"I was picked up by the Military Police on the night of April 7, 1943 at 2030 hours and was taken to the Police Station at Port Lyautey, French Morocco" (Pros. Ex. A).

Accused declined to testify or make an unsworn statement.

4. The evidence together with the pleas of guilty establishes the absence without leave as alleged in the Specification, Charge I.

The evidence also shows, with respect to Charge II and its Specification, that on 23 March 1943, accused had again returned to military control and that on 24 March 1943, was turned over to an officer of the regiment for return to his company. He was then 20 miles from his company, which was within a few hundred yards of the front line at that time. The officer informed accused that his company was then "up in the hills", indicating to the accused that they were then engaged with the enemy. Thereupon accused again absented himself without leave. His intent to avoid hazardous duty as alleged can be inferred from these and other attendant facts and circumstances. The period of unauthorized absence and the manner of its termination as approved by the reviewing authority is established by substantial proof. While accused was not physically with his company at the time of his second unauthorized departure he was under military control of officers of his regiment and under competent orders to rejoin his own company. There is here no essential variance between the allegation and proof (CM NATO 1087, Lapiska; Dig. Op. JAG, 1912-40, sec. 416 (10)).

5. The evidence first introduced by the prosecution was accused's confession. This procedure was irregular but cannot be said to have prejudiced the substantial rights of accused, for the corpus delicti was subsequently established by competent and convincing testimony (MCM, 1928, par. 114a). In the absence of any showing to the contrary, it must be presumed that the confession, as indicated, was voluntary.

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(40)

6. The charge sheet states that accused is 24 years old and that he was inducted into the Army of the United States 14 February 1941. No prior service is indicated.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

Daniel O'Hearn, Judge Advocate.  
John J. Keane, Judge Advocate.  
James J. Donavan, Judge Advocate.

250274

~~CONFIDENTIAL~~

**CONFIDENTIAL**

(41)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
28 January 1944.

Board of Review

NATO 1267

U N I T E D   S T A T E S	)	ISLAND BASE SECTION
v.	)	Trial by G.C.M., convened at
Private ALSTON T. DENSON	)	Palermo, Sicily, 4 October
(34412098), Company A, 249th	)	1943.
Quartermaster Battalion.	)	Dishonorable discharge and
	)	confinement for life.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----

**REVIEW by the BOARD OF REVIEW**

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

**CHARGE: Violation of the 92d Article of War.**

**Specification:** In that Private Alston T. Denson, Company A, 249th Quartermaster Battalion, did, on or near Highway 120, approximately seven (7) miles from Alimena, Sicily, on or about September 1, 1943, forcefully and feloniously, against her will, have carnal knowledge of Adele Adelfio, a civilian woman.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for

254753

**CONFIDENTIAL**

**CONFIDENTIAL**

(42)

the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 1 September 1943, shortly after finishing supper, accused and three other soldiers, all members of the 249th Quartermaster Battalion (Service), left their bivouac area to drive to the nearby town of Petralia Sottana, Sicily. They drove about 15 minutes and then dropped accused off at the entrance to the town. "He was wearing O.D.s, a helmet liner, and glasses" on his helmet; the glasses were leather-mounted with one continuous lense (R. 115-117,140).

Four Italian civilians, traveling by bus from Palermo, Sicily, to Alimena, Sicily, had reached the town of Petralia Sottana, 1 September 1943, and were in the bus station there waiting for further transportation to Alimena (R. 12.47.51.53). They were Mrs. Adele Adelfio, wife of an official of a Palermo bank, her 16-year old son Giulio Adelfio, Professor Paolo Accurso, a school teacher in Alimena, and Signore Benedetto Nasta, a certified public accountant in Palermo (R. 11.47.50.51.53). Shortly before 1930 hours Giulio left the bus station and went to a nearby cafe for some ice cream (R. 12.13.47.49). There he met accused, who came into the cafe with a local youth endeavoring to change a 1000 lire note (R. 12.15.29.33). With an Italian-born American soldier acting as interpreter, Giulio discovered that accused was going to Caltanissetta, and as the road to Caltanissetta goes through Alimena, Giulio mentioned something about securing a ride (R. 12.13.37). Accused then went with Giulio and the interpreter to the waiting room of the bus station, where he met Mrs. Adelfio and her party, said that he was going to Caltanissetta, "bowed and showed by his expressions that he was glad to accompany" them to their destination (R. 13.48.51.53.54). He promised to return at 2200 hours with an automobile, stating that he would blow his horn to notify them (R. 13.49). Accused was in a "great hurry" and stayed in the waiting room only a few minutes (R. 13.48.52.54).

Second Lieutenant Lloyd Thompson, 27th Quartermaster Regiment, was in the vicinity of Petralia Sottana on 1 September 1943, in a convoy to pick up some gas cans. Guides had been posted along the road and it was necessary to send a car out to pick up the second guide (R. 123-125). For that purpose, between 2245 and 2300 hours, he sent out Private Carl Vincent, in his regularly assigned quarter-ton jeep (R. 125.132). A strange soldier from another outfit, who happened to be in the area (accused), volunteered to go with the driver to show them the way, and did go (R. 125.126.130.132). Private First Class Robert Louden, a member of Vincent's company, also went along (R. 127.132). Private Vincent drove the jeep away (R. 131).

At about 2250 or 2300 hours, accused returned to the bus station in a jeep. He was accompanied by two other American negro soldiers (R. 14.15.16.49.52.54.55.72). He had promised to return alone and when Mrs. Adelfio heard that there were three soldiers, she "became frightened and at first refused to go" (R. 49). However, accused made a gesture signifying "come" (R. 81) and the soldiers with "much courtesy" helped the civilians to load

254753

**CONFIDENTIAL**

**CONFIDENTIAL**

(43)

the baggage on the jeep (R. 16,52,81). They all then got into the jeep. In the rear was Signore Nasta on the extreme left, Professor Accurso in the center and one soldier on the right. In the front was the driver on the left, Mrs. Adelfio in the center and accused on the right. Giulio sat on the luggage between the front and rear seats (R. 16,17,34,55,72,81,82).

The four civilians identified accused in open court as the soldier who came to the waiting room twice on the evening of 1 September 1943 (R. 15,50,52,54,55,81).

The jeep then left the bus station and started for Alimena. Giulio stated that "It was a well travelled road. As a matter of fact, there were vehicles all along the road both left and right of the road which were stopped and\*\*\*while we were passing between these two columns of vehicles the driver told me to keep quiet, 'shut up, shut up'" (R. 36). After traveling a few minutes and before leaving the outskirts of the town, they reached a fork in the road, one branch going to Petralia Soprana and the other branch going to Alimena. The driver started to take the wrong road and Giulio spoke up and said "The street is not right. Go this way". Mrs. Adelfio put her hand on the arm of the driver to get him to stop. After some conversation between the driver and accused, the car was turned around and took the correct road out of town for Alimena (R. 17,18,36,72, 73,82).

They then continued on the road to Alimena for about ten or fifteen minutes, when they reached the Madonuzza road junction (which was stipulated to be 9.67 miles from Alimena (R. 10)). There was another fork here and the driver took the fork to the left, leading to Geraci, instead of the road to Alimena. He had proceeded about 300 meters past the intersection, when Giulio informed him that they were on the wrong road, and Mrs. Adelfio, being afraid, again placed her hand on the hand of the driver on the steering wheel (R. 18,56,57,82,83).

The jeep stopped immediately on the right side of the road, and accused, Signore Nasta and Giulio alighted. "Mrs. Adelfio showed that she was afraid to travel any more with those negroes and she said she was feeling ill and wanted to get off". Giulio then helped his mother out, "because she wasn't feeling very well". The third soldier and Professor Accurso remained in the back of the vehicle (R. 19,38,73,74,77,83). There was no moon (R. 40). The lights of the jeep were extinguished (R. 21,75,84) and the driver alighted from the front of the vehicle with a carbine in his hand (R. 19,38,74,83). Mrs. Adelfio, Giulio and Signore Nasta moved around to the driver's side of the jeep. Giulio in English, was asking the negro soldier where they wanted to go, why they were taking the wrong road and what they intended doing". Accused thereupon came over to the driver's side of the jeep, with a pistol or revolver in his hand, pointing it at them and saying "shut up, shut up". He gave Giulio "a slap in the face and a punch". Sometimes he pointed the pistol or carbine at Giulio, sometimes at Signore Nasta, changing his position. When Giulio tried to speak accused placed the gun against his neck and hurt him (R. 19,20). Then one of the soldiers took hold of Mrs. Adelfio's arm, slapped her in the face (R. 19).

254753

**CONFIDENTIAL**

# CONFIDENTIAL

(44)

maltreated her and pulled or dragged her along the road some eight meters ahead of the jeep (R. 19,38,39). She tried to resist and was yelling, "You'll not place a finger on my person" (R. 19,39). She seized the soldier's hand, talking to him saying 'Take your hands off of me. You'll kill me, but you're never going to put your hands on me' (R. 58). She continued to resist and was slapped and struck; "she reacted and fought back because she saw her son being slapped and pointed at with a gun". After being dragged a short distance, struggling, resisting and attempting to cry out, she was knocked or thrown upon the ground at the edge of the road (R. 19,58,59,67, 74). They removed her clothes (R. 69) and tore off her underpants (R. 68). The three colored soldiers one after the other had intercourse with her, completing the act of penetration (R. 59,68).

There is some variance in the testimony as to the order in which each of the three soldiers went down the road with Mrs. Adelfio, but there is no disagreement that all three were with her (R. 19-21,31,58,59,68,74,83, 85). There is also some variance in the testimony as to the number and kinds of weapons used and who used them on each occasion, but there is no disagreement that the civilians were threatened by firearms from the time the jeep stopped until it drove away (R. 19-21,31,32,39,43,57,58,74,77,78, 83-85,92).

Giulio heard the laments or cries of his mother (R. 20) and Signore Nasta heard from that direction "not a yell but a lament like a person who is suffering". He "could see the shadow of two people" but then nothing more (R. 75). Professor Accurso could "see the woman react and move. Naturally it was not too bright by the light of the stars, but you could see her moving" (R. 85). He testified that

"There was some confusion there. The Mrs. was as if she had fainted\*\*\*Because after the accused threw her on the ground, she started to make noises and screams until the accused served himself of the Mrs.\*\*\*The position of the hands and arms I could not see. All I did see was the first who mounted the woman and the action\*\*\*I did see the legs facing the vehicle and the head away from the front\*\*\*The dress I could not see whether it was down or up. All I did see was that he jumped on her, mounted the woman, and the action" (R. 89,90).

Mrs. Adelfio testified that after accused knocked her on the ground she had to "yield to the demands for the salvation" of her son. "She did fight back. She tried to get up and she was pushed and shoved and then she had to yell because she couldn't fight\*\*\*she was not only slapped and punched but if she tried to get up they would put her down again. When she got up, she couldn't bend her leg" (R. 59). She finally became so "terrorized" that she wanted to "yell", but her "voice did not come". She could not get up without aid (R. 70). Her shin bone was hurt, her back was bruised, and she had a swollen thigh for eight days (R. 58,60). The three soldiers completed the act of penetration (R. 59,68). Accused inserted "his privates or male organ" into her "female organ or privates". The act was done against her will and without her consent (R. 71).

254753

# CONFIDENTIAL

# CONFIDENTIAL

(45)

As soon as one soldier finished he returned and took over the weapons, standing guard over the civilians while the other in turn went to Mrs. Adelfio (R. 20,31). She testified that almost no time elapsed between the first two, "because they were in such great hurry\*\*\*I did not try to get up, because I was so near an incline, I was afraid I might fall, and then you can imagine the condition of the state of mind I was in" (R. 68).

When the soldiers first began to maltreat Mrs. Adelfio and lead her away, none of the civilians were able to go to her rescue. At the beginning, accused had covered Giulio and Signore Nasta with a carbine in one hand and a pistol in the other, then the driver returned and held the guns (R. 20,78). Giulio was slapped "because he tried to scream" (R. 74,84) and the gun was placed against his neck (R. 20). Signore Nasta, having made some movement, was threatened and searched (R. 20,78). Professor Accurso was held in the back seat of the jeep by the third soldier who held on to his jacket; as he attempted to leave the vehicle accused approached and slapped him hard (R. 20,21,84,88).

After the three soldiers had had intercourse with Mrs. Adelfio they returned to the jeep and the baggage was unloaded (R. 21,74,85). Signore Nasta went to Mrs. Adelfio, helped her to her feet and aided her to return to the vehicle (R. 21,22,70,74). Her clothes were "all dirty" (R. 91); "she was ragged" and "almost like an insane person" (R. 22). She was limping (R. 41) and "she was in a pitiful condition\*\*\*First of all she had her leg in such condition that she couldn't walk with it. Then she had a swollen face and black, and then her general condition was a very nervous condition" (R. 76).

The civilians were then lined up on the side of the road by their baggage and while accused kept them covered with the carbine, the other two got in the jeep and turned it around. As the jeep came up to accused, he got aboard and the vehicle, still without lights, went back on the road to Petralia Sottana, from which it had come (R. 21,22,41,42,60,74,75,91,92). This was between 2300 and 2320 hours (R. 42). After the three soldiers had departed, the civilians picked up their luggage, and, with Signore Nasta supporting Mrs. Adelfio, they started back in the direction of the road junction (R. 22,75,86).

Some time around midnight of 1 September 1943, Technical Sergeant Walter Riggan, Jr. and Corporal Maford M. Sanders, both of Company A, 51st Signal Battalion, were in bed in the bivouac of their organization, about 178 yards from the center of the Madonnuzza road junction leading to Alimena (R. 93,94,102). At this time they heard some unusual sounds coming from the vicinity of the road junction, "something like the noise of a man changing a tire on a truck". They heard the sound of a slap, a man saying "shut up" and the "screaming" of a "woman trying to yell something like 'No, no' in Italian" (R. 94,100,102,106). The soldiers did nothing for 15 or 20 minutes, then got up, dressed and took their rifles and searchlights to investigate (R. 96). At a bridge on the Petralia road near the Madonnuzza road junction they met Mrs. Adelfio, her son Giulio, Professor Accurso and Signore Nasta coming slowly across (R. 22,23,60,75,85,97,98,103,104). When the soldiers

254753

# CONFIDENTIAL

# CONFIDENTIAL

(46)

shined their flashlights the civilians stopped (R. 103). Mrs. Adelfio was leaning against the concrete railing with her hands crossed over her stomach (R. 104). She "was in some sort of hysterics\*\*\*sort of crying and standing there with her coat over her arm. She had her drawers in her hand, holding them in front of her" (R. 97,101,106). Giulio "acted as if he was half way crying" and pointed to Corporal Sanders' rifle (R. 104). "Then he pointed toward the road toward Alimena" and asked the soldiers if they had a truck (R. 105). Sergeant Riggin and Corporal Sanders had heard a jeep turn around and leave, heard the sound of its motor and exhaust, and saw its silhouette as it went down the road toward Alimena (R. 99,102,103). Sergeant Riggin went back and got a truck and took the group to the Madonie Hotel in Petralia Sottana, stopping at the police station enroute (R. 23,24,61,75,86, 98,100,105).

Mrs. Adelfio was taken, about 0100 hours (R. 96), from the hotel to a hospital where she was put to bed and examined by a physician (R. 61,108). Mrs. Adelfio told the doctor that she had been raped (R. 62,108) and asked him particularly to "visit" her vagina (R. 110). The doctor found injuries on her right leg from the ankle to the calf (R. 108,109), although she walked without difficulty (R. 110). He found "spots of a mucous substance" on the interior parts of her thigh and on the exterior parts of her genitals. He examined the interior of her genitals with his hands and an instrument and "found that in the vagina there was much sperm". There "were no other lesions on the vagina" and the torso revealed nothing. He "noticed that she had been maltreated" and her face had been "touched", but he found no lesions or wounds (R. 109,110). The following day Mrs. Adelfio was "in bed with a fever, a high temperature" (R. 62). At the trial she was nervous and emotionally upset, wept once, and on two occasions it was necessary to interrupt her testimony in order that she might gain sufficient composure to continue as a witness (R. 59,68).

During the evening of 1 September 1943, accused gave no indication to the civilian witnesses of being under the influence of liquor or of having been drinking. "He was under all mental faculties" (R. 33,66,67,88). Lieutenant Thompson was under the "general impression" that the soldier from the other outfit who went with Private Vincent in the jeep had been drinking; "he acted like a person under the influence of liquor" (R. 126, 130).

Private Elbert Allen, accused's tent-mate, went to bed that night "somewhere along twelve" and accused was not yet in when he went to sleep (R. 155,156). Accused returned to his bivouac area about 0100 hours on the morning of 2 September 1943 (R. 136,137).

Considerable testimony was introduced in regard to the identification on 2 September 1943, by Giulio at accused's bivouac area (R. 25-29,32,42,43, 117-119,140-143) and by Signore Nasta, Professor Accurso and Mrs. Adelfio at the latter's home (R. 62,63,80,86,87). It has not been set forth in this review, the question of accused's identity not being in issue.

Private First Class Louden testified that he heard accused talking in his cell to Vincent, saying that witness "didn't know whether we went out

254753

# CONFIDENTIAL

**CONFIDENTIAL**

(47)

with the jeep or not because he was asleep\*\*\*He said the gun that they took from him was not the same gun they had in the jeep" (R. 133,134).

A voluntary statement made by accused on 15 September 1943, to the investigating officer, was introduced in evidence as Prosecution's Exhibit "B" (R. 150). In this statement accused detailed the matter about getting a 1000 lire note and going into Petralia. He admitted going into the ice cream parlor and talking to Giulio about wanting to go to Alimena; that he met a group of civilians, who wanted to go to Alimena; that he drank wine in a cafe until around 2230 hours; and that he arrived back in his bivouac area about 2300 hours. He saw the guard and went to his own tent; he went to the tent on his right and had a drink with some of the boys and then went to bed with his tent-mate, Elbert Allen. He stated that he "never left the bivouac area" after returning to it about 2300 hours (Pros. Ex. B).

Accused testified that on 1 September 1943, he left camp after supper with three soldiers and went to the town of Petralia Sottana, expecting to sing at an officers' party that night (R. 159). As he was trying to get a 1000 lire note changed at an ice cream parlor he met Giulio, who told him that his party would like to go to Alimena. He went with Giulio to the building where Mrs. Adelfio was, and met her and the other civilians. Giulio talked with them in Italian, after which they all shook hands with accused and he left them. After leaving the group he consumed considerable wine in town and eventually returned to his bivouac area (R. 159-161). As he arrived there he noticed that a new convoy of trucks had come in and he spoke to two soldiers, who were going out in a jeep to pick up a road sergeant. Accused went with them. They did not find the sergeant, and went on into town for wine. The cafe was closed when they got there. Then one soldier asked accused, "What kind of chance do you have with women around here?" and accused said, "We do very well. Sometimes they come in our bivouac area" (R. 161,162). As they were driving around looking for women, Giulio came up to the jeep and accused said, "That's the same kid that was asking me for transportation to Alimena." The driver asked who they were and when accused told him Giulio, two men and a woman, he asked, "What she look like?" Accused said, "All right." Thereupon the driver said, "I believe I go in and see what she look like\*\*\*If she look all right and want to talk terms I'll carry her to that town" (R. 162,163). The driver went in and soon thereafter they all came out, loaded their luggage into the jeep, climbed in and started out. Mrs. Adelfio sat up front and Giulio on some luggage behind the front seat. As they started making a turn, someone yelled "Wrong road", and they backed up, got on the main road and went through town. They drove along saying nothing. When they came to the Alimena-Nicosia cross road, the driver again took the wrong road and

"I believe, I'm not sure - I believe the woman pressed her hand on his hand and he stopped the vehicle, and pulled to the side. When he stopped, this boy in the back jumped up and the driver jumped up, and she made motions for me to get out so I stepped out, and she stepped out. She started on the other side of the jeep, where this little boy and the driver and also the other man in the car was, and in going around this jeep there was a lot of slag rock, sort of large

254753

**CONFIDENTIAL**

**CONFIDENTIAL**

(48)

size, which had been piled on the road, she stepped on the rock and almost fell. The driver caught her to keep her from falling. Then this here little boy began to ask a lot of questions. Some I understood, some I did not. The driver caught the lady by the arm, and when he caught her, they both started to walk off together, and this boy started to follow, and also this man, and I said, 'No, you stay here with me, no one is going to hurt you.' I said, 'Just take it easy, and nobody going to bother you.' The boy said, 'No, no,' and started off, and I said, 'You stay right here.' His mother turned around and said something to him, and whatever she said, the reaction from which she said it, he started to playing with my hands, and then he took my helmet off and put it on his head. I didn't know what he was doing. I just stood there looking at him. In the meantime the driver and this lady walked down the road and laid on the ground. The way I seen it, and I was close enough to see it, I didn't see no scuffle, just laid down. He stayed a few minutes and came back and she was still there. He came back, and I told the little kid, I said, 'Now, you stay here until I come back.' The boy said, 'No, I'm going.' I said, 'No, you stay here.' So I went over to where she was, and when I got there, where she was, she was laying on the ground, and I believe she had her left arm behind her head and her right arm stretched on the ground. She had one leg stretched, and one leg sideways on the ground. I stood there and unfastened my trousers, and started to get on, and she moved her leg over in order to open her leg a little. I stayed there for a minute or so, and then got up, and stuck out my hands, and she put her hands in mine, and I lifted her up. She picked up her pants off of the ground and we walked back to the jeep. She started to get into the jeep, but those two Italian men began to talk to her in Italian, and then she turned away. As I remember, part of the baggage were out of the car and part still in the car when I returned. Some had been taken out. But anyway, they got the remaining baggage and placed it on the further side of the road, and the driver got in the car, turned it around. When he turned it around, we all got in the car and drove to the intersection" (R. 163-165).

They returned to the gas dump where they were bivouacked, parked the jeep and eventually went to bed (R. 165). Accused saw no one slapped and Mrs. Adelfio spoke above her normal tone only when she spoke to Giulio (R. 167, 168). The driver was "the first soldier to go down the road with the lady \*\*\*She laid down like an ordinary person would lay down, and the soldier got down" (R. 167,168). "After the driver came back then the soldier in the rear got out. When he came back, I went" (R. 185). She moved around "a lot\*\*\*just like an ordinary person would during the course of an intercourse". The driver was the second soldier, and accused was third. When accused "got there, her dress was around her stomach. The bottom part was. She did not say or do anything by way of objection - "In fact when I got 254733 she took her hand from her head and put her hands around the back of

**CONFIDENTIAL**

**CONFIDENTIAL**

(49)

my neck" (R. 168). The expression on Mrs. Adelfio's face, while accused had intercourse with her, was "just an ordinary", natural expression (R. 185).

The only weapon accused saw displayed was a carbine, which was taken out of the car; he himself had a knife, which he carried for protection, but no pistol or carbine. There was also a flashlight which the driver used "in getting down in position" (R. 168,169,183).

On cross-examination, accused testified that he estimated he had had intercourse with about 30 or 40 Sicilian women (R. 170). He did not caress Mrs. Adelfio while driving along but that did not mean that he "wasn't sexually attracted toward her" (R. 170,171). At the bus station, "the boys wanted to know whether the lady looked good, and I said she looked all right as far as I'm concerned" (R. 171). Private Carl Vincent was the driver; on the way into town he brought up the subject of wine, asked how the women were, and said something about carrying her to Alimena. Private Robert Louden was the soldier who sat behind. While they were driving along there was no conversation in the car about having intercourse with Mrs. Adelfio (R. 172). Before the jeep stopped, Mrs. Adelfio "just laid her hand on" the driver's hand "like that and he stopped". Accused realized the wrong road had been taken but said nothing; "I just kept my peace". He kept quiet because he thought the driver had "made a deal" with Mrs. Adelfio. "I decided he knew what he was doing so I didn't say anything I just kept quiet" (R. 173,174). When the jeep stopped the lights were turned off by the driver (R. 174). As they were leaving, "after we turned the jeep around and after everything was over, one of the men offered us a drink of wine" (R. 175).

He further testified that he had intercourse with Mrs. Adelfio "just a few minutes" and that "she seemed perfectly willing".

"I would say about two or three minutes because I never finished. I started to get up one time, and the word she spoke was 'Finish?' I never finished because it seems like she was all wet and it was hard for me to keep it in her, so I just stopped" (R. 176).

He did not have a pistol with him that night because the lieutenant had given them orders "that it was all right to have pistols but we couldn't carry them" (R. 176,177).

Of the 30 or 40 Sicilian women accused had had intercourse with, about one third were from houses of prostitution. He did not feel ashamed "because I paid for what I got" (R. 177,178). He offered Mrs. Adelfio "one-hundred lire and she wouldn't accept it". On several occasions he had taken women on a vehicle before he had had intercourse with them (R. 178). When he signed the statement, "I never left the bivouac area after the Italian Police left the area" ("let me out", Pros. Ex. B) he was not trying to conceal anything "at that particular time" (R. 179). Because he was being accused of rape he decided that he would wait until the investigating officer had gathered his evidence together and then he would "tell how the

254753

**CONFIDENTIAL**

**CONFIDENTIAL**

(50)

thing was" (R. 179,180). He did not "just remain silent" because the investigating officer "kept telling" him to make a statement. "I'm capable of telling the truth\*\*\*the parts of the main facts were the truth" (R. 180, 181).

When Giulio drove up in the jeep with Lieutenant Riffert, accused "didn't act in no way towards him. I asked him a point blank question I wanted to know what was going on\*\*\*I didn't know about what he came there for, what he wanted. I'm not in the practice to answer questions unless I know what he wants and otherwise I may say the wrong thing" (R. 187).

Accused stated on redirect examination that his experience in Sicily with regard to women who accepted rides in an automobile was that "she knows what is to take place. That is well understood, because I don't believe they would get in a jeep or any other automobile with a soldier unless they did know\*\*\*if someone gets in the car with me, there are no outcries and it wasn't no assault. They went their way, and I went mine". That had happened to him many times in Sicily and to his friends (R. 189,190).

In response to questions by the court accused testified that he had a knife but did not remember that he had a carbine.

Private Carl Vincent testified for the defense that on 1 September 1943, accused and Private Louden accompanied him when he went out on the Madonnuzza road to pick up a road guide. The guide was not there so they rode into town to get some wine and find a house of prostitution (R. 195, 196). They met Giulio on the road and accused said, "The people he was with want to go to some town", and Vincent said he would take them. He drove to the waiting room and "all got in" with their baggage. "The two men and the boys piled in back, and the lady sat up in front in the center with Denson". On the way the lady was talking in Italian about "what's to be done". When they reached the point where they were to pick up the guide,

"she yells and I stop. When I stop, the lady gets out on my side out of the jeep and as she gets out she stumbled on a rock, and I caught her by the arm to keep her from falling. Lenson say she would like to give away some of her body. I said I wasn't expecting any, in case if she were giving it away, I was going to pay for it. So I told Denson, 'Well, I'll go first if it's okay with you.' He said, 'It's okay with me.' So I start walking down the road with the lady and the boy said something to the lady in Italian. She spoke back, but by that time the kid and the old man were by the jeep and by that time everything seemed to be all right after she spoke to this kid. The little kid was scared at first, but after she spoke to him in Italian, he was all right. He was playing with Denson, and the taller Italian fellow wanted to give Denson some wine. I and the lady went on ahead of the jeep a few paces and she slipped her hand into mine, then went over to the place and laid down. She pulled off her step-ins and when

254753

**CONFIDENTIAL**

**CONFIDENTIAL**

(51)

I got through with her, I got up, she never got up, and when I got through with her I went back to the jeep. When I got to the jeep Denson said he was going next, but Louden said, 'No, I'll go next.' He went on next. I went back to the jeep and the kid was laughing and talking to me and this big fellow he was sitting on the back part of the jeep. So I went over to the other side and started talking to him" (R. 196,197).

When Vincent was with the lady, her hands were behind her head, and she made no effort to get up or away from him. "She doubled up her legs and opened up" (R. 197). He saw no signs of a struggle while Denson was with her and heard no screams or noises; "it always seemed to me like the lady wanted to give away some of her body" (R. 198). After all three "were finished", the lady "got up and put her step-ins on and came back in the jeep". "The tall fellow got angry" and "started to take out the bags" (R. 197,198). Louden wanted to pay her but she refused, saying, "No, no, beaucoup money" (R. 198). Then the soldiers drove back to the bivouac area (R. 198,199).

Upon cross-examination, Vincent testified that as they were driving along the road to Alimena, Mrs. Adelfio was talking to Denson (R. 199,200). "She wasn't speaking American language. She used a lot of Italian words, and said, 'fickie fickie.' She kept saying 'fickie fickie, buono buono.' (Indicating with a boring motion in his cheek.)" (R. 200). When they reached the intersection she asked if they were ready; "she didn't say it in American", but he understood her meaning "by the motions of her hands" (R. 200). There was a carbine in the vehicle "by the front seat. \*\*\*It got out when I was getting out, I raised it up and got up and laid it on the hood". He saw no other weapons. Although Mrs. Adelfio did not "hug" him or "kiss" him, she "raised no kind of objection" (R. 201). He had intercourse with her first, Louden second, "and Denson was third" (R. 201,202). The intercourse took place about 12 feet from the car; one Italian "was in the jeep and the other one and the boy were playing with Denson" (R. 202). He admitted having previously made a statement to the investigating officer, Captain Dunn, in which he stated they returned to camp immediately after failing to find the sergeant, and omitted to mention anything about Italian civilians (R. 203,204).

Captain Wilson H. Dunn, called as a witness for the defense, testified, that in preparing a statement made by Mrs. Adelfio to witness as investigating officer, he did not include the remark: "Take your hands off me. You may take my life but never put your hands on me". Witness testified, "I have a faint recollection of some statement of that nature, but I couldn't say it to be a fact. Due to the translation of the witnesses statement and the confusion, I can't say that she did and I can't say that she didn't. It's possible that she might have said something like that and I wouldn't have it on this statement". He made no note of any such remarks (R. 192,193).

4. It thus appears from substantial evidence that at the time and place alleged in the Specification accused forcibly and against her will

**CONFIDENTIAL**

254753

CONFIDENTIAL

had unlawful carnal knowledge of Adele Adelfio. The act of sexual intercourse and actual penetration were established by undisputed proof and were admitted by accused, but he and a defense witness testified that Mrs. Adelfio gave her consent thereto. However, there is ample evidence that Mrs. Adelfio was dragged down the road, thrown to the ground and forced to submit to sexual intercourse; that her son was slapped, struck and threatened with firearms, giving her cause to fear for his life; that she and the Sicilian men with her were slapped and intimidated; that she cried out, protested and resisted but that she was overpowered and forced to submit while accused and the two other colored soldiers ravished her. The findings of guilty are fully warranted by the evidence (MCM, 1928, par. 148b; Winthrop's, reprint, pp. 677,678; CM NATO 1030, Jingles; CM NATO 939, Vincent, Louden). The Specification is not in the exact form set forth in the Manual for Courts-Martial for the offense of rape, in that the word "forcefully" is used in lieu of "forcibly". This was sufficient, however, to apprise accused that force in the commission of the act was intended to be charged.

5. During the cross-examination of accused the trial judge advocate asked several questions relative to former acts of intercourse by accused with Sicilian women. Although this testimony was irregular and improper, it was prompted by a statement of accused in which he said about women, "We do very well. Sometimes they come in our bivouac area" (R. 162). No objection was made by defense and on redirect examination defense counsel went into the matter a second time, examining accused on a closely related subject (R. 189,190). It therefore appears that the waiver of any objection thereto was deliberately made (MCM, 1928, par. 126c) and that the substantial rights of accused were not injuriously affected thereby.

6. There was considerable testimony produced tending to prove the identity of accused and showing the procedure whereby the witnesses for the prosecution had identified accused during the pre-trial investigation. It has been held improper as constituting hearsay for a witness to testify that a certain person on an occasion out of court identified the accused (CM NATO 1069, Scott, and cases there cited). Although the latter testimony was therefore, inadmissible, positive identifications of the accused as the person who had committed the rape were made in open court by the three civilian witnesses and by the victim herself. Moreover, accused had expressly admitted the act of intercourse with Mrs. Adelfio and the question of identity was not in issue. Under the circumstance it cannot be said that the substantial rights of accused were injuriously affected.

7. Attached to the record of trial is a letter signed by Signore Nasta and by Professor Accurso recommending clemency "to the extent of reducing the sentence of the court from death to life imprisonment". Attached thereto is a letter by defense counsel in which he states that Mrs. Adelfio and her son Giulio Adelfio were willing to sign the same but were forbidden to do so by Signore Adelfio.

8. This is a companion case to CM NATO 939, Vincent and Louden.

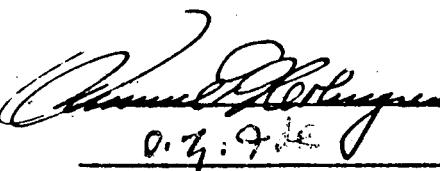
9. The charge sheet states that accused is 27 years old and that he

**CONFIDENTIAL**

(53)

was inducted into the Army of the United States 1 September 1942. No prior service is shown.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

  
Charles E. Holleyman, Judge Advocate.  
O. 3: 7 1/2,  
  
Gordon Simpson, Judge Advocate.

**CONFIDENTIAL**

**CONFIDENTIAL**

(54)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
28 January 1944.

Board of Review

NATO 1267

UNITED STATES

v.  
Private ALSTON T. DENSON  
(34412098), Company A, 249th  
Quartermaster Battalion.

ISLAND BASE SECTION

Trial by G.C.M., convened at  
Palermo, Sicily, 4 October  
1943.  
Dishonorable discharge and  
confinement for life.  
U. S. Penitentiary, Lewisburg,  
Pennsylvania.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

The record of trial in the case of the soldier named above has been  
examined and is held by the Board of Review to be legally sufficient to  
support the sentence.

*John P. Holmgren*, Judge Advocate.

*O. J. Ide*, Judge Advocate.

*Seward Johnson*, Judge Advocate.

NATO 1267 1st Ind.

Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army,  
28 January 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Private Alston T. Denson (34412098), Company A,  
249th Quartermaster Battalion, attention is invited to the foregoing  
holding by the Board of Review that the record of trial is legally

254753

**CONFIDENTIAL**  
NATO 001267

~~CONFIDENTIAL~~

.(55)

NATO 1267, 1st Ind.  
28 January 1944 (Continued).

sufficient to support the sentence, which holding is hereby approved.  
Under the provisions of Article of War 50½, you now have authority to order  
execution of the sentence.

2. After publication of the general court-martial order in the case,  
nine copies thereof should be forwarded to this office with the foregoing  
holding and this indorsement. For convenience of reference and to  
facilitate attaching copies of the published order to the record in this  
case, please place the file number of the record in parenthesis at the end  
of the published order, as follows:

(NATO 1267).



HUBERT D. HOOVER  
Colonel, J.A.G.D.  
Assistant Judge Advocate General

---

(Sentence as commuted ordered executed. GCMO 6, NATO, 28 Jan 1944)



**CONFIDENTIAL**

(57)

Breach Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
18 January 1944.

Board of Review

NATO 1279

U N I T E D   S T A T E S	)	MEDITERRANEAN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private HENRY J. ALEX	)	Oran, Algeria, 8 December
(39105871), Company D,	)	1943.
250th Quartermaster	)	Dishonorable discharge and
Service Battalion.	)	confinement for 20 years.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Henry Alex, Company "D", 250TH Quartermaster Service Battalion did, at Oran, Algeria, on or about 15 November 1943, with intent to commit a felony, viz, Murder, commit an assault upon Private J. C. Barnes, Company "D", 250TH Quartermaster Service Battalion, by willfully and feloniously shooting the said Private J. C. Barnes in the stomach, with a rifle.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, "except the words 'in the stomach'; of the excepted words not guilty" and guilty of the Charge. Evidence of one previous conviction by summary court-martial for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at

**CONFIDENTIAL**

**CONFIDENTIAL**

(58)

hard labor for 20 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The evidence shows that about 1400 hours 15 November 1943, the first section of Company D, 250th Quartermaster Service Battalion was formed for guard mount (R. 7,12,13,21). Private J. C. Barnes and accused, both members of the third relief of this guard detail (R. 13), had "a little scuffle". Sergeant William Smith, in charge of the section, saw that each had hold of the barrel of the carbine of the other. He parted the two and in the presence of accused, asked Barnes "what was the trouble". Barnes' said that "Alec Henry had been teasing him all morning" (R. 12) and asked Smith "to make Alec let him alone". Smith "told Alec to leave Barnes alone and to get back in ranks and Alec smiled and got back in ranks" (R. 13). When the first relief of the guard had gone towards its post (R. 16,23), Smith went to his tent to get his note book (R. 13). Accused then left the formation, went "to his tent and then he comes back. He comes back and stands back in line and then he walked around in front of Barnes and told him to put his rifle down. He refused" (R. 8).

Barnes had his carbine "at sling arms" on his right shoulder. Accused then said "You don't mess with me". Barnes did not reply. Accused was holding his carbine at "a sloppy port arms", the muzzle "a little higher" than the butt (R. 8,9). One witness testified that when accused came out of his tent and around in front of Barnes, he said "Let's fight with fists", holding "his rifle in front of him, across in front of him" (R. 21), and that accused, holding the weapon "in front of him" with the barrel "to the left" said "Put your gun down and let's fight with fists" (R. 22). Accused was standing "right in front of" Barnes (R. 23). The carbine in accused's hands was not pointing at Barnes at that moment. There was no further conversation except from a member of the guard (R. 21), who said to accused "You all stop that and come on and get into line" (R. 24). Eight or ten minutes had elapsed since the scuffle (R. 15). When Barnes failed to reply to accused's remarks, accused turned his rifle towards Barnes and fired a shot (R. 8,11,24). Barnes fell (R. 22), the bullet having entered the left anterior side of his chest, leaving on the right posterior. A medical officer who examined Barnes testified "There must have been some ricochet of the bullet against the spinal column\*\*\*otherwise he wouldn't be here today" (R. 6). It was stipulated that if Captain Alton B. Skelton, Medical Corps, 7th Station Hospital, were present he would testify that he examined Barnes at 1455 hours, 15 November 1943, and found in addition to the wounds caused by the bullet a complete bilateral paralysis of the lower extremities (R. 24,25).

The guard had drawn the carbines with which it was armed "from the supply room" (R. 17). No ammunition had been issued to any of the guard (R. 8,14,19,21). It was issued only to "the relief that is going on guard" (R. 19). The guard had been inspected, but the bolts of the rifles had not been opened (R. 18,19). Smith didn't know where accused got the cartridge fired. Barnes and accused lived in the same tent (R. 14). Three members

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(59)

of the section testified they did not know of any arguments or fights or "bad blood" between accused and Barnes (R. 10,14,23).

Barnes was not a witness at the trial.

Accused remained silent and offered no evidence.

The court asked defense counsel as to accused's correct name, "whether it is Alec Henry or Henry Alex". Accused replied "Henry Alex" (R. 25).

4. It thus appears from the uncontroverted evidence that at the time alleged, accused committed an assault on Private J. C. Barnes, the person named in the Specification, by shooting him through the body with a rifle. Accused had engaged in a scuffle with Barnes eight or ten minutes before the assault. When told to leave Barnes alone and get back in line accused "smiled and got back". Immediately before the assault accused fell out of the guard formation he was in, went to his quarters and returned. The evidence shows that no ammunition had been issued to any member of the guard that day. The court may well have inferred that accused left the guard formation to obtain a cartridge in his quarters. Upon his return to the guard formation accused, standing "right in front of" Barnes, challenged him to a fight with fists. At that time accused was holding his rifle at a "sloppy port arms", the muzzle a little higher than the butt. When Barnes did not reply accused turned the rifle towards Barnes and fired the rifle at him, almost killing him, and in fact causing a total paralysis of his lower extremities. That a rifle is adapted to the purpose of murder is irrefragable. No justification, excuse or provocation for the wanton and malicious assault is shown by the testimony. The intent to murder was properly inferable from the circumstances surrounding the shooting, the nature of the weapon used and the character of the injuries inflicted. The malice required for murder existed at the time of the shooting and if Barnes had died accused could properly have been convicted of murder. Thus all elements of the crime alleged are amply supported by the evidence. (MCM, 1928, par. 148a, 1491; Winthrop's, reprint, pp. 687,688).

5. The finding of not guilty with respect to the excepted words "in the stomach" resulted in an unnecessary elimination of an unessential detail and the accused was in no way harmed by the procedure.

6. The evidence does not show that the assault took place "at Oran, Algeria" as alleged. It merely shows that the assault took place in the immediate vicinity of accused's organization. The location of the organization on the date alleged was not a matter of which the court could take judicial notice. The matter of locus was not in issue and in this case the exact location at which the offense was committed was not of the essence of the offense. Accused was in no way harmed by the omission of this proof (NATO 440, Gilbert).

7. Sergeant Smith testified that he called accused "Alec Henry" while according to statement by accused his real name is Henry Alex. The identity of the accused was clearly established. Neither the fact that the witness was under a misapprehension as to the true name, nor the somewhat unusual

~~CONFIDENTIAL~~

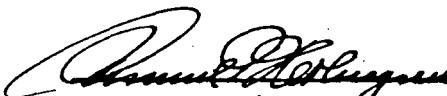
**CONFIDENTIAL**

(60)

procedure of asking defense counsel accused's real name was in any material way prejudicial to accused's substantial rights.

8. The charge sheet shows that accused is 21 years of age and was inducted into the Army of the United States 21 September 1942. No prior service is shown.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. Penitentiary confinement is authorized for the offense of assault with intent to commit murder here involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 455, Title 18, United States Code.

 Judge Advocate.

O. J. G. C., Judge Advocate.

Torom Draper, Judge Advocate.

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(61)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
17 January 1944.

Board of Review

NATO 1283

U N I T E D   S T A T E S	)	FIRST ARMORED DIVISION
v.	)	Trial by G.C.M., convened at
Private ROBERT F. GUEST	)	APO 251, U. S. Army, 22
(12017454), Company B, 6th	)	December 1943.
Armored Infantry Regiment,	)	Dishonorable discharge and
1st Armored Division.	)	confinement for 20 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks, Beekman,
	)	New York.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Robert F. Guest, Company "B", 6th Armored Infantry, did, near Tebessa, Algeria, on or about March 11, 1943, desert the service of the United States, by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: actual combat with the enemy, and did remain absent in desertion until he surrendered himself at his organization at or near Rabat, French Morocco, on or about June 6, 1943.

CHARGE II: Violation of the 61st Article of War.

Specification: In that Private Robert F. Guest, Company "B", 6th Armored Infantry, did without proper leave absent

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~

(62)

himself from his camp at or near Caivano, Italy, from about October 28, 1943, to about December 7, 1943.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of one previous conviction by summary court-martial for absence without leave in violation of Article of War 96 was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 30 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence but remitted ten years of the confinement imposed, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 11 March 1943, accused's company was located "in more or less pine grove\*\*\*within twenty miles of Tebessa", Algeria (R. 9,10). It was alerted for a movement to the Maknassy area and while it had no actual engagement with the enemy it was doing some training and outpost duty (R. 9). The company executive officer testified:

"At that time we were just pushed out of Sbeitla and on back near Tebessa. At that time we were setting up defensive positions moving from point to point. We were engaged in patrol activity and guarding mine fields and during this period there was no one between us and the enemy\*\*\*our point was withdrawing as far as we knew. At that time we had guards out on outposts in case the enemy should break through and attack us" (R. 9).

He identified the morning reports of Company B, 6th Armored Infantry, with entries pertaining to accused in the months of March, June, October and December of 1943 and the initials of the company commanders at the time (R. 7,8). "Extracts of the morning report" were admitted into evidence, without objection by defense, as Prosecution's Exhibit "A" (R. 8). Remarks therein pertaining to accused are as follows:

"Mar 11/43: Pvt Guest duty to AWOL 1300 hrs.  
June 6/43: Pvt Guest AWOL to duty 0700 hrs.  
Oct 28/43: Pvt Guest duty to AWOL 1700 hrs.  
Dec 7/43: Pvt Guest AWOL to duty 0645 hrs" (Pros. Ex. A).

A soldier testified accused was sleeping with him in the early part of March 1943 (R. 10), and accused "just said if he didn't get any mail and didn't get paid he was thinking about going over the hill". Witness further testified that he did not know if accused got any mail or not. He did not know accused had left the area "until that night". He and the sergeant major made a search for accused. The next time witness saw him was "in the area of Rabat" (R. 11).

The squad leader in the third platoon, of which accused was a member, learned of the accused's absence "on the day of the 11th of March". He

~~CONFIDENTIAL~~

**CONFIDENTIAL**

(63)

"reported him to the Platoon Sergeant and searched for him" unsuccessfully (R. 12). Witness testified that accused was not "present on the 12th or March or 13th or 14th or later" (R. 12); that the next time he saw accused was "in June in Rabat" and that he knew of no authority the accused had to be absent during this time. Witness further testified that on 11 March his squad was engaged in the duty of guarding a mine field (R. 12,13). They were not in contact with the enemy and he did not consider it hazardous duty, but they were "alerted to move out at any time and wasn't allowed to leave the area. The Battalion Commander had a meeting just before that and told us" (R. 13). The purpose of the mine field duty was to keep the enemy from coming into Tebessa, and as far as witness knew there were no other troops between him and the enemy (R. 14).

Sergeant Edward L. Counts testified that accused was in his squad on or about 28 October 1943, when they arrived in Naples (R. 14,15). He "searched the area and called him a few times and went back there the second time to look for him"; when they were going out to Caivano he reported accused absent (R. 14). The next time witness saw him was "about December 7th"; he knew of no authority accused had to be absent (R. 14,15).

Accused elected to remain silent and no testimony was offered for the defense.

4. It thus appears from the uncontradicted evidence that at the place and time alleged in the Specification of Charge I, accused absented himself without leave from his command and remained unauthorizedly absent for 87 days. When he left his organization it was engaged in patrol activity and guarding mine fields, no other troops being between it and the enemy. The duty of the organization was to keep the enemy from coming into Tebessa, and it was subject to attack and actual combat with the enemy at any time. Under these circumstances the court was warranted in concluding that accused absented himself with the specific intent of avoiding the hazardous duty of engaging in combat with the enemy and that he was guilty as alleged in Charge I and its Specification (MCM, 1928, par. 130a).

The manner and place of termination of this unauthorized absence are not clearly evidenced in the record. That fact, however, is of no controlling importance here, where the gravamen of the offense charged is desertion with intent to avoid the hazardous duty of actual combat with the enemy (CM NATO 867, McCullough).

It further appears from uncontradicted evidence that at the place and time alleged in the Specification of Charge II, accused again absented himself without leave from his command and that this absence, which continued for 40 days, was without authority from anyone competent to give him leave. He was properly found guilty as alleged in Charge II and its Specification (MCM, 1928, par. 132).

5. The charge sheet states that accused is 25 years old, that he enlisted in the Army of the United States 2 December 1940 and had no prior service.

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(64)

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

Paul E. O'Hare, Judge Advocate.  
O. J. Gale, Judge Advocate.  
Horace Simpson, Judge Advocate.

~~CONFIDENTIAL~~

# CONFIDENTIAL

(65)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
2 February 1944.

Board of Review

NATO 1329

U N I T E D   S T A T E S	)	EASTERN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private JOHN H. ROBINSON (34064909), NATHANIEL (NMI) GARRETT (34164444) and	)	Bizerte, Tunisia. 23 December
NATHANIEL (NMI) JONES (34134637), all of 1956th	)	1943.
Quartermaster Company (Truck)	)	As to each: Dishonorable
Aviation.	)	discharge and confinement for
		30 years.
		U. S. Penitentiary, Lewisburg,
		Pennsylvania.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.  
-----

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were tried upon the following Charge and Specifications:

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Private John H. Robinson, 1956th Quartermaster Company Truck (Aviation), Private Nathaniel Jones, 1956th Quartermaster Company Truck (Aviation) and Private Nathaniel Garrett, 1956th Quartermaster Company Truck (Aviation), acting jointly, and in pursuance of a common intent did, at or near the Tunis-Sousse Road, on or about 5 October 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person and presence of Aleya ben Othman ben Salem, one (1) wallet and money therein contained, the property of said Aleya ben Othman ben Salem.

Specification 2: In that\*\*\*acting jointly, and in pursuance of

254990

# CONFIDENTIAL

(66)

# CONFIDENTIAL

a common intent, did, at or near the Tunis-Sousse Road, on or about 5 October 1943, by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons and presence of Becker ben Ali ben Hadj Mohamed Slim, Ahmed ben Ali ben Chiker and Zeghouany ben Salem Cheikh three (3) wallets and money therein contained, the property of said Becker ben Ali ben Hadj Mohamed Slim, Ahmed ben Ali ben Chiker, and Zeghouany ben Salem Cheikh value about \$600.00.

Specification 3: In that\*\*\*acting jointly, and in pursuance of a common intent did, at or near the Tunis-Sousse Road, on or about 5 October 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the persons and presence of Salah ben Mohammed Daoud ben Halina, Salah ben Hamamia ben Abdelkader and Abdelhader Razig ben Ali ben Mahmoud three (3) wallets and money therein contained, the property of said Salah ben Mohammed Daoud ben Halina, Salah ben Hamamia ben Abdelkader and Abdelhader Razig ben Ali ben Mahmoud, value about \$240.00.

Each pleaded not guilty to and was found guilty of the Charge and Specifications. Evidence of one previous conviction by summary court-martial for wrongfully using a government vehicle in violation of Article of War 96, was introduced as to accused Jones. Evidence of one previous conviction by summary court-martial for entering a "restricted" district, in violation of Article of War 96, was introduced as to accused Garrett. Evidence of one previous conviction by special court-martial for sleeping on post in violation of Article of War 86, was introduced as to accused Robinson. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 30 years, three fourths of the members of the court present concurring. The reviewing authority approved each of the sentences, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50<sup>t</sup>.

3. The evidence shows that about 0100 hours on 5 October 1943, Aleya ben Othman ben Salem and two other Arabs were riding in two wagons along the Tunis-Sousse road near Hammam-Lif, Tunisia (R. 20, 21, 22, 24), when three colored American soldiers alighted from a truck which had passed and stopped in front of the wagons. Two of the soldiers "climbed on the wagon" on which Aleya and one of the Arabs were riding and the third soldier motioned to the other Arab to "come down from the wagon" he was on (R. 22). One of the soldiers "stuck a pistol" against Aleya's neck, searched him and took his wallet which contained "95 to 100 francs, Tunisian money and two small English money, 25 francs each". Aleya testified he did not give his assailant his pocket-book but was grasping it tightly when the soldier "stuck the gun right into my neck and I was scared, I loosened up", whereupon he took the wallet. Asked if he could identify any of the soldiers, Aleya pointed out Garrett and testified he "would not say definitely it is him, almost, just like this fellow here" (R. 21). This witness

254930

# CONFIDENTIAL

# CONFIDENTIAL

(67)

identified his pocket-book among the prosecution's exhibits which had been placed on a table before the court (R. 20). While Aleya was being robbed, the third soldier "climbed up and stuck a gun" in the neck of the third Arab who had refused to alight from his vehicle. This soldier searched the Arab but "did not find anything on" him. The Arab testified that the soldier who came to his wagon was "pretty big, husky", that he was "not sure because it was dark but I think it is something like this heavy one (soldier) here, the big one (referring to accused Robinson)" (R. 22).

Further, the evidence shows that about 0130 hours the same night, Bechir ben Ali Hadj Mohamed Slim, Ahmed ben Ali ben Chiker and Zaghouani ben Salem ben Cheikh were riding on the Tunis-Sousse road in a truck loaded with vegetables when another truck passed, almost turned the vegetable truck "on the side" and stopped directly in front of it (R. 23,24,25,27,28,29). Three colored American soldiers armed with pistols alighted from the truck which had ten wheels and was "the color of the sand of the desert". They approached the Arabs and started searching them (R. 26). One opened the door of the truck and "grabbed" Bechir by the collar, pulled him out of the truck "altogether", stuck a revolver in his stomach and took his wallet. Bechir testified he did not give his assailant anything, he "was so scared"; that the soldier "just took it from me at the point of the gun". The wallet contained 2000 francs in money and papers the owner customarily carried with him. The Arab identified his wallet among those exhibits on the table in the court room. He could not "promise definitely" that he would know the soldiers but he testified "I think it is the one sitting at the end (The witness indicated one of the accused, Private Jones)" (R. 24). He testified further that Jones "looks very much like" one of the soldiers who engaged in the assaults (R. 25).

Ahmed, who was riding on the seat with the driver of the vegetable truck, was also obliged to alight and one of the soldiers, whom Ahmed identified as Jones, "stuck the revolver" against his stomach and took the Arab's money (R. 26,27). Ahmed testified:

"I didn't give him no wallet. He stuck a pistol or a revolver just like the one I see on that table (referring to the Smith and Wesson revolver) and took it from me" (R. 27).

"They" took 3100 francs and some personal papers from Ahmed. He identified his wallet and some of the papers among the articles on the table before the court (R. 26).

Zaghouani, the third Arab on this vegetable truck, was "sitting on top of the vegetables". One of the soldiers climbed upon the truck and when the Arab "didn't want to give" up his wallet, the soldier hit him on the head "with his rings", and cut his forehead. The soldier then "put the revolver" against the Arab's chest and took his wallet which contained some "cards" and 25,300 francs. Zaghouani testified that Robinson "without a doubt" was the one that struck him and that Jones was "the one that was on the road beside the truck". He also identified his wallet and personal papers among the articles on the table in the court room (R. 28,29).

254990

# CONFIDENTIAL

# CONFIDENTIAL

(68)

The same night along the same road, at about 0215 hours, a truck in which Salah ben Mohammed Daoud ben Halina, Salah ben Hamamia ben Abdelkader and Abdelhader Razig ben Ali ben Mohmoud were riding was overtaken by a "big truck of ten wheels" operated by three colored American soldiers (R. 30,31, 32,33,34), who forced the Arabs to the side of the road and, as one of the Arabs testified,

"immediately stopped their truck in front of our truck and they got down from their truck and they forced us out of our truck" (R. 30).

This Arab (Salah ben Mohammed Daoud ben Halina) testified further that

"The three of them came to us with revolvers. One of them under the threat of the revolver was pointing at me, wanted to search me and take my money. I refused him. When I refused him, he hit me with the revolver on my for(e)head. Blood came out and landed on my face and when he threatened me with his arms, what could I do but let him take my money" (R. 30).

This witness identified some personal papers and a wallet among the exhibits on the table in the court as having been taken from him by the soldiers. He also testified that when it was taken from him, the wallet had contained 1400 francs. Another of these three Arabs (Salah ben Hamamia ben Abdelkader) testified that after the soldiers had stopped their truck

"One of them came out from the end of the truck with two revolvers in his hand and the other two each one had a revolver, came out on the other side of the truck and opened the door of our truck" (R. 32).

The witness also testified that the soldiers "grabbed" and searched him, and took from him 10,240 francs; that they "grabbed hold of" the wallet of one of his companions and "pulled it out of his inside pocket" and when his other companion "refused to give him what he had the soldier hit him on the head with the revolver". This witness identified Robinson as one of the soldiers "because he carried two revolvers" (R. 32). He testified "Yes, that is him. I am sure" (R. 33). The witness also identified a driver's license from among the exhibits in court as having been taken from him by the soldiers and testified that one of the wallets among the exhibits was "something like" his own (R. 32).

The third of these three Arabs (Abdelhader Razig ben Ali ben Mohmoud) (R. 33) testified:

"They came to us on the truck as I was sitting beside the driver of the truck, took a hold of my clothes and was pulling me out of the truck. I did not go down from the truck and he started searching me. I tried to hold on my money with my left hand. I did not give in to him.

# CONFIDENTIAL

**CONFIDENTIAL**

When I did not give in to him, he hit me on the head with the butt of the revolver on my head and then I lifted up my left hand arm and he pulled everything I had in my inside pocket" (R. 34).

He testified there were 3000 francs, an English gold piece and a small ring in his wallet and that "They took all that away" (R. 34).

The same night a sergeant attached to the Tunis Provost Marshal's Office was patrolling the road between Tunis and Enfidaville "looking for two or three colored boys suspected of armed robbery" (R. 5,6). At about 0220 hours a truck passed the jeep in which the sergeant was driving. Suspecting it was the vehicle for which they were searching, the sergeant pursued the truck which accelerated its speed to some 60 or 65 miles an hour, and when the jeep had gotten within some 300 yards of it after purusing the truck three or four miles, two men leaped off the vehicle and "ran" into the open fields". Shortly, the sergeant overtook and stopped the truck. Accused Robinson alighted from the vehicle and the sergeant found on his person five Arab and two American made wallets (R. 7,9) and a .32 caliber French pistol which had five rounds of ammunition in it (R. 8). Shortly afterward, accused Jones came out of the woods. He was also searched and in his possession were found one Arab and one American made wallet. The third man did not come out of the woods and the sergeant with the other two accused drove away in the jeep but returned after going some 300 or 400 yards. The sergeant testified that "there was our third man standing there". It was accused Garrett. He was armed with a Smith and Wesson .38 caliber revolver and had one Arab and one American made wallet in his possession (R. 9). A Smith and Wesson .38 caliber revolver, a .32 caliber Echaverryarizmendi pistol and a clip containing seven rounds of ammunition, eleven wallets, and an envelope containing \$1908.90, all of which had been taken from the three soldiers, were introduced in evidence (R. 8,9,10).

Accused Garrett, after having been advised of the substance of Article of War 24 and after being warned that he need not say anything and that whatever he said might be used against him (R. 11,12), made a statement which was admitted in evidence as touching only upon his own guilt or innocence (R. 5; Pros. Ex. 5). He stated that about 2100 hours, 4 October 1943, he agreed, when invited by accused Robinson, to go on a trip to deliver some bombs about 80 miles away. Accused Jones was already in the cab when Garrett got on the truck. They arrived at Depienne, their destination, about 2300 hours, and "unloaded in about one hour". He stated further that they started toward Sousse and about 14 miles beyond Grombalia, accused Robinson

"pulled up in front of an Arab cart that was headed in the Tunis direction. Pvt. ROBINSON and Pvt. NATHAN JONES got out. ROBINSON had a pistol in his hand and Pvt. JONES had a flashlight. Pvt. ROBINSON got up on the Arab cart and threatened the Arab with his pistol and relieved him of his wallet. Pvt. JONES got up on the rear of the cart where there was another Arab apparently asleep and searched him

(70)

# CONFIDENTIAL

and releaved him of a wallet. This entire incident took about 2 Or 3 minutes. Both Pvt. ROBINSON and Pvt. JONES returned to the truck and we continued on our way towards SOUSSE. I noticed a jeep following us and thought it was Lt. J.C. BIDDLE, our Company Commander, who frequently checks up on his drivers. Pvt. ROBINSON looked back and observed this jeep following us and at once he increased his speed. I asked Pvt. ROBINSON to slow up so we could get off the truck which he did and Pvt. Jones and I fled into the fields nearby. This jeep that was following caught up to ROBINSON'S truck and made him stop. I was some 200 yards in the field when I heard someone calling my name. I hesitated in coming out as I did not know who was out there. Both the truck and the jeep turned around and headed towards Tunis. I came out of the field and started walking towards Tunis, when the jeep, that was some 300 Yards up the road, turned around and came back and picked me up" (R. 13,14,15; Pros. Ex. 5).

The three accused elected to remain silent.

4. It thus appears from the evidence that at the places and times alleged in the three Specifications, accused, acting jointly and in pursuance of a common intent, assaulted with pistols the persons named in the Specifications and by force and violence and by putting them in fear, forcibly and without their consent, took from them wallets containing varying sums of money. The value of the property alleged to have been taken in Specification 1 was not averred but it was described as "one wallet and money therein contained". The proof showed that money valued at some 150 francs was taken. It thus appears that property of some value was stolen. The amounts alleged to have been taken in the other two Specifications were established substantially as averred.

Accused were identified both circumstantially and directly as the offenders. Each of the three was identified at the trial by one or more of the victims. All were apprehended riding in a truck along the road where the offenses had been committed and shortly after the commission of the crimes. They fled in the truck as they observed that they were pursued, and when it appeared they were about to be overtaken two of the three ran into the near-by fields. When apprehended, two pistols were found in their possession together with wallets belonging to the Arabs who were robbed. Accused Garrett admitted in his voluntary statement that he was present when the first robbery occurred.

The three accused were shown to have acted jointly in the perpetration of the several robberies. Each was a principal and responsible in law for the acts of each of the others (CM NATO 646, Simpson et al). The robberies described in the three Specifications were separate transactions and were properly so alleged, for each robbery was basically a separate trespass and as such constituted a distinct and complete offense. There was no unreasonable multiplication of charges (CM NATO 950, Harlan).

254990

# CONFIDENTIAL

# CONFIDENTIAL

(71)

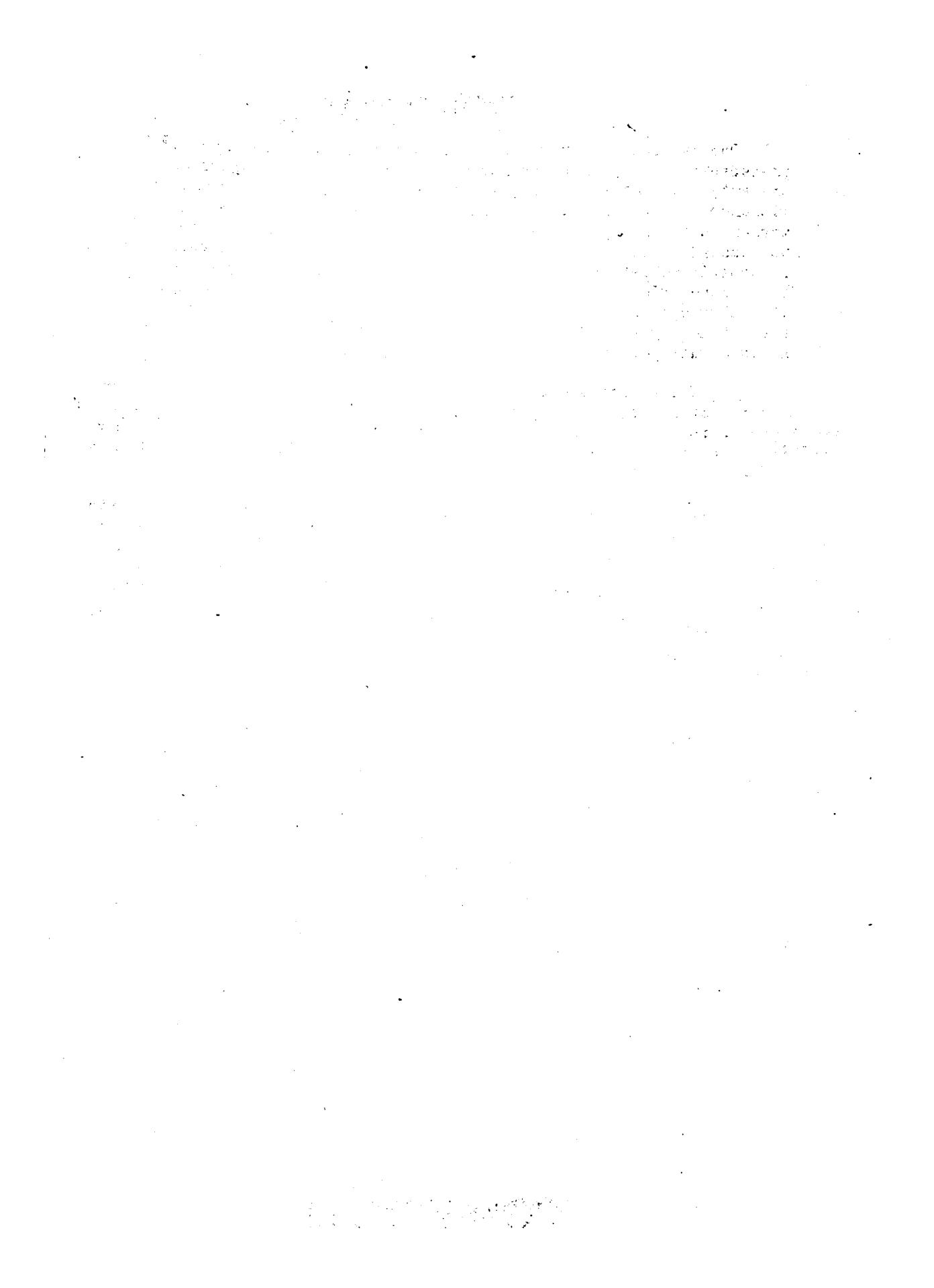
The evidence clearly shows that the assault in each instance either preceded or accompanied the larcenous taking of the victim's personal property and that the taking was effected against his will by means of violence and intimidation. Each victim under the circumstances, was warranted in making no resistance other than to remonstrate with and try to dissuade accused from committing the crime. The situation presented a reasonably well-founded apprehension of present serious danger if resistance were offered. All elements of proof necessary to support findings of guilty upon each of the three Specifications and the Charge are established by the evidence. The court was amply justified in finding accused guilty as charged (NCM, 1928, par. 149f; CM NATO 950, Harlan).

5. The charge sheet shows that accused Robinson is 24 years old. He was inducted into the Army 7 November 1941 and had no prior service. Accused Garrett is 23 years old. He was inducted into the Army 3 December 1941 and had no prior service. Accused Jones is 24 years old. He was inducted into the Army 20 October 1941 and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as to each accused and the sentences. Penitentiary confinement is authorized by Article of War 42 for the offense of robbery here involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 463, Title 18, United States Code.

 James E. Thompson, Judge Advocate.  
O. J. Gile, Judge Advocate.  
Gordon Simpson, Judge Advocate.

# CONFIDENTIAL



**CONFIDENTIAL**  
 Branch Office of The Judge Advocate General  
 with the  
 North African Theater of Operations

APO 534, U. S. Army,  
 27 January 1944.

Board of Review

NATO 1330

U N I T E D   S T A T E S	)	EASTERN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private PATSY J. DONOFRIO	)	Bizerte, Tunisia, 3 January
(32468624), Company B, 5th	)	1944.
Replacement Battalion.	)	Dishonorable discharge and
	)	confinement for ten years.
	)	Federal Reformatory, Chilli-
	)	cothe, Ohio.

---

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Patsy J. Donofrio, attached casually to Company B, 5th Replacement Battalion APO 372, did, on or about 25 November 1943, desert the service of the United States by absenting himself without proper leave from his organization Company B, 5th Replacement Battalion, APO 372, with intent to avoid hazardous duty, to wit: having been duly alerted for a shipment on 25 November 1943, SO 254 P 32, Headquarters 7th Replacement Depot, which shipment was to be made to a combat zone, and did remain absent in desertion until he surrendered himself at Company B, 5th Replacement Battalion on 25 November 1943.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification except the final words and figures "25 November 1943", substituting therefor the final words and figures "26 November 1943", of the excepted words and figures not guilty, of the substituted words and figures guilty, and guilty of the Specification as amended and the Charge.

271527

**CONFIDENTIAL**

(34)

# CONFIDENTIAL

No evidence of previous convictions was introduced. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 25 November 1943, accused was a member of Company B, 5th Replacement Battalion, which was then stationed at APO 372. The unit was made up of casualties from several branches of the service, some of whom were evacuees from hospitals, ready for shipment back to their units (R. 5,6) in the United States, Africa, England, Sicily, India (R. 7) and Italy (R. 8,18). Accused was a hospital evacuee and was on orders for shipment to another replacement battalion "for the purpose of going to his unit", the 40th Engineers (R. 12,16,17), which was assumed by the commanding officer to be in Italy or Sicily (R. 17). He was not "limited service" (R. 16,17).

Accused answered to roll call at a reveille formation at 0730 hours that day (R. 5,6) at which an announcement was made that there was to be a "big shipment" that morning and the men were told to remain in the immediate area after attending church services (R. 5,11). The men were not told the destination of the shipment (R. 7), but were told they were going back to their units (R. 11). It was "usually pretty certain they go back to their outfit" (R. 8), and the men understood "that they were to be returned to their organization" (R. 7). There was a sign about two by three feet, stating "All men will return to their units", painted in red letters on a white background and posted on the bulletin board near the orderly room (R. 10,16).

At about 1000 hours on that date a troop movement sergeant (R. 9) called a formation of accused's platoon (R. 11) and "called out" Sailing List 195, upon which list accused's name appeared (R. 9,11; Ex. 1). Accused was absent from the formation (R. 10,11) and the platoon was checked but he could not be found. He was not in the area. The sergeant made the notation "AWOL" beside the name of accused. Accused did not go out on the shipment, which was going to Italy (R. 10). He returned to the area the following day (R. 15).

The company morning report, showing accused's unauthorized absence on 25 November 1943, and other entries, was received in evidence without objection (R. 13).

Captain Craig Bakie, Commanding Company B, 5th Replacement Battalion, testified that on 24 November 1943, at about 0930 or 0945 hours he "thought" he "recognized" accused in a group of three or four men, one of whom said

"all you have to do is run like hell for the dispensary or get a stomach ache" (R. 14).

271927

# CONFIDENTIAL

**CONFIDENTIAL**

On 26 November 1943, when accused was brought to the orderly room, after having missed the shipment, Captain Bakie asked him if he was one of the men he had heard discuss ways of "beating a shipment the day before" and accused answered "'yes, sir, I was one of them', or words to that effect" (R. 15).

He did not believe accused had been told where the movement was going. The orders were usually "confidential", and in special cases "might be secret" (R. 19). Accused was not shown and had no way of seeing a copy of the shipping order. If a man had been away from his organization more than 30 days he could make a statement in writing that he did not "desire to return to his own outfit and he could then be in a general replacement status for assignment to his own outfit" (R. 20).

Accused made the following voluntary statement to an investigating officer, which was admitted to evidence without objection:

"About 1030 hours on the morning of 25 November 1943 I left the 5th Replacement Battalion to go to the 78th Station Hospital to visit a friend. At roll call about 0630 hours my name was called and I answered. We were told not to leave the area because there was to be a shipment after breakfast. I remained in the area until one shipment left about 0900 hours. We were then told that if any of us wanted to go to church we might do so. I went to church and then went to the 78th Station Hospital to visit Private Philip Mazzone who works in the Red Cross there. After visiting with him and spending the night of 25 November there, I returned to the 5th Replacement Battalion arriving about 0800 hours on 26 November. I was immediately arrested and placed in the stockade" (R. 23,24).

Accused made an unsworn statement, through defense counsel, that he was a member of the 40th Engineers and was wounded in Sicily, brought back, hospitalized and returned to the Replacement Battalion. He was not told he was going back to his unit, had no intention of doing anything to avoid hazardous duty and had a clean record up to this time. He remained in the area until one shipment went out, then visited a friend at a hospital where he stayed over night and surrendered himself the next morning. He did not know where the shipment was going and when the shipment went out at 0900 hours he thought that the alert was ended. He thought that his unit was still in Sicily, part of the 7th Army (R. 25,26).

Accused personally stated: "I want to say, sir, I am guilty of A.W.O.L. but not of desertion" (R. 26).

271927

**CONFIDENTIAL**

**CONFIDENTIAL**

4. It thus appears from the evidence that, at the time and place alleged in the Specification, accused absented himself without proper leave from his organization, a replacement company, members of which had been alerted for shipment that day to an unknown destination, preparatory to rejoining their own units. Accused's unit was then in Sicily or Italy. He surrendered himself the following day after the shipment had moved out. His intent to avoid hazardous duty as alleged can be inferred from the facts and circumstances attendant upon his unauthorized departure.

5. Accused's company commander, over objection by the defense, was permitted to testify that accused had admitted to him that he was present with a group of soldiers who had discussed means of avoiding going on the shipment, without showing that the statement was voluntarily made. This statement was not a confession of guilt but an admission against interest and no affirmative showing that it was made voluntarily was necessary (MCM, 1928, par. 114b).

6. The charge sheet shows that accused is 22 years old, and that he was inducted into the Army 23 September 1943. No prior service is indicated.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. Confinement in a penitentiary (Federal Reformatory) is authorized by Article of War 42 upon conviction of desertion in time of war.

Daniel P. O'Leary, Judge Advocate.  
O. J. F. de L., Judge Advocate.  
Gordon Simpson, Judge Advocate.

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(77)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
4 March 1944.

Board of Review

NATO 1366

U N I T E D   S T A T E S	)	EASTERN BASE SECTION
v.	)	Trial by G.C.M., convened at
Technician Fifth Grade STANLEY	)	Bizerte, Tunisia, 3 January
J. ANDERSON (36629869), Army	)	1944.
Postal Unit 372, U. S. Army.	)	Dishonorable discharge and
	)	confinement for 15 years.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.  
-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that T/5 Stanley J. Anderson, Army Postal Unit 372, 7th Replacement Depot, did, at 7th Replacement Depot, on or about 15 December 1943, wrongfully and unlawfully abstract and remove from a U. S. mail package addressed to Corporal Joseph L. Ebner, 14048370, Headquarters Company, 7th Army, APO 758, c/o Postmaster, New York, N. Y., one Universal Geneva Wrist Watch, before the package had been delivered to the person to whom it was directed, in violation of Section 317, Title 18, U. S. Code, (1940 Edition).

Specification 2: In that T/5 Stanley J. Anderson, Army Postal Unit 372, 7th Replacement Depot, did, at 7th Replacement Depot, on or about 15 December 1943, wrongfully and unlawfully abstract and remove from a U. S. Mail package addressed to Private M. E.

~~CONFIDENTIAL~~

**CONFIDENTIAL**

Gilbert, 35157128, APO 758, c/o Postmaster, New York, one Royal fountain pen and pencil set, before the package had been delivered to the person to whom it was directed, in violation of Section 317, Title 18, U. S. Code. (1940 Edition).

Specification 3: In that T/5 Stanley J. Anderson, Army Postal Unit 372, 7th Replacement Depot, did, at 7th Replacement Depot, on or about 15 December 1943, wrongfully and unlawfully abstract and remove from a U. S. Mail package addressed to Lieutenant Colonel L. A. Prichard, 15th Infantry, APO #3, c/o Postmaster, New York, N. Y., four brushes, and field coil and cutting head of a Schick electric razor, before the package had been delivered to the person to whom it was directed, in violation of Section 317, Title 18, U. S. Code. (1940 Edition).

Specification 4: In that T/5 Stanley J. Anderson, Army Postal Unit 372, 7th Replacement Depot, did, at 7th Replacement Depot, at various and sundry times between about 25 November and about 14 December, 1943 wrongfully and unlawfully, abstract and remove from U. S. Mail packages, addresses unknown, five watches, before said packages had been delivered to the persons to whom they were directed, in violation of Section 317, Title 18, U. S. Code. (1940 Edition).

Specification 5: In that T/5 Stanley J. Anderson, Army Postal Unit 372, 7th Replacement Depot, did, at 7th Replacement Depot, at various and sundry times between about 25 November and about 14 December 1943, wrongfully and unlawfully abstract and remove from U. S. Mail packages, addresses unknown, four fountain pens, before said packages had been delivered to the persons to whom they were directed, in violation of Section 317, Title 18, U. S. Code. (1940 Edition).

Specification 6: In that T/5 Stanley J. Anderson, Army Postal Unit 372, 7th Replacement Depot, did, at 7th Replacement Depot, at various and sundry times between about 25 November and about 14 December 1943, wrongfully and unlawfully abstract and remove from U. S. Mail packages, addresses unknown, gold rings, before said packages had been delivered to the persons to whom they were directed, in violation of Section 317, Title 18, U. S. Code. (1940 Edition).

He pleaded as follows:

"Defense: We make a general plea joining issue to violation of the criminal code, one incident and on one date of the articles laid out in specification one, two, and three. We make a general plea of guilty of violation of the Criminal Code of larceny of mails on one incident and on one date as laid out in specification four, five and six" (R. 6).

**CONFIDENTIAL**

**CONFIDENTIAL**

(79)

He pleaded guilty to the Charge. He was found guilty of all Specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 15 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution showed that on 16 December 1943, First Lieutenant Lowell G. Reynolds, of Army Postal Unit 372, had occasion to check over the property of accused, who was an employee of the post office. The officer found some wrappers in a waste paper box which he concluded were from packages that had been in the mail. They did not show the date when the packages had arrived at the post office because, as he testified, "we do not date them when they arrive" (R. 11,12). The witness identified an assortment of boxes and wrappers and, upon being asked what they were, testified:

"Well, one contains three packages, one of them is a wrist watch, one a pen set and some shaving parts and in the other package there is two wedding rings, and the other is wrappers found in the waste paper box" (R. 12).

He further testified that "the watch and pen set were in the cash box that the boy, T/5 Anderson had" (R. 12). Referring to accused, the following questions and answers are of record:

"Q. Did he ever make any statement to you about these?  
A. Yes, sir.

Q. What statement, if any, did he make?  
A. Well, he identified them to me." (R. 12).

And it is stipulated

"\*\*\*between the defense, the prosecution, and the accused that all items of Jewelry listed in the six specifications were introduced in evidence as prosecution's Exhibit '3', to be withdrawn at the conclusion of the trial" (R. 12).

An extrajudicial "statement" or "declaration" amounting to a confession by accused, signed and sworn to before a Second Lieutenant John K. Chappell, Infantry, Acting Assistant Adjutant General, dated 16 December 1943, was admitted in evidence without objection. It reads that

"\*\*\*having been duly advised that any statement which I herein make might later be used against me, I voluntarily make the following declaration: 'My name is Stanley J Anderson, T/5, 36629869, 372nd Army Postal Unit, that I

**CONFIDENTIAL**

**CONFIDENTIAL**

have been assigned to said unit for approximately four (4) months. That during that time my job was Assistant Army Mail Clerk and by virtue of that assignment I handled both incoming and outgoing mail, including parcels. That on or about 15 December 1943 while on duty with APU 372, I had occasion to handle an incoming package which was addressed to Cpl Joseph L Ebner, Hqs Co, 7th Army, APO 758, c/o Postmaster, New York, N. Y. (14.048370) Pers. Center #5. By Request, From M E Ebner, Clementia Farm, Meggetti, South Carolina, postmarked Oct 15 1943. The contents of which was one (1) UNIVERSAL GENEVE wrist watch in a box bearing the name JAMES ALLAN & CO, JEWELERES, 285 King St, Charleston, S. C. Also on the same date I handled a package addressed to Pvt M E Gilbert, 35157128, APO 758, c/o Postmaster New York, postmarked RICHMOND, INDIANA, November 15, 1943, Mrs Ethel Gilbert, 820 North I St, RICHMOND, Indiana, contents of which was one (1) ROYAL fountain pen & pencil set. Likewise of 15 December 1943, I handled a package addressed to Lt. Colonel L A Prichard, 15th Infantry, APO #3, c/o Postmaster, New York, N. Y. 5th Replacement Battalion, APO 372, postmarked STAMFORD, CONN. October 14, 43, contents of which were four (4) brushes, coil, shaving head of an electric razor which were in a box bearing the trademark SCHICK. "The package also bears 'our number NS43444'". All of these packages I took knowing that same did not belong to me nor were they intended for me.

"I have on other occasions within three (3) weeks immediately preceding this date taken other packages the contents of which included rings, wrist watches and fountain pens of various trade names knowing that the same did not belong to me or were they meant for me.

"All of the above items and others which I have taken within the past three (3) weeks were found in my possession 16 December 1943" (Ex. 2; R. 10,11).

On 21 December 1943, accused also made a statement to Major Lonnie E. Dowd, an investigating officer. There was testimony that it was voluntary and made after that officer had explained to accused his rights. Signed and sworn to, it was introduced without objection by defense and reads in part as follows:

"\*\*\*To the best of my knowledge, about three (3) weeks ago I took my first article out of the mail, which was a watch. Since then I have taken five (5) other watches from packages. I have also taken four (4) or five (5) fountain pens out of packages.

"It is hard for me to account for the exact reasons why I did such a thing\*\*\*I am unable to name the owner of any

**CONFIDENTIAL**  
4

**CONFIDENTIAL**

(81)

package opened by me, except three (3) packages now in the possession of Lieutenant Reynolds. One of these packages belonged to Lieutenant Colonel Prichard. One watch was addressed to Corporal Ebner. I cannot recall the other one.

"\*\*\*To the best of my knowledge I took about four (4) or five (5) watches besides the one from the package which Lieutenant Reynolds has.

"\*\*\*I did agree to pay Joseph Smith ten per cent (10%) of the sale value of all watches sold by him.\*\*\*" (Ex. 1; R. 9,10).

Accused made a voluntary statement through counsel as follows:

"The accused states through counsel that the reason he pleaded guilty is that all evidence was against him. Previous to this he's had a clear record, never been involved in any trouble of this kind, and he realizes now that his will power was not strong enough for him to overcome the temptation he had and the faith placed in him by his superior officer to handle United States mail, and for that reason and also his age, it is hoped that the court will consider as much clemency as it possibly can in its finding and its sentence. The defense rests" (R. 13).

Later, when asked if he had anything to tell the court before making its findings, accused made the following statement:

"No, sir, except that I'm sorry I've done this. Back in civilian life I worked at a hospital, had opportunities to handle a great amount of money and never took any cent of it. I have a clean record back in civilian life and in the Army too. All I plead is for clemency" (R. 13).

4. It thus appears that accused wrongfully and unlawfully abstracted and removed articles from packages in the United States mail, as alleged in the several Specifications. He pleaded guilty to the last three Specifications but with the qualification that the acts complained of were of "one incident and on one date", thereby manifestly intending that his pleas thereto would justify but a one five-year sentence. In view of the sentence imposed by the court and the conclusions herein reached, it is unnecessary to consider whether the evidence or circumstances warrant a departure from the terms of accused's plea of guilty.

In reference to Specifications 1, 2 and 3, it is shown aliunde the confession that accused was on duty as an "employee" in the Army post office and that a postal officer, having "occasion to check accused's property", discovered the articles described. Wrappers were found which indicated they had been from packages that had been in the mail. When confronted with the articles, accused "identified" them to the officer. The circumstances of accused's employment in the Army post office, the finding of

**CONFIDENTIAL**

**CONFIDENTIAL**

wrappers that had been removed from mail packages, the discovery of the specified articles in the possession of accused and the latter's significant "identification" thereof, combine to support inferences that articles had been abstracted and removed from packages in the United States mail and that accused was implicated therewith. They thus serve to corroborate the confession; tending not only to prove the fact of the commission of the offense in each instance but, seemingly exceeding the minimum legal requirement as to proof of the corpus delicti, to demonstrate accused's connection with the offenses charged. It is stated that,

"This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense" (MCM, 1928, par. 114a).

The competency of a confession is established if in addition thereto, as here shown, there is some evidence touching the offense and tending to prove its commission (CM 202213; Dig. Op. JAG, sec. 395 (11)).

The first three Specifications were evidently intended to charge separate and distinct offenses and hence authorize as to them a gross sentence of 15 years. While but one five-year sentence has been held to be justified in a case where three separate counts charged the abstraction of three different parcels from one mail pouch (Johnston v. Lagomarsino (C.C.A. Cal. 1937) 88 F. 2d 86), a cumulative sentence is indicated as authorized where the takings are not simultaneous and are selective (McKee v. Johnston, 109 F. 2d 273 (C.C.A. Cal. 1939), certiorari denied, 1940, 60 S. Ct. 592, 303 U.S. 664, 84 L. Ed. 1011). It is reasonable to conclude from circumstances in the instant case that the wrongful takings did not occur at the same time or involve, for example, removals from a single mail pouch. In his confession of 16 December 1943, accused states he had occasion to handle an incoming package addressed to Corporal Ebner; "also on the same date" he handled a package addressed to Private Gilbert; "likewise of December 15, 1943" he handled a package addressed to Lieutenant Colonel Prichard. These statements support an inference that the taking in each instance was coincidental with the handling of the particular package in the course of his day's work and tend to dispel the idea of simultaneity. Moreover, each taking appears to have been consciously and deliberately selective. There is substantial evidence upon which the court could adopt this view and consequently compute its sentence consistently with findings of guilty of three separate and distinct offenses on the same day as charged.

5. There are several irregularities and questionable matters in the record that deserve special consideration.

a. Each Specification is designed to set forth an offense under Section 194 of the Criminal Code (18 U.S.C.A. 317) which, inter alia, makes it an offense for any person to abstract or remove any article or thing contained in any package "from or out of any mail, post office or station thereof, or other authorized depository for mail matter\*\*\*". That is the

**CONFIDENTIAL**

# CONFIDENTIAL

(83)

gravamen of the offense alleged. The statute condemns any unauthorized abstraction from the mail of postal matter (49 C.J. 1227). The allegation that the articles had been abstracted and removed "before the package had been delivered to the person to whom it was directed", seems appropriate only when the act is done, as set forth in the statute, "with a design to abstract the correspondence, or pry into the business or secrets of another". But such language in the Specification may be disregarded as surplusage or accepted as an allegation denoting that the particular package was then actually a part of the mail. Language in the Specification that the articles were abstracted and removed "from U. S. Mail packages", does not accurately conform with the provisions of the statute. But however inartificially drawn, it is clear that the Specification sets forth the offense sought to be charged in sufficient and understandable language. It need not be measured by strict rules applicable to indictments (Dig. Op. JAG, sec. 428 (8)).

b. In each of Specifications 4, 5 and 6, the offense is alleged to have been committed "at various and sundry times between about 25 November and about 14 December, 1943". The defense by special plea objected to the allegation on the ground of uncertainty and indefiniteness. The court overruled the plea and thereupon accused pleaded guilty as previously indicated. When asked if he understood the meaning and effect of his plea of guilty, accused replied, "Yes, sir. There is nothing else I can do", and expressly added that he desired to plead as stated by his counsel (R. 6). Under the circumstances here involved, the exact time of the commission of the offense is immaterial (Dig. Op. JAG, 428 (10); CM 130989). Accused was evidently not misled and in view of the evidence, the introduction of the articles involved and other circumstances, it is reasonable to conclude that he could successfully plead former jeopardy in any subsequent trial for the same offenses.

c. Accused's confession dated 16 December 1943, was introduced without proof that it was voluntarily made. Defense counsel did not object (R. 10,11). The confession contains a recital that accused had been advised that it might be used against him and that the confession was voluntary. While a confession made to a military superior should ordinarily require inquiry into the circumstances under which it is made (MCM, 1928, par. 114a), the voluntary character of this confession appears unquestionable. The other confession containing substantially the same subject matter was admitted following such proof. No improper advantage is suggested and in the absence of any facts to the contrary, the confession may be regarded as having been voluntarily made.

d. The confession relating to the Specifications to which accused pleaded, in effect, not guilty, should have been introduced in evidence only after the proof of the corpus delicti. The pertinent paragraph (114a) of the Manual for Courts-Martial provides that:

"Usually such evidence is introduced before evidence of the confession; but a court may, in its discretion, admit the confession in evidence upon condition that it will be stricken out and disregarded in the event that the above

requirement as to evidence of the corpus delicti is not met later."

The irregularity, however, did not injuriously affect the accused.

e. The defense by special plea objected to Specifications 1, 2 and 3, as constituting an unreasonable multiplication of charges. The court overruled the plea stating it was "up to the defense to indicate to the court as to whether or not it is three violations of Section 317, Title 18, U. S. Code, (1940 Edition)" (R. 5). This, though harmless, was an erroneous statement if it be construed as a requirement imposed on the defense to prove any element of the offenses charged. It was inferable, however, as hereinbefore indicated, that these particular Specifications were not based upon a single transaction or act.

f. Pleas to the general issue include: Guilty, not guilty (MCM, 1928, par. 70). The plea, "joining issue to violation of the criminal code, one incident and on one date of the articles laid out in specification one, two, and three", was irregular. It was tantamount however to a plea of not guilty as to these Specifications and it is manifest that the court so considered it. It is patent on the other hand that the same qualification attached to accused's plea of guilty to the other three Specifications was accepted by the court. It was advantageous to accused to have them considered as arising from one act. With that qualification, which concerns only the quantum of punishment, the accused must be deemed to have admitted the facts set forth in these Specifications. In no respect does the record disclose any inconsistency necessitating an entry of a plea of not guilty to all of the Specifications and the Charge (Dig. Op. JAG, 1912-40, sec. 378 (3)).

6. The charge sheet shows that accused is about 22 years old, that he was inducted into the Army 17 December 1942 and had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. Penitentiary confinement is authorized for the offense here involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 317, Title 18, United States Code.

Donald R. MacKay, Judge Advocate.  
Torron Simpson, Judge Advocate.  
Donald R. MacKay, Judge Advocate.

**CONFIDENTIAL**

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
22 February 1944.

Board of Review

NATO 1383

U N I T E D   S T A T E S	)	MEDITERRANEAN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private SYLVESTER (NMI) BELL	)	Oran, Algeria, 30 November
(38184108), 497th Quarter-	)	1943.
master Laundry Company.	)	Dishonorable discharge and
	)	confinement for 20 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Sylvester Bell, 497th Laundry Company, did, at Oran, Algeria, on or about 16 October 1943, with malice aforethought, willfully, deliberately feloniously, unlawfully, and with premeditation kill one Private Rozell Bass, 497th Laundry Company, a human being by striking him on the head with a bottle and a rock.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions, one by summary court-martial for absence without leave and being disorderly in uniform in a public place, in violation of Article of War 96, and the other by special court-martial for wrongfully striking a private, breaking restriction and unlawfully carrying a concealed weapon, in violation of Article of War 96, was introduced. He

was sentenced to dishonorable discharge, forfeiture or all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three fourths of the members present concurring. The reviewing authority approved the sentence, remitted the confinement in excess of 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The evidence shows that at about 2230 hours 16 October 1943. accused together with several other soldiers was in a grape field on Route "D", near Oran, Algeria (R. 5,16). There were Arab women and other soldiers in the fields on both sides of the road. The group first went into the fields at the left of the road, then crossed over and "were on the other side of the field when a woman hollered" (R. 6). They went to investigate and found that "some soldier was on top of an Arab lady" (R. 17). According to one witness this was the deceased, Bass (R. 17-19); another witness believed it was Private Lanier Watkins who was "raping a woman" (R. 6). The same witness testified that accused then "grabbed Watkins" and tried "to make him give some money back" to the Arab woman, who claimed that Watkins had taken it from her (R. 6,8). Several fights, all of which "started about that woman" (R. 11), then developed among the soldiers. One witness testified that as accused "was trying to get Lanier to give the money back\*\*\*McDonald (Private George E. McDonald) came up and him and Lanier began tussling, and Bass came up from out by the road and asked, 'what's going on.' He jumped down on George\*\*\* and just as I pulled him up Bell grabbed him and hit him twice with the bottle" (R. 6). Another witness testified that when accused saw Bass "on top of" the Arab Woman, he said "This is bad"; as Bass "was crawling off the woman" accused said to him "I don't like you". Words were passed between them, "one word leading to another", then accused struck Bass over the head with the bottle. Bass said "I am going to get you Bell" and accused hit him again (R. 17-20). The bottle was an empty wine bottle that accused had gotten from Watkins: it broke with the second blow (R. 7,8,10,14). Another witness testified that he

"heard a woman holler and seen Bell run over there\*\*\* Watkins hollered and I ran over there too. By the time I got over there I seen Bass walking from the opposite side of Bell and he said, 'what's going on here'. Bell said, 'I am raising a little hell, that's all'. Bass said, 'there isn't no need of that', and at that time he hit Bass with the bottle. Bass fell to the ground and then Bass got up. He said, 'Bell, you hit me with the bottle, didn't you' and he said 'that's all right, forget about it'. Bell said, 'no, I didn't hit you with the bottle', and he hits him again". Bass "fell to the ground" and accused "said, 'you son-of-a-bitch you better not move, and nobody better open their mouth'" (R. 12,13).

Another witness testified to substantially the same conversation (R. 6) and stated that accused twice struck Bass "on the top of the head" with

the bottle and that Bass "fell to the ground", where he lay "two or three minutes" (R. 8). Then "he got up\*\*\*he had put on his cap and was doing something with his trousers" (R. 9). Another witness testified that

"while Bass was on his knees this soldier Bell stooped down and gets\*\*\*a brick or something with a lot of dirt on it\*\*\*and hits Bass alongside the head again\*\*\*Bass) fell to the ground on his shoulder and on his arm and just laid there" (R. 17).

Witness was standing six or seven feet from accused and deceased and felt "dirt or bricks or something" fall off "This something" accused hit Bass with and hit witness "in the face" (R. 17,18).

A witness who had seen accused "hit Bass with the vino bottle over the head" (R. 44), testified that he "heard one of the boys say Bass was knocked out". Then accused "went over to see if he was knocked out\*\*\* leaned over him" and "said Bass was knocked out". On the way back to camp, witness further testified, the only thing that was said "about what had happened to Bass\*\*\*was that he was dead". Accused was "along with" them at the time (R. 45,46).

In the opinion of one witness accused was drunk; he had been seen drinking wine, the odor of liquor was on his breath, he could not walk straight and he could not understand what witness said to him (R. 11). Another witness testified that accused was not drunk, "he didn't act like a man that was drunk" (R. 19).

Two soldiers put Bass on the shoulders of another soldier, who attempted to carry him to a dispensary, but he was too heavy so they put him down (R. 13,15). One soldier said that Bass was dead but another soldier felt his pulse "still beating". "Lots of blood" was coming from the left side of his head (R. 19).

A medical officer was summoned and at about 0120 hour found Bass "lying in the vineyard\*\*\*on his back with his face upward\*\*\*he was not breathing, and had no pulse". In the opinion of the medical officer Bass was dead when he first saw him. Blood was flowing from "cuts in the back of his head and near his left ear\*\*\*there were small cuts on his neck all effected by palpitation and there was a depression just above" the left ear. In his opinion the deceased had a fracture of the skull on the left side due to an external blow (R. 26,27).

An autopsy revealed a fracture of the skull on the left side, "involving the three major bones of that side", and hemorrhage of the meninges and in the brain substance. In the opinion of the medical officer who performed the autopsy the head condition was caused by a blow from a blunt instrument on the left side of the skull (R. 29, 30).

Deceased was identified as Private Rozell Bass by the medical officer, a sergeant from the Criminal Investigation Division, and a noncommissioned officer of a graves registration company from the identification tags he

was wearing (R. 21,27,28). Bass's body was taken by ambulance to the 7th Station Hospital and from there to the American Cemetery, where it was buried (R. 28,29).

A blood-stained rock, found by the sergeant of the Criminal Investigation Division "not quite a yard" from Bass's body on the night of 16 October, was introduced into evidence as Prosecution's Exhibit "A". Some dirt had "been knocked off it", and the stains were "a lot drier". He testified that he "marked a large 'X' near the body on the ground". A few days later he interviewed Private Watkins at the hospital. Watkins "appeared to have a bruise on his head, a bandage. I couldn't tell the extent of his injuries" (R. 21-24).

Parts of a broken wine bottle, with blood and mud on them, were found by a staff sergeant of the Criminal Investigation Division at about 0830 hours on 17 October 1943, scattered within three to five feet in a semi-circle around the "X" which the sergeant had marked on the ground, and introduced into evidence as Prosecution's Exhibit "C" (R. 25,26).

Accused voluntarily gave a signed, sworn statement to a military police officer four days after the alleged assault, which was received in evidence without objection (R. 22,23,46). After reciting the events leading up to the fight substantially as was given by the other witnesses, accused said:

"When we got there Watkins was on the ground with a woman. I picked Watkins up saying Get up Watkins there aint no need of this, we all just come out of the stockade. Watkins said 'Is that you Bell'. I said yes so he said O.K. Watkins & MacDonald started tusseling & fighting. I kinda got them loose but as I did so Bass came over & said 'Whats the matter here'. Watkins said 'Nothing just a little row'. They started in again & Bass got in it. I had a quart wine bottle in my right hand, holding it by the neck. I got the bottle out of Watkins's hand when I first picked him off the woman. When Bass, Watkins & MacDonald started in again, I hit Bass on the side of the head with the bottle and the bottle broke. Bass said 'Bell you hit me with the bottle' & I said 'No I didnt. I then got Watkins & MacDonald & Wadsworth to leave & go back to camp with me. I did not see Bass fall & neither did I know that he was laying in the field when I left. I did not know that Acree went back to help him either. I only hit Bass once & then walked off. We did not have any conversation about Bass' condition on the way back to camp" (Pros. Ex. B).

McDonald testified for the defense that he was in the group with accused and that the fight started when they stopped Watkins and Bass from

assaulting an Arab girl.

"We came up and stopped Watkins. Bass got up and started arguing and I told him, 'Bass, go ahead home because there is no use to argue'" (R. 33).

Bass then grabbed McDonald by the collar and accused pulled him loose. Then Bass started "raising hell and cutting up again" and Watkins "started again". McDonald caught Watkins and was holding him when he heard Rozell Bass say "That's alright, Bell, you hit me". McDonald turned and saw Bass on the ground. The only rocks he saw thrown were the ones which hit Watkins on the head, causing him to bleed (R. 33,34). He further testified that he did not see accused strike Bass nor hear him say anything to Bass (R. 35).

Accused testified that he had known Bass "better than a year" and they never had "no argument or no fight". They had gone into the fields to have sexual intercourse with the Arab women. They heard a woman "holler" and found Watkins "down on a woman". Accused pulled him off. The woman claimed that Watkins had her money which Watkins denied. Watkins and McDonald started fighting. Accused took a wine bottle away from Watkins, and when Bass started interfering in the fight accused hit him with the bottle and the bottle broke. Watkins "had blood all in his eyes" and they carried him to the road and "all went to the camp". Accused testified further that he hit Bass only once with the bottle which broke with the first blow and that he did not strike Bass again with a stone or a piece of dirt (R. 36,37) or anything. He had no intention of killing Bass; he "just tried to stop him from fighting" (R. 38). He testified: "we were all in the outfit and I didn't want to see them fighting and just tried to stop them". He denied telling Bass "I don't like you no how" (R. 38). He knew he did not hit Bass twice. "I know I hit him once". He was not drunk and knew what he was doing (R. 39). At no time did Bass try to strike accused. Accused denied that, after striking Bass, he said "You son-of-a bitches better keep your mouths closed" (R. 40,41). He had had "a little discussion over money" with Acree, but had not known McClure. He had known McDonald and Wadsworth about a year and they had "got along all right" (R. 41). He did not say "he's knocked out" after striking Bass with the bottle, and he "didn't even know if Bass went down". He admitted that Bass said "bell, you hit me, that is all right forget about it" and that he replied "No, I didn't". When asked why he "lied" accused replied "I just said it \*\*\* to be saying something". Bass was standing up when accused left the field (R. 43). He did not see anyone fighting when he was leaving. He did not pay any attention to whether or not Bass was bleeding. He struck Bass "on the left hand side toward the rear" (R. 44).

4. It thus appears from the evidence that at the place and time alleged, accused struck Private Rozell Bass, the person named in the Specification, on the side of the head with a bottle and a rock or similar weapon. There is evidence that Bass died on the spot as a result of these blows. The uncontradicted evidence, including the testimony of accused,

shows that accused's acts in striking Bass were deliberate and unprovoked. The blows were repeatedly and viciously dealt upon a victim who had not attacked accused. Accused had been drinking but there was substantial evidence that he was not drunk, and in his testimony he denied that he was drunk and demonstrated a clear recollection of the events during the night of the fatal affray. His conduct was willful and wanton, and malice is properly to be inferred from the circumstances surrounding the assault. Accused testified he struck the victim only once and that he did not intend to kill him but the court was fully warranted in rejecting this claim. The killing was without legal justification or excuse. Accused was properly found guilty of murder as specified (MCM, 1928, par. 148a).

5. The charge sheet states that accused is 30 years old and that he was inducted into the Army 26 June 1942. No prior service is indicated.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the sentence. Penitentiary confinement is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Samuel T. Holmgren, Judge Advocate

Gordon Simpson, Judge Advocate.

Donald K. Mackay, Judge Advocate.

Branch Office of The Judge Advocate General  
 with the  
 North African Theater of Operations

APO 534, U. S. Army,  
 15 March 1944.

Board of Review

NATO 1406

U N I T E D   S T A T E S	)	EASTERN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private RILEY (NMI) BELL	)	Bizerte, Tunisia, 12 January
(34018339) and Private First	)	1944.
Class JAMES H. SMITH	)	As to each: Dishonorable dis-
(13014848), both of 227th	)	charge and confinement for 16
Quartermaster Salvage	)	years.
Collecting Company.	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Mackay, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were tried upon the following Charges and Specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private First Class James H. Smith, 227th Quartermaster Salvage Collecting Company, and Private Riley Bell, 227th Quartermaster Salvage Collecting Company, then T/5th Grade, acting jointly, and in pursuance of a common intent, did, at or near Mateur, Tunisia, on or about November 7, 1943, knowingly and willfully misappropriate one hundred and one (101) mattress covers of the value of about \$166.65, property of the United States intended for the military service thereof.

Specification 2: In that Private First Class James H. Smith, 227th Quartermaster Salvage Collecting Company, and Private Riley Bell, 227th Quartermaster Salvage Collecting Company,

**CONFIDENTIAL**

NATO 1406

then T/5th Grade, acting jointly, and in pursuance of a common intent, did, at or near Mateur, Tunisia, on or about November 7, 1943, knowingly and willfully apply to their own use one 2 1/2 ton truck of the value of about \$2250.00, property of the United States furnished and intended for the military service thereof.

**ADDITIONAL CHARGE:** Violation of the 94th Article of War.

**Specification 1:** In that Private First Class James H. Smith, 227th Quartermaster Salvage Collecting Company, and Private Riley Bell, 227th Quartermaster Salvage Collecting Company, then T/5 Grade, acting jointly and in pursuance of a common intent, did, at or near Mateur, Tunisia, on or about 3 November 1943, wrongfully and knowingly sell four mattress covers, of the value of about \$6.65, property of the United States furnished and intended for the military service thereof to Mostafa ben Mabrouk.

**Specification 2:** In that Private First Class James H. Smith, 227th Quartermaster Salvage Collecting Company, and Private Riley Bell, 227th Quartermaster Salvage Collecting Company, then T/5 Grade, acting jointly and in pursuance of a common intent, did, at or near Mateur, Tunisia, on or about 3 November 1943, wrongfully and knowingly sell twenty-five pounds of tea, of the value of about \$12.25, property of the United States furnished and intended for the military service thereof to Hassen Ben Dahmany.

**Specification 3:** In that Private First Class James H. Smith, 227th Quartermaster Salvage Collecting Company, and Private Riley Bell, 227th Quartermaster Salvage Collecting Company, then T/5 Grade, acting jointly and in pursuance of a common intent, did, at or near Mateur, Tunisia, on or about 3 November 1943, knowingly and willfully apply to their own use and benefit one 2½ ton truck, of the value of about \$2250.00, property of the United States furnished and intended for the military service thereof.

Each accused pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of one previous conviction by summary court-martial for absence without leave, in violation of Article of War 61, was introduced as to accused Bell. No evidence of previous convictions was introduced as to accused Smith. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 16 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentences, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement in the case of each accused and forwarded the record of trial for action under Article of War 50½.

~~CONFIDENTIAL~~

(93)

3. The evidence shows that on 3 November 1943, accused, driving a ten-wheel American truck which had "painted stars" on it, went to Mostafa ben Mabrouk's place at Omjannah, about five miles from Mateur, Tunisia and about two kilometers off the main highway. They sold Mostafa four mattress covers which were similar to an article exhibited to the Arab in court and described by the Trial Judge Advocate as a "United States mattress cover". About three days later, military police "came and took" the mattress covers Mostafa had bought. Accused had been to Mostafa's place "about two times" to buy chickens, before they sold him the mattress covers. He also saw them the "very same day the military police made the raid". One of the accused was "behind the wheel" and the other "walked out of the truck" when the military police "happened on the scene". At the time, they had nothing in their hands but they "had something in the truck". Mostafa identified the two accused in court "out of a group of four American colored soldiers who were sitting alongside each other" (R. 7-9).

It was stipulated that "the price of four mattress covers is about \$6.65" (R. 9).

Also living at Omjannah, was Hassen ben Dahmany. "A little over two months" before the date of the trial (12 January 1944), two colored American soldiers, the accused, came up to his house at about 1500 hours, in a ten-wheeled American Army truck and Hassen testified that he bought from them for five thousand francs five boxes of tea, similar to a "Carton size, five pound box of Orange peccoe and Pekoe tea packed by the Maxwell House Division, Branch - New York" handed to him in court. He used none of the tea but he knew what it was, for "they told me it was all tea and I told them to show me and they made a hole in the boxes to show me". Three or four days after he bought the tea, American military police came and took the tea away from him and he saw the two accused again at that time, "as the police took them in" not far from his home (R. 9-12).

It was stipulated that "the price of 25 pounds of tea is \$12.25" (R. 9).

Captain Lloyd E. Skinner testified that he had been commanding officer of the 227th Quartermaster Salvage Collecting Company since 17 November 1942, and that accused were members of his company. He further testified that accused Bell's

"job was that of Assistant Salvage Foreman at the Mateur Salvage yard and Private Smith was a truck driver with Corporal Bell. They had to report to the Mateur Salvage yard every day, always working together. \*\*\*Their duty was to work at the Yard Salvaging metal."

At no time did he authorize accused to take a truck to an Arab village in the vicinity of Mateur, and accused had no reason to haul used mattress covers (R. 16).

It was stipulated that "a two and a half ton truck is valued at about \$2250.00" (R. 9).

~~CONFIDENTIAL~~  
NATO 1406

Private First Class Ed Brown testified that on 7 November 1943, he "caught a ride" with the two accused, getting on their truck "in the company" and leaving it in Mateur. A "Private Pitman" was also on the truck and got off with Brown. Accused Smith was driving and accused Bell was with him (R. 16,17,18). As they approached Mateur they went over a bridge, and a truck in front of them, driven by Private First Class Dillard, came to a stop (R. 22,23). Accused stopped their truck and transferred four bags of mattress covers from the truck in front to their own truck (R. 17,18,22). All the bags except one were full (R. 18). Brown further testified that he did not know why the accused "switched the bags from one truck to another" and that he did not see what they did with the mattress covers (R. 17,18). After the bags had been switched Brown and Pittman went on to Mateur and accused "drove off" (R. 18).

First Lieutenant Raymond J. Brown, an assistant provost marshal, testified that on 7 November 1943 he "was conducting a raid on a small village a few miles west of Mateur". Mostafa ben Mabrouk and Hassen ben Dahmany lived in one of the houses he raided (R. 12,13). He further testified that he picked up from the Arabs "Mattress covers, shot guns, rifles, and tea, and other various articles. That is of Government equipment". There were "perhaps twenty or twenty-five pounds" of "Ordinary American tea\*\*\*contained in boxes with an American Firms name on them", and six or eight "regular government issue mattress covers". He "had just finished the raid on the Arab village" when he "came across" a two-and-a-half ton "G.I. truck". In the truck were the two accused and they had on it "three mattress covers filled" (R. 13). Subsequent count showed that there were 101 mattress covers in the truck at the time (R. 13,14). Accused in their truck were approximately nine-tenths of a mile "off the main high-way", between Djalta and Michaud, "four and a half miles west of Mateur". Witness further testified that the truck had a trip ticket made out to accused Bell; that accused told him they had come to "buy some chickens" and that the mattress covers "were used to haul clean laundry" (R. 14). None of the mattress covers were new; "They were all dirty and had various organizational markings on them". The tea was "property of the United States government\*\*\* packed in five pound boxes. Approximately the same way our tea is sent over from the States" (R. 15).

It was stipulated that "the value of one hundred and one United States Government Issue Mattress Covers would list in the Army regulations at \$166.65" (R. 15).

Private First Class Rufus Dillard testified for the defense that on 7 November 1943, he was driving a truck in front of a truck driven by accused Smith. Private First Class Artis Johnson "was in charge of the truck" driven by Dillard and told him he had mattress covers on the truck; he "saw Johnson take some down". Witness further testified that his truck "never stopped", and that he did not "cross a bridge in Mateur going toward the American Red Cross" but went instead "on the detour going to the laundry". He testified that "both trucks" went "on the detour" and he did not know if one truck went "over the bridge". He did not know if anything was "transferred from the back" of his truck, because he "was driving" (R. 19-21).

**CONFIDENTIAL**  
NATO 1406

~~CONFIDENTIAL~~

(95)

The two accused elected to remain silent (R. 23).

Private First Class Heinsitch D. Pittman, a witness for the court, testified that he was riding with Private First Class Ed Brown in the truck driven by accused Smith. They crossed "the bridge in Mateur" and the truck in which he was riding stopped "from ten to fifteen minutes\*\*\*Just as you cross the bridge. You go to the left about twenty-five yards and turn and just there they stopped and they transferred the bags from one truck to another". Accused Bell transferred the bags and there were four of them (R. 23,24). He could not recall if the detour was washed out 7 November 1943; "seems like we came down that detour" (R. 24). He was "quite sure" that they followed Dillard's truck "until we came across the bridge" (R. 25).

4. It thus appears from substantial evidence that at the time and place alleged in the Specifications of the Charge, accused Smith and Bell, acting jointly and in pursuance of a common intent, knowingly and willfully misappropriated 101 mattress covers, of the value of \$166.65, and knowingly and willfully applied to their own use a two-and-one-half-ton truck, of the value of about \$2250.00, all property of the United States, furnished and intended for the military service thereof. As assistant salvage foreman, Bell, it is inferable, had some measure of control and supervision over the mattress covers. It was no part of his or Smith's duties to haul used mattress covers, and the transfer thereof from another government truck to their own constituted a willful misappropriation. They were not authorized to take the truck to the Arab village and their doing so constituted a wrongful application. Their subsequent apprehension, with a government truck on which were 101 mattress covers, in an Arab village nine tenths of a mile off the main highway, is inconsistent with an honest purpose and gives rise to compelling inference of guilt of misappropriation and of application to their own use of property of the United States furnished and intended for the military service.

It further appears from uncontradicted evidence that at the time and place alleged in the Specifications of the Additional Charge, accused Smith and Bell, acting jointly and in pursuance of a common intent, wrongfully sold to Mostafa ben Mabrouk four mattress covers, of the value of about \$6.65 and to Hassen ben Dahmany 25 pounds of tea, of the value of about \$12.25, and knowingly and willfully applied to their own use a two-and-one-half-ton truck, of the value of about \$2250.00, all property of the United States, furnished and intended for the military service thereof. The identification of the mattress covers, the markings on the boxes of tea, the description of the truck and the other circumstances in evidence demonstrate satisfactorily, as to both Charges, the fact of Government ownership and that the property was furnished and intended for the military service of the United States. The use of the government truck by accused in hauling the mattress covers and tea to the Arab village constituted its wrongful and willful application to their own use.

Concert of action between Bell and Smith was clearly established. Smith acted for Bell in driving the truck, in like manner as Bell acted for Smith in transferring the mattress covers. Both were principals in the undertaking and each is responsible for the acts of the other in furtherance of the common plan (CM NATO 1135, Morning et al).

~~CONFIDENTIAL~~

NATO 1406

**CONFIDENTIAL**

(96)

5. A United States penitentiary was designated as the place of confinement. Article of War 42 provides, *inter alia*, that:

"Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year".

Insofar as this enactment authorizes confinement in a penitentiary it is a penal statute (59 C.J. 1111, citing among other authorities, Huntingdon v. Attrill, 146 U. S. 667) and must be strictly construed, as in the case of any penal statute (59 C.J. 1113; Wharton's Crim. Law, 12th Ed., sec. 40).

To justify penitentiary confinement some act of which accused was convicted must, by the terms of the Article of War, be "recognized as an offense of a civil nature" by Federal civil statute, that is, must be identical with the offense denounced by the Federal civil statute. The principle of punishing as for a closely related offense embodied in Paragraph 104c of the Manual for Courts-Martial, is applicable only to determination of the quantity of punishment as prescribed in the Table of Maximum Punishments. It may not be resorted to in determining the legal propriety of confinement in a penitentiary.

The offense or act of which accused were convicted under Specification 1 of the Charge, knowingly and willfully misappropriating mattress covers, property of the United States, intended for the military service, is not expressly denounced as an offense of a civil nature and made so punishable by any statute of the United States or of the District of Columbia.

The offenses or acts of knowingly and willfully applying to one's own use, and wrongfully selling, property of the United States, furnished or intended for the military service, of which accused were found guilty under Specification 2 of the Charge and the Additional Charge and its Specifications, are not denounced as offenses of a civil nature by any Federal statute except by Section 36 of the United States Criminal Code (18 U.S.C. 82). Prior to the amendment of Section 36 by the act approved 22 November 1943 (Pub. Law No. 188, 78th Congress, First Session), it had been held to be unenforceable with respect to the offenses here mentioned (Holmes v. U. S. 267 Fed. 529), and had been held not to constitute a basis for penitentiary confinement (Dig. Op..JAG, 1912-40, sec. 399 (2), CM 209295, De Armond). The offenses in this case having been committed prior to the amendment, the section as amended may not be invoked, for such action would increase the

**CONFIDENTIAL**

NATO 1406

punishment (MCM, 1928, par. 94) and would therefore have ex post facto effect (16 C.J.S. 886,895).

In his review of the record of trial the staff judge advocate advised the reviewing authority that in his opinion the offenses found under Specification 2 of the Charge and Specification 3, Additional Charge, misapplications of motor vehicles, property of the United States, furnished and intended for the military service, were recognized as offenses of a civil nature by Section 2204, Title 22 (formerly sec. 826b) of the Code of the District of Columbia. This statute, under the title "Unauthorized Use of Vehicles", provides:

"Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit use or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment".

It is apparent from the language employed that the offense thus denounced involves a trespass, a taking, use, operation or removal from a building or place as described, without the consent of the owner, and a subsequent operation or driving for the offender's own profit, use or purpose. The wrongful application to the offender's own profit, use or purpose is made an offense only if coupled with a preceding trespass. To give full and intelligible effect to all parts of the statute, connotation of the term "use" as it first appears immediately following the word "take" and of the term "used" must be accepted as defining an assumption of control of a vehicle through means other than personal mechanical operation (66 C.J. 74, citing Feitelberg v. Matuson, 208 N.Y.S. 786,789).

There is a clear distinction between the offense thus denounced by the Code of the District of Columbia and the offenses found in the instant case. Trespass may precede but is not an essential element of misapplication of government property as denounced by Article of War 94, for that offense is committed when government property, furnished or intended for the military service, is willfully and knowingly devoted to the unauthorized use or purpose of the offender (MCM, 1928, par. 150i). No trespass is alleged nor found here. Neither is it alleged nor found that accused operated or drove the vehicle.

In a case in which accused was found guilty of knowingly and willfully applying to his own use and benefit a government vehicle intended for use in the military service, in violation of Article of War 94, the Board of Review, in holding unauthorized the designation of a penitentiary as the place of confinement, has said:

(98)

"But the finding in this case that accused willfully and knowingly, and without authority, applied the motor vehicle to his own use and benefit is consistent with an hypothesis that he was not found guilty of doing all the acts required to complete the offense under this section of the Code of the District of Columbia. In a similar case (CM 149985, Swinkins) the Board of Review stated:

'Section 826 b of the Code of the District of Columbia denounces the offense of removing an automobile from a public highway, without the owner's consent, and operating or driving the same or causing it to be operated or driven for one's own use, but accused, under Specification 1, Charge I, was found guilty only of removing an automobile from the custody of another and converting it temporarily to his own use, a finding wholly consistent with an hypothesis that he did not operate or drive the automobile, or cause it to be operated or driven' (CM 209295).

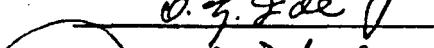
It follows that the acts of which accused were convicted are not recognized as offenses of a civil nature by the quoted statute of the District of Columbia.

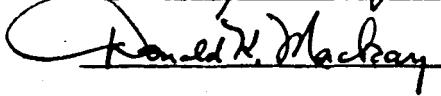
The circumstance that the evidence in this case may show acts or offenses other than those charged (such as larceny of mattress covers of value in excess of \$50) cannot be made the basis of penitentiary confinement. The language of Article of War 42 is clear to the effect that confinement in a penitentiary may be authorized only for those acts or omissions of which an accused is convicted.

6. The charge sheet shows that accused Bell is about 31 years old, that he was inducted into the Army 14 March 1941, and that he had no prior service; that accused Smith is about 22 years old, that he enlisted in the Army 6 February 1941, and that he had no prior service.

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence in each case as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 16 years in a place other than a penitentiary.

 Donald D. Chapman, Judge Advocate.

 O. G. J. de J., Judge Advocate.

 Donald K. Mackay, Judge Advocate.

NATO 1406 1st Ind.  
Branch Office of The Judge Advocate General, NATOUS A, APO 534, U. S. Army,  
15 March 1944.

TO: Commanding Officer, Eastern Base Section, APO 763, U. S. Army.

1. In the case of Private Riley (NMI) Bell (34018339) and Private First Class James H. Smith (13014848), both of 227th Quartermaster Salvage Collecting Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentences as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 16 years in a place other than a penitentiary, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution or reformatory, you will have authority to order the execution of the sentences.

2. After publication of the general court-martial order in this case, ten copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 1406).



HUBERT D. HOOVER  
Colonel, J.A.G.D.  
Assistant Judge Advocate General

**CONFIDENTIAL**



LAW LIBRARY  
CONFIDENTIAL  
JUDGE ADVOCATE GENERAL  
NAVY DEPARTMENT  
(1ca)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army.  
21 February 1944.

Board of Review

NATO 1420

U N I T E D   S T A T E S	)	TWELFTH AIR FORCE
)	)	
v.	)	Trial by G.C.M., convened at
)	)	Foggia, Italy, 18 December
Private First Class HOWARD	)	1943.
(NMI) WHITMIRE (34125658),	)	Dishonorable discharge and
981st Military Police Company	)	confinement for life.
(Aviation).	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private First Class Howard (NMI) Whitmire, 981st Military Police Company (Aviation), did, at Bercall, Benghazi, Libya, on or about 3 September 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Staff Sergeant Charles L. Johnson, 981st Military Police Company (Aviation), a human being by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and

CONFIDENTIAL

266546

CONFIDENTIAL

forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 1730 hours on 3 September 1943, accused, who had been out during the day on a pass, returned to his organization which was then stationed at Berca II, Benghazi, Libya. When he turned in his pass nothing unusual or abnormal was noticed about his behavior. He went to the tent of another soldier to whom he gave two bottles of "this form of spirituous liquor that is purchased in the Middle East", one bottle for the soldier and the other for "the two cooks" (R. 7, 12,20,26,27,30,32,36,42,48,69,77). Accused remained at this tent about 20 minutes and at about 1745 hours went into a tent occupied by Sergeant William J. Thomas, 981st Military Police Company (R. 37,69). Accused had an Army automatic .45 caliber pistol in his waist band (R. 38,44). When he entered the tent, accused said he was going "to fuck up tonight" (R. 37,42). Thomas asked accused to go to a picture show with him, and that invitation being refused, asked him to go swimming but again accused refused (R. 37,38). During the conversation, accused took out his .45 caliber pistol, put a shell in the chamber, ejected the shell, picked it up, put it back in a clip and inserted the clip in the weapon (R. 44). Thomas testified that accused made "some threatening remarks" about Sergeant Johnson (R. 38). Accused said Johnson "had been threatening some of the boys" and "mentioned an incident where he had been threatened" at Lockbourne, Ohio, about 11 months previously (R. 40). The "incident" at Lockbourne, Ohio, was described by Private First Class William F. LaBair, 981st Military Police Company, a witness for the prosecution. He testified that on that occasion he and accused had had a fight in which accused had stabbed him; that Johnson had then said "If you don't get him out of here I am going to kill him". LaBair did not know whom Johnson meant by "him" but testified he thought he knew (R. 45,46,47). In Thomas' tent, accused also said two or three times he was going to "get Johnson" and once he said he was going to shoot him (R. 42,43). Thomas asked accused for a drink and the latter replied "he didn't have any" (R. 38). Thomas testified that accused was flushed and "slobbering"; that his speech was "a little" slurred and he did not appear to be acting "according to his usual mode of conduct" (R. 39,41). LaBair, who was also in Thomas' tent at the time, testified that when accused said he was going to shoot Johnson, he "acted mad" and his face was flushed but LaBair did not know if this was "from being mad or from drinking" (R. 43). After staying in Thomas' tent about 15 minutes, accused left (R. 42).

Johnson and Corporal Elvin C. McManus, 981st Military Police Company, occupied the same tent. At about 1800 hours on 3 September 1943, Johnson was sitting on his "bunk" facing the tent entrance, writing a letter, and McManus was lying on his bed, facing the back of the tent, reading. McManus testified that after they had been so occupied about 15 or 20 minutes, he heard a shot and heard Johnson scream and say "Don't shoot me again, Whitmire" (R. 31,32,33). Johnson "fell back on his bunk against the back of the tent". McManus observed blood was "coming out" of a "spot over the left pocket". He went outside and saw accused going around the corner of the tent (R. 34). Immediately after this shot was fired, the commanding officer of accused's company saw accused with his head and shoulders inside Johnson's tent (R. 7,9). Accused turned and fired one shot from a regulation .45 caliber pistol "towards" Staff Sergeant Olice Brannon, 981st

266546

CONFIDENTIAL

**CONFIDENTIAL**

(103)

Military Police Company, who was approaching the scene of the shooting (R. 10,18,22,26,28), and pointed his pistol at the company commander (R. 10). Accused then went to his own tent, where he remarked to his tentmate "Don't let them come in here after me" (R. 10,48,50). After having been asked three times for his pistol, accused surrendered it to his tentmate but "there was another gun hanging close by, and he removed that gun from the holster". He also surrendered this weapon to his tentmate at the latter's insistence and they left the tent together (R. 50,51). Accused's company commander was seen approaching and accused, who "had his hands raised shoulder high", said "Here I am, Captain" (R. 51).

On the day of the shooting, a medical officer of the 15th Field Hospital examined the body of "Staff Sergeant Johnson" in an ambulance as he was being taken to the hospital and on the following day, this officer made a post mortem examination at the hospital morgue. The officer found a bullet lodged in Johnson's backbone. He testified that death was caused by a gunshot wound which penetrated the right ventricle of the heart and liver (R. 52,53).

Captain John M. Flumerfelt, Medical Corps, 38th General Hospital, a psychiatrist, testified that accused was under his observation from 15 September to 5 October 1943. As a result of his examination he concluded that accused was "not insane" and was able to distinguish between right and wrong (R. 55,56), but lacked the normal mental resistance to wrongdoing (R. 57) and "has this lessened ability to discriminate between, or to adhere to the right. He has the lack of conscience, and in this type, they very frequently become involved with the law in anti-social acts" (R. 59). Upon being questioned by the defense, Captain Flumerfelt testified that accused was not a "normal, mental person" and that an individual of his type did not have the "character that a normal person has to keep him from doing wrong". His "diagnosis" of the accused was "a Constitutional psychopathic state with paranoid trends" (R. 56). Witness testified:

"A paranoid type of a Constitutional psychopathic state is an individual, who first of all lacks\*\*\*social conscience and moral fiber,\*\*\*plus, in layman terms, the continual chip on the shoulder attitude toward society" (R. 57).

He also testified:

"With an individual of this type, their history is marked by an inconsistency in their ability to adhere to the right. That is, this person may learn the difference, and does learn the difference, between right and wrong. He knows that if he does something wrong he is likely to be punished for it. He does not have in himself this character that a normal person has to keep him from doing wrong\*\*\*That is, it does not take the same quality, shall we say, stimulant, to make him do wrong as it would a normal person" (R. 56,57).

**CONFIDENTIAL**

(104)

CONFIDENTIAL

Upon further questioning by the prosecution, Captain Flumerfelt testified that accused was not "forced" to do the things "that the normal person would not do", but was "more apt to" do them (R. 58). He further testified that accused was, at the time of his examination, "capable of conducting his defense with the assistance of counsel and of understanding the nature of the proceedings and doing the things necessary for an adequate presentation of his defense" (R. 59). In response to a question by a member of the court, as to whether there was "any element of compulsion which makes a Constitutional psychopathic individual commit an assault or murder", the psychiatrist answered that he

"wouldn't use the word 'compulsion'". When the paranoid psychopathic individual\*\*\*receives what by a normal person would be slight injuries or harm, and would be shrugged off by a normal person, he interprets these as exaggerated harms or insults to him, and then he is apt to retaliate in the same exaggerated fashion he imagines the injury" (R. 60).

Captain Flumerfelt also testified that the "most important part" in making his diagnosis was the history of the accused as furnished by accused himself (R. 62).

After both the prosecution and the defense had closed, the court recalled Captain Flumerfelt (R. 84) and asked him for "the pertinent factors in the history of the accused" upon which he had based his diagnosis. Captain Flumerfelt then ennumerated and reviewed these factors, showing, among other things, that accused had "played hookey a great deal" and had left school at the age of 13 or 14 years; that he began to drink at the age of 14 years and often left home; that during his early life "he was always getting in trouble with petty things, such as stealing apples from the grocers"; that he could not "get along in the C.C.C."; that he had been arrested for drunken driving and "on one occasion he was sentenced to three years for stealing an automobile and driving it while drunk"; and that he had been "jailed for one year in the Georgia chain gang for breaking into a store" (R. 84). Accused had admitted going absent without leave during basic training and in 1943 had become "involved in an altercation" with the military police at Cairo. "In this patient, his peculiar behavior started with playing hookey and stealing apples from the grocer, and his involvement, first in petty difficulties, and then allegedly major difficulties" (R. 84, 85). At the time of the examination witness testified that in his opinion accused "was mentally abnormal\*\*\*he did not show evidence of insanity, but the borderline between the two is sometimes very thin" (R. 85). Accused had a "syphilitic history" but in the hospital his Wasserman was negative (R. 86).

In response to a "hypothetical question" as to whether it would have changed his diagnosis if he had known that "this patient" had made "suicidal attempts", witness answered:

"It would indicate that mental abnormality is present,  
if such were true\*\*\*Had his attempt been a genuine attempt

CONFIDENTIAL

263546

\*\*\*then I would be more inclined to think of mental abnormalities, but I can say that we gave all the tests for sanity, and found him sane" (R. 86).

In response to a final question put to him by a member of the court, Captain Flumerfelt affirmed that a very large proportion of criminals "are individuals with Constitutional psychopathic states" (R. 87).

A witness for the defense testified that on one occasion about 11 months previously, accused had attempted to commit suicide by drinking poison (R. 64-68). Another witness for the defense described an incident which had occurred about six months previously (R. 70) as follows:

"Well, the accused came in the tent, and we had a rack in the middle of the tent where we kept our rifles. He picked up his rifle, threw one in the chamber, and went over to his bunk and laid down. Where he put the gun, I don't know. Then he started crying and carrying on and saying 'I won't see my mother again'. One of the other fellows went over and got the gun and put the gun back in the rack. Then the accused went to sleep" (R. 71).

Captain Richard O. Flinn, Jr., accused's "Chaplain at that time" testified for the defense that he had seen accused "approximately 15 minutes" after the shooting and that he "was shouting that the gun should be put down\*\*\*I should say he was acting abnormally" (R. 73,74). "He was in a highly excitable condition. He was shouting in the presence of officers, struggling with the men who were attempting to hold him, and his general appearance was abnormal" (R. 75). The last time witness saw accused, "within two hours" of the shooting, "he appeared to be very drowsy and irritable" (R. 76). In accused's "consultations" with witness "he did not indicate any harbored feeling toward anyone\*\*\*There was nothing said to me on any other occasion that indicated he had a grudge or harbored feeling against anyone" (R. 77).

Major Wade M. Fleischer testified for the defense that when he saw accused on the evening of 3 September "in the Provost Marshal's jail in Benghazi" and discussed securing counsel to represent him, accused "answered in an unintelligible manner. Sounded like a grunt" (R. 78). When he saw him "the next morning he was sitting up on his bunk. The accused didn't appear frightened or unduly worried" (R. 79).

A soldier who had been with accused in Benghazi on 3 September 1943, from 0900 to about 1200 hours, testified for the defense that he met accused in a restaurant and they had "two or three drinks of this zivic" and a chicken dinner. Witness further testified that accused "drank a quart of zivic anyway"; that the drink was "very strong"; that he left accused and "another fellow" in the restaurant with about half of a second bottle of the drink which they were engaged in consuming; that accused was "pretty happy" but "didn't seem to be drunk\*\*\*He wasn't doing anything out of the way" and "was having a good time" (R. 79-82).

266546

CONFIDENTIAL

(106)

CONFIDENTIAL

Accused elected to remain silent (R. 83).

4. It thus appears from the uncontradicted evidence that at the place and time alleged in the Specification, accused shot "Staff Sergeant Johnson" with a pistol, killing him almost instantly. Only a few minutes before he fired the fatal shot, accused had declared that he was going to kill Johnson, referring to a threat he claimed Johnson had made against him some 11 months previously and implying that this was his reason for the violence he threatened. He deliberately loaded the pistol with which he was armed, went to Johnson's tent and without warning shot his victim through the heart. While it appears he had been drinking, the evidence showed he had acted normally while in the organization area prior to the shooting. His conduct reflected a calculated and deliberately formed design to kill. The court was fully warranted in concluding that accused was in full possession of his faculties when he slew his victim. His conduct was wanton and willful. Malice is plainly inferable from the circumstances surrounding the shooting. There was no legal excuse or justification for the homicide and accused was properly found guilty of murder as charged (MCM, 1928, par. 148a).

Defense counsel sought to raise the issue of accused's sanity. However, the psychiatry expert testified that after a three week examination of accused, he had concluded accused was sane and could distinguish between right and wrong. This witness also took the view, in effect, that accused was capable of adhering to the right, though his ability to do so was less than that of a normal person. Further, the witness testified that when he examined accused, the latter was capable of "doing the things necessary for an adequate presentation of his defense". The court properly concluded accused was not insane either at the time of committing the offense or at the time of the trial.

Accused was alleged to have killed Staff "Sergeant Charles L. Johnson". Deceased was identified by the proof as only "Sergeant Johnson". The identity of deceased as the person named in the Specification was sufficiently established by the proof of his surname and occupation (NATO 965, Saunders).

5. The charge sheet shows that accused is 29 years old and was inducted into the Army of the United States 19 June 1942. No prior service is shown.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

 Daniel J. Ellengreen, Judge Advocate.

Gordon Thompson, Judge Advocate.

266546

 D. J. Ellengreen, Judge Advocate.

CONFIDENTIAL

**CONFIDENTIAL**

(107)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
15 February 1944.

Board of Review

NATO 1432

U N I T E D   S T A T E S	)	ISLAND BASE SECTION
v.	)	Trial by G.C.M., convened at
Private ISAAC HERBERT	)	Palermo, Sicily, 29 November
(34052075), Company C,	)	1943.
255th Quartermaster	)	Dishonorable discharge and
Battalion (Service).	)	confinement for seven years.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

**REVIEW by the BOARD OF REVIEW**

Holmgren, Simpson and Mackay, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

**CHARGE I: Violation of the 93d Article of War.**

Specification: In that Private Isaac Herbert, Company "C", 255th Quartermaster Battalion (Service), did, at Misilmeri, Sicily, on or about September 4, 1943, commit the crime of sodomy by feloniously and against the law of nature having carnal connection per os with Private Cataldo Colella, an Italian Prisoner of War.

**CHARGE II: Violation of the 96th Article of War.**

Specification 1: In that Private Isaac Herbert, Company "C", 255th Quartermaster Battalion (Service), did, at Misilmeri, Sicily, on or about September 4, 1943, wrongfully strike Giuseppe Zizzi, Italian prisoner of war, in the face with his fist.

267740

**CONFIDENTIAL**

**CONFIDENTIAL**

(108)

Specification 2: In that Private Isaac Herbert, Company "C", 255th Quartermaster Battalion (Service), did, at Misilmeri, Sicily, on or about September 4, 1943, wrongfully slap Pietro De Luca, Italian prisoner of war, in the face with his hand.

Specification 3: In that Private Isaac Herbert, Company "C", 255th Quartermaster Battalion (Service), did, at Misilmeri, Sicily, on or about September 4, 1943, wrongfully kick Antonino Farilla, Italian prisoner of war, about the body with his foot.

Specification 4: In that Private Isaac Herbert, Company "C", 255th Quartermaster Battalion (Service), did, at Misilmeri, Sicily, on or about September 4, 1943, wrongfully slap Domenico Villani, Italian prisoner of war, in the face with his hand.

Specification 5: In that Private Isaac Herbert, Company "C", 255th Quartermaster Battalion (Service), did, at Misilmeri, Sicily, on or about September 4, 1943, wrongfully kick Antonio Guida, Italian prisoner of war, in the testicles with his foot.

Specification 6: In that Private Isaac Herbert, Company "C", 255th Quartermaster Battalion (Service), did, at Misilmeri, Sicily, on or about September 4, 1943, wrongfully kick Donato Nardilli, Italian prisoner of war, in the buttocks with his foot.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for seven years. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 4 September 1943, accused was guarding Italian prisoners of war who were stacking gasoline drums and arranging gasoline cans at Misilmeri, Sicily (R. 6,15). Between 1500 and 1530 hours he gave a cigarette to Cataldo Collela, took him about 60 meters away where he could not be observed by the other prisoners, threatened him with the rifle he was carrying, ordered and forced him to get down on his knees and inserted his penis in Collela's mouth. "All the while" Collela "was crying and trying to run away and join" his companions. Collela "saw him masturbate\*\*\*First he inserted his penis in my mouth and then after I was crying he took it out and began to indulge in onanism", having an emission in "three or four minutes" (R. 5-8). "After he took his penis from my mouth he took me to my companions\*\*\*and he told me to keep my mouth shut" (R. 8). He was "gone from the rest of the prisoners\*\*\*twenty minutes" (R. 7). Witness Villani saw accused at about 1430 hours take Collela away.

267740

**CONFIDENTIAL**

# CONFIDENTIAL

109)

"approximately two hundred meters", but he did not see what happened. The guard was gone "about a half hour". When Collela returned to work, Villani testified that he thought he "saw a change" in him; "he had a red face\*\*\* His eyes looked funny also\*\*\*I just remember that my friend looked disturbed" (R. 18,19). Witness Guida heard Collela "protesting. It seemed that the guard wanted to take him away". He testified that he "saw the guard take Collela with him and walk away" and saw the guard give him a cigarette. They were gone "approximately twenty minutes" and when they returned he "noticed that Collela was trembling\*\*\*Just as soon as they returned Collela didn't say anything to me but later he told me about it" (R. 20,21). Collela testified that he saw accused buy some wine from a civilian at about 900 hours and that he saw him drink "now and then". He was "half and half" intoxicated; "I saw him sober and yet I could tell he was tight" (R. 9). He further testified that he was "overworked that day" and that in the morning accused slapped his face (R. 9,10).

Guisepppe Zizzi testified that accused sent him and "another prisoner (Farilla) to get some water and when we came back he kicked us because he said we dallied\*\*\*He gave me a light kick on my rump" (R. 10,11). He further testified that he "was overworked that day" and that when he insisted upon going to the latrine the accused slapped him. "It was a hard blow because I felt the effects of it" (R. 12).

Pietro DeLuca testified that when he was working at Misilmeri and accused was guarding him, "during the course of the day I had the desire to drink some water. I indicated to the guard I wanted a drink, and he slapped my face\*\*\*I was working harder than usual" and was "overworked that day" (R. 13).

Antonino Farilla testified that on 4 September he was working at Misilmeri under accused as guard. He and "another prisoner" were sent "to get some water" and when he returned accused gave him a hard kick in the buttocks. "I still had the bucket of water in my hand when he kicked me" (R. 14). "The guard kicked me once in the morning and that caused me to stand in fear of the guard and I was later kicked in the afternoon". He "was overworked" that day but accused did not point the gun at him (R. 15). Zizzi was the other prisoner with him when he brought the water back and Zizzi was also kicked by accused (R. 16).

Domenico Villani testified that on 4 September he was "maltreated" by accused. He had been "working all morning\*\*\*lining up these cans of gasoline" and went to "the drinking point" about 1200 hours to get some water. He had been there "about ten minutes" drinking water "and the soldier walked up to me and slapped my face\*\*\*It was a hard blow". He saw accused mistreat others. "All in general were maltreated. Some were kicked and some were slapped during the course of the day\*\*\*by the accused" (R. 16,17). "I saw the guard kick my friend\*\*\*Nardilli" (R. 18).

Antonio Guida testified that on 4 September he was working at Misilmeri, guarded by accused, and "was very much mistreated" by him. "While I was rolling these cans of gasoline the guard kicked me", in a

267740

# CONFIDENTIAL

**CONFIDENTIAL**

(110)

spot "indicated high in the crotch from the rear". It was a hard, painful kick "right in the testicles and the lower part of my buttocks". He "continued working" after being kicked, but "went to the doctor" that night for an examination (R. 19-21).

Donato Nardilli testified that on 4 September 1943, he was working "under guard" at Misilmeri and was "mistreated\*\*\*by the accused\*\*\*While three of us were rolling a can of gasoline I was kicked from behind by the soldier" in a spot "indicated high in the crotch from the rear\*\*\*It was a hard kick" and he "felt the pain for three days". He saw a doctor "at the Prisoner of War Stockade". He saw "other prisoners who were mistreated \*\*\*Guida was maltreated". He "actually" saw "the guard kick and slap them" (R. 21,22). When he "stopped working" to feel where he was kicked, "the guard egged me on with the rifle to keep on working\*\*\*The gun was pointed at me and\*\*\*I was afraid because I knew the rifle was loaded and I was afraid it was going to go off". He further testified that he thought the reason he and "the other prisoners" had been "hit or kicked" was that "the guard was under the influence of liquor\*\*\*He was drunk\*\*\*He walked all right. You couldn't tell he was drunk unless you observed him very closely" (R. 23).

Attilio Cenni, a second lieutenant and director of the Italian Infirmary at the Prisoner of War Stockade, testified that on 4 or 5 September, he examined Donato Nardilli and Antonio Guida (R. 23,24,26).

"The soldiers complained of being kicked in the rump and I examined their rumps\*\*\*Their anus was red and swollen and when I applied my fingers to the anus they complained (R. 25)\*\*\*I didn't examine their testicles because they didn't complain of any injury there\*\*\*It wasn't a serious injury" (R. 27).

Private James W. Crockett testified for the defense that on 4 September he "was working on a detail in the area near Palermo\*\*\*about sixty yards from accused\*\*\*practically" all day. He did not at any time see accused abuse any prisoners or leave with the prisoners at any time. He could not have been gone from his prisoners as long as 20 minutes without witness noticing it. At lunch accused's condition "was normal and he didn't seem to be drinking"; he did not "look unusual" and his manner of speech was normal (R. 28,29). Upon cross-examination, witness testified that he was sixty yards from accused all day, saw him all day long and accused was never out of his sight. He never left his squad but some of them left him. Accused's prisoners always worked, but "they never did work good\*\*\*They didn't want to\*\*\*they didn't work so good that day". Accused had a canteen but did not drink from it. Witness did not see accused hit or kick anybody; he did not "hardly think" he could have, without witness seeing it "because he was too close to me" (R. 29-31).

Private Roy Davis testified for the defense that on 4 September 1943, he was working at the Class III Dump at Misilmeri, in the same detail as accused. They were "about thirty yards\*\*\*apart all day" and at no time

267740

**CONFIDENTIAL**

**CONFIDENTIAL**

(111)

did he see accused slap or kick any prisoners or leave them. He was sure accused could not "have been gone twenty minutes or a half hour" without his knowing it. He did not see accused with a bottle. They "ate lunch right together" and his condition was "just like it always was" and he spoke and acted normally. After work his condition was "the same as it had been at noon" (R. 31-33). Upon cross-examination witness testified that accused might have kicked one of the prisoners and witness not have seen it, for "I didn't keep my eyes on him. He left a couple of times probably". Accused was not gone a half hour and was always there every time witness looked. He had never seen any prisoners hit or kicked and he knew of no reason for their accusations "unless they thought he was working them too hard\*\*\*Sometimes he would tell them to get up and go to work", and they did without objection (R. 33-34).

Corporal James M. Hunter testified for the defense that accused was a member of his squad and on 4 September was working for him "just above Misilmeri at a gasoline dump". He saw accused on duty, and did not see him strike, kick or mistreat any prisoners. He saw accused after work and "his condition was normal". In witness's opinion, accused's conduct was not "so bad so far as being an honest man and a good worker". In regard to his reputation for morality, accused "has always seemed to exemplify high moral standards" and "has never caused a disturbance between any of the other members of the squad. On cross-examination witness testified that the prisoners were checked "at frequent intervals"; he did not know what might have happened between the intervals (R. 34-36).

Sergeant Albert McDowell testified for the defense that on 4 September he was "Sergeant of the Guard at Dump No. 9, Misilmeri" and that accused was working under his control as "a member of that guard". He did not see accused while he actually had the prisoners working, but he observed that his condition was normal at 1200 hours and at 1700 hours. There was no evidence that accused had been drinking and none of the prisoners complained that they had been mistreated. In regard to the reputation of accused "in the company so far as morality goes" witness had "never seen him do anything wrong. He gets along nicely with the men. I have heard certain of the men discuss him" (R. 36,37).

Staff Sergeant Albert B. Smith testified for the defense that accused was a member of his platoon. He knew accused's integrity and reputation and his "character is above reproach. I have never had any report from any non-com in charge of a detail that his conduct was bad" (R. 38).

Accused testified that on 4 September his "duty was to guard the prisoners" at Misilmeri who were "piling gasoline drums\*\*\*The prisoners didn't work none too good\*\*\*I really had to scold at them to get them to get the barrels out of the ditch. That is the reason I think they got offended at me". He "didn't hit a one", or "kick any of them". He permitted "them to go to the latrine when they wanted to" and let them have water any time they wanted it (R. 39). He did not "kick or hit any of them wanting to go to the latrine or get a drink of water". He did not leave his prisoners any time that day but he "probably stepped to the edge of the bushes for a

267740

**CONFIDENTIAL**

**CONFIDENTIAL**

short period of time". He bought no wine and had nothing at all to drink that day. He testified that he did not "take Private Collela, Italian Prisoner of War, away from the rest of the prisoners"; that he did not force Collela or any other person to take his penis in his mouth; that he did not strike Giuseppe Zizzi in the face with his fist, or slap Pietro DeLuca in the face with his hand, or kick Antonino Farilla with his foot, or slap Domenico Villani in the face with his hand, or kick Antonio Guida in the testicles with his foot, or kick Donato Nardilli in the buttocks with his foot (R. 40). Upon cross-examination he testified that he knew no reason why the people named above should have made the charges they did against him.

"No more than they objected to trying to get the barrels up out of the ditch. I guess they must have got offended over that. They must have got mad at me for making them get the barrels out of the ditch there\*\*\*Once or twice I got angry at them for making me run after them back and forth, but I never got angry enough to hit them. I have heard them complain of the bruises on them. They fall down while rolling the barrels and bruise themselves on the rocks. This guy that accused me of putting my penis in his mouth--I don't understand that. Only one thing which we all know is the rules of sex crimes--things like that. In the United States that is an awful bad crime and probably from these interpreters and different ones who speak Italian--probably gave them an idea or something. I don't know. I can't understand it" (R. 40-41).

He did not know why Collela should say he had forced his penis in his mouth "unless they figured that that would prosecute me". He "wouldn't know" how to account for the fact that two of the prisoners he had been guarding "had bruised and tender parts between their legs". He "probably gave all" the prisoners cigarettes; "they didn't have any". He did not drink any wine on 4 September (R. 41), or "jerk" himself "off" that day. He "didn't altogether leave" the prisoners "at any time--just walk off a little ways and take a 'crap' or 'leak' or something. I could always see them". He "never left them for a period of twenty-five minutes". The only "explanation" he could make for the charges against him was "the trouble that arose with reference to the barrels in the ditch" (R. 42).

Defense introduced, in connection with the cross-examination of Cataldo Collela, "to show that he previously made statements which he contradicted", his sworn affidavit before the investigating officer and it was admitted into evidence as Defense Exhibit "A" (R. 10). It reads, in part,

"After dinner, at a time I would estimate to have been about 0330, the guard came to me and asked me to go with him. We went to a point about 150 meters from the rest of the prisoners where no one could see us. Pointing the gun at me he tried to force me to take my pants down. I would not do it and started crying. He then cocked the gun, threatening me and told me to get on my knees. The

**CONFIDENTIAL**

**CONFIDENTIAL**

(113)

guard then took his penis out of his trousers and forced me to take it in my mouth, threatening to shoot me if I didn't do it. I kept on crying. He then took his penis out of my mouth. Then the guard standing in front of me jerked himself off.

"He then took me back to where the other men were working. I did not make a report of the incident to any of the American officers at the dump because I did not see any until I got on the truck. The truck then started and I did not have a chance to tell him about the incident. Upon getting back to the stockade, I reported the incident to an Italian officer who is in charge of Camp No. 7 which I live in" (Def. Ex. A).

4. It thus appears from substantial evidence that at the time and place alleged in the Specification of Charge I accused, armed with a rifle and using it threateningly, ordered Private Cataldo Collela, an Italian prisoner of war named in the Specification of Charge I, to get down on his knees, and forcibly inserted his penis into Collela's mouth. "Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being" (MCM, 1928, par. 149k). Penetration alone is sufficient; emission is not necessary. Although accused denied that he committed the act, the testimony of the pathic embraces every element of the offense charged and a conviction would have been justified upon that evidence alone (Underhill's Crim. Ev., 4th Ed., p. 1175). There were in addition corroborating circumstances in Collela's agitation and disturbance when he returned to the group: it was testified without contradiction or explanation that there was "a change" in his appearance, "he had a red face", "his eyes looked funny", he "was trembling" and "looked disturbed". The court was fully warranted in view of the foregoing testimony and the surrounding circumstances in finding accused guilty of sodomy and all elements of the offense are amply established by the evidence.

It also appears from substantial evidence that at the time and place alleged accused committed separate and distinct acts of assault and battery upon the six Italian prisoners of war named in the Specifications of Charge II. Here also there was a conflict of testimony, as accused denied the assaults and testimony was offered by the defense tending to show that accused could not have committed the offenses charged because he was "never" out of sight of other soldier guards. However, the witnesses were before the court and each separate assault was testified to by the Italian prisoner of war concerned. Under such circumstances it was the function of the court to judge of the credibility of witnesses and to determine controverted questions of fact. It is not the function of the Board of Review to weigh evidence and the court was fully justified in finding accused guilty of all the assaults charged.

5. Attached to the record of trial is a letter signed by all members of the court who heard the case recommending "that no clemency be shown in any respect to this accused".

267740

**CONFIDENTIAL**

# CONFIDENTIAL

(114)

6. The charge sheet states that accused is 36 years old and that he was inducted into the Army of the United States 22 August 1942. He had previously been inducted 1 May 1941, and transferred to the Enlisted Reserve Corps 4 October 1941.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of sodomy, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 22-107, Title 22, Code of the District of Columbia (NCM, 1928, par. 90a).

*James P. McGuire*, Judge Advocate.

*Horace S. Carpenter*, Judge Advocate.

*Donald W. Jackson*, Judge Advocate.

267740

# CONFIDENTIAL

**CONFIDENTIAL**

(115)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
24 February 1944.

Board of Review

NATO 1461

U N I T E D   S T A T E S	)	88TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened in
Private JAMES J. SULEWSKI	)	the vicinity of Magenta,
(11070899), Company E, 351st	)	Algeria, 25 January 1944.
Infantry.	)	Dishonorable discharge and
	)	confinement for ten years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.  
-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private James J. Sulewski, Company E, 351st Infantry, having received a lawful command from Captain ROBERT K. CARLSTONE, Company E, 351st Infantry, his superior officer, to fall out with his organization for a march, did, in bivouac near Magenta, Algeria, on or about January 16, 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of four previous convictions was introduced, one by special court-martial for larcenies in violation of Articles of War 93 and 94, and three were by summary court-martial for absence without leave in violation of Article of War 61, for disobedience of order by a commissioned officer in violation of Article of War 96, and for being disorderly in uniform in a

253306

**CONFIDENTIAL**

**CONFIDENTIAL**

public place in violation of Article of War 96. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. At about 1300 or 1330 hours 16 January, a corporal in charge of quarters in Company E, 351st Infantry, was supposed to "have Private Sulewski fall out for one of the battalion drills he was to go on. He was to go on a battalion fatigue march\*\*\*." Accused refused to go and the non-commissioned officer thereupon reported him to Second Lieutenant Oliver D. Jones, also of that organization. The latter testified that the charge of quarters called him "to see if I could make Private Sulewski go on a march that he had been ordered to go on. Private Sulewski of course refused". Lieutenant Jones gave accused a direct order to go on the march and "asked him if he realized what he was doing by refusing to go and he stated that he did". Lieutenant Jones took accused to Second Lieutenant John W. Watkins, his platoon leader, who was told "that he had refused to go on a battalion march" (R. 7,8,11). Lieutenant Watkins made no effort to have accused go on the march, "because there was an order by the battalion commander". He took accused to his company commander, Captain Robert K. Carlstone, at the latter's tent (R. 8,9).

Captain Carlstone testified that "the first time I ordered him to take the hike, I told him I wanted him to go put on his pack and fall out with the company and then told him that was a direct order from me to fall out with the company". Accused replied "I refuse". The captain explained to accused what it meant to disobey a lawful order and "I reissued the order after he said he understood that he could be tried by general court-martial" (R. 9). Accused still refused to obey the order. The witness "talked to him for a few minutes to find out why he did not want to go on a hike". Accused "said that he thought it was silly" (R. 10).

Lieutenant Watkins, who had remained at Captain Carlstone's tent, testified that the order given was "to go on the march". This officer in other respects substantially corroborated Captain Carlstone's testimony (R. 11).

The march was not one in which the entire company participated; it was "a battalion punishment, for march discipline, for men who had fallen out on night problems". It was called "extra instruction" and was to improve "march discipline", "for the men that were not able to perform hikes properly". Accused had "a couple of times slipped off the column at night and found his way back to his tent ducked the night problem and gone to bed" (R. 10).

The captain also testified that accused "was serving a sentence of six months hard labor without confinement for a court-martial offense which took place a week before". The offense involved was larceny. Captain

259306

**CONFIDENTIAL**

**CONFIDENTIAL**

(117)

Carlstone "could see no reason why Private Sulewski should sleep on Sunday afternoon while other men were not", and "felt that in order to keep up his hard labor it would be a form of punishment to make the hike" (R. 10).

Accused testified he enlisted in the Army when 21, that he had been living at home with his parents for six months when he enlisted, that prior to that time he had lived for about nine or ten years in "a state institution", that "was a school for feeble minded and insane cases". He had also been in a "state school" and had been sent to "a couple of other state homes" (R. 12). He ran away from the school "several times", "got a few jobs and quit" and when he could not get another one, enlisted in the Army. Accused did not understand that the hike was in the nature of punishment. He had not performed any hard labor and he did not think his "hard labor for three months", "my six months hard labor case" had yet been approved. He considered his status as a soldier was not changed by the court-martial, knew that Captain Carlstone was his company commander and that the latter had authority to order him to go on the hike (R. 13,14).

Accused and each of the other witnesses, when asked to state his station, replied, "vicinity of Magenta, Algeria" (R. 6,7,8,12).

4. It thus appears that at the time alleged accused expressly and defiantly refused to obey a direct order from his company commander, his superior officer, to "fall out with the company" and to "go on the march", substantially as alleged. After the consequences of his failing to obey the order had been explained to accused, he still refused to go, stating he thought "it was silly". The elements of the offense charged are clearly established.

Though there was some testimony to the effect that the march was in the nature of punishment, there also was substantial evidence that it was "extra instruction" to improve "march discipline". The order was evidently one given pursuant to the exercise of a function of command. If the march ordered had been intended only as a punishment, a question as to its legality would have been raised as a march of the kind described is not an authorized form of punishment and consequently the disobedience shown might not have constituted an offense under Article of War 64 (See CM 226870; Bull. JAG, December 1942, p. 363). In the instant case, however, it appears the march which accused was ordered to make was a battalion exercise to develop march discipline and instruction. Accused was not to make the march alone. All the other members of the battalion who had not performed properly were to be given extra instruction in that aspect of military training. Proper march discipline is a well recognized necessity in all military units and may be lawfully employed for training and exercise. There is ample evidence that the order given was legal.

The record discloses that a number of orders to go on the march were given to the accused prior to the giving of the order set forth in the Specification. When accused refused to obey Captain Carlstone, that officer tried to induce him to change his mind. There is no suggestion that the order was given with the expectation that accused would disobey it, or was

253306

**CONFIDENTIAL**

(118)

**CONFIDENTIAL**

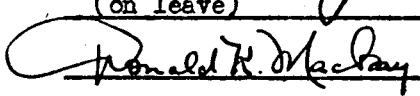
given in order to increase the number of offenses or permissive punishment.

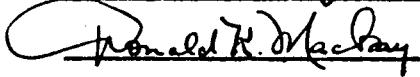
While there is no explicit testimony as to where accused was at the time of the offense it is clear he was at the tent of his company commander. At the trial (25 January 1944) all witnesses testified their station was in the "vicinity of Magenta, Algeria". It was reasonable to infer the station had been the same on the date of the offense. In any case, the place of commission of the offense not being of the essence, a failure of proof thereof is harmless (NATO 440, Gilbert; NATO 1279, Alex).

5. The charge sheet shows that accused is about 23 years old and that he enlisted in the Army 16 July 1942. No prior service is shown.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

 Judge Advocate.

(on leave) , Judge Advocate.

 Donald R. MacLay, Judge Advocate.

250306

**CONFIDENTIAL**

**CONFIDENTIAL**

(119)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army.  
15 March 1944.

Board of Review

NATO 1470

U N I T E D   S T A T E S	)	EASTERN BASE SECTION
v.	)	Trial by G.C.M., convened at
Sergeant WILLIE (NMI) HALL	)	Bizerte, Tunisia, 31 January
(33268841) Technician Fifth	)	1944.
Grade EALIE (NMI) LEWIS	)	As to each: Dishonorable dis-
(34223227), both of Headquarters	)	charge and confinement for
and Service Company, 357th	)	life.
Engineer General Service	)	U. S. Penitentiary, Lewisburg,
Regiment.	)	Pennsylvania.

-----  
**REVIEW by the BOARD OF REVIEW**

Holmgren, Ide and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Sergeant Willie (NMI) Hall, Headquarters and Service Company, 357th Engineer General Service Regiment and Technician 5th Grade Ealie (NMI) Lewis, Headquarters and Service Company, 357th Engineer General Service Regiment, acting jointly, and in pursuance of a common intent, did, at Koudiat, near Bizerte, Tunisia, on or about 16 January 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician 5th Grade George Robinson, Company "B", 402nd Engineer Battalion, a human being by shooting him with a pistol.

Each pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Each accused

259308

**CONFIDENTIAL**

**CONFIDENTIAL**

(120)

was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved each of the sentences, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 2000 or 2030 hours 15 January 1944 deceased and a friend of his, Private First Class Johnie Lee Bell of Company B, 402d Engineer Battalion, visited the home of Mr. Justin Devin at Oued-Merdj, near Bizerte, Tunisia. Deceased "used to bring his laundry" there. About 2200 or 2230 hours both accused also visited the home. Accused "seemed to recognize" deceased. Some wine drinking was going on at the house but no one was "unsteady on his feet". "They sat down and talked there for awhile." Deceased had a pistol in his pocket, which Lewis noticed. Witness had seen the pistol clip with ammunition in it before leaving camp. Lewis asked deceased "what he was doing with it". According to Bell, deceased asked Lewis "why" and the latter replied that in three or four days he was going to take the pistol from deceased. An argument developed and Bell started to leave, telling deceased he was ready to go and that he had to work the next day. Deceased told Bell to "go ahead and that he was coming on", and that "he was going in a half hour". When Bell left at 2345 or 0045 hours, Robinson, the two accused, Mr. Devin, his wife and two girls were in the house. When Bell last saw the gun it was in deceased's possession. "He was sitting on it or something; he put it in his pocket". Deceased "kept his hand in his pocket" (R. 13-18).

Devin testified he did not know the names of the accused but he identified both, nominating Hall "the Sergeant", and Lewis "the soldier". He also referred to deceased by his first name "George", and Bell by his nick-name "Kakay" (R. 14,17-19). In most of their testimony, Devin and his wife both used this nomenclature.

Devin testified that after Bell left, "the quarrel or the argument which was taking place became more violent until it reached the point where they all approached each other, plunged toward each other". As to what the argument was about, witness testified:

"I couldn't say exactly but from what I could tell from the words, the word 'speak' was repeated constantly in an angry manner and George would answer 'no speak'" (R. 18).

Asked who first started the bickering or argument, Devin replied:

"First of all it was the Sergeant who was starting the quarrel; by his motions he was making by his arms but I didn't pay much attention because they usually do that. I didn't really notice it until the Sergeant picked up a chair as if he were going to hit somebody" (R. 25).

Deceased appeared to be the most angry of the three soldiers. Witness also testified Lewis was "picking the quarrel" and not deceased. Lewis had a

259305 **CONFIDENTIAL**

# CONFIDENTIAL

(121)

knife (R. 18). It was the same type as one shown witness in court but slightly larger. After Bell left the argument became more violent and it appeared to witness "they seemed to have the manner of going to strike each other". Witness "asked them to calm themselves or leave the house. After that they quieted down". The argument "seemed to be over the gun" which accused had. "They continued to argue". There was some talk by both accused about "I'll tell the Captain" and they made "motions toward the revolver". Deceased "did put his hand toward where the revolver was". Finally they stood up and "started quarreling facing" Lewis. As deceased made a motion with his hand, Hall grabbed it (R. 19). Witness testified:

"That moment the soldier had the knife in a position like this (witness indicated by holding the knife in his right hand, hand extended over his head). The Sergeant was holding Robinson's hand and coming back while the soldier was holding his hand from in front. He was holding Robinson and Robinson's hand was on the pistol. He made a motion from his pocket. At that moment, they all fell onto the davenport all together and at that moment the Sergeant got hold of the pistol, I don't know how" (R. 19).

Everyone, including Devin, was trying to get the firearm (R. 25). It was exactly the same type weapon as one shown to witness and called by the trial judge advocate a "German Luger". Then "they all jumped up", Lewis "brought up the knife", his arm extended over his head, "and gave a blow toward Robinson's shoulder. At that moment, he grabs his hand to keep the hand from reaching the shoulder". Asked what happened after that, witness replied:

"They all overturned onto the divan. George was on his right and the Sergeant in back of him still holding his hand. The soldier (Lewis) was overturned in front of him (George). At that moment George managed to free himself from the other and jumped up from the divan. Each one jumped up at the same time and the impact caused George to fall back in one position and the soldier in another position and the Sergeant in another position. From the impact the table was half turned over and right after the jumping up I heard the shot" (R. 19).

Hall was holding the pistol. Deceased started to fall, but Devin eased him to the floor. Deceased was four feet from Hall when the shot was fired (R. 19). Witness did not think deceased had any weapon in his hand at the time of the shooting. At that time deceased "was still holding Lewis' hand in which he was holding the knife. He had been thrown back with him at the moment each one arose from the davenport" (R. 20). At the time of the shooting, Hall was holding deceased from behind and witness was "still holding the accused by the wrist". Deceased disengaged himself and fell back against the table. Witness did not see anything in deceased's hands. Hall and the deceased were not wrestling (R. 23,24). As far as witness

259308 CONFIDENTIAL

**CONFIDENTIAL**

(122)

knew, "no one had a pistol". Only one shot was fired (R. 20).

Mrs. Devin testified that prior to the trouble she was sitting on the corner of the davenport with a child in her arms. When the quarrel became more violent her husband went over and stood by the fireplace. Hall "pulled his chair up to" deceased and Lewis "pulled out the gun". Hall turned to deceased and said "boom, boom, boom, no good". Lewis had the knife in his hand all this time. They all got up, deceased put his hand on the butt of the revolver, and all three moved toward the divan and fell over. Before they fell she saw Lewis holding his arm over his head with the knife in his hand. At this point Mr. Devin told witness to take the child into the next room. When she came back from the bedroom and was coming through the doorway she heard a shot. She was not able to "give any exact detail as to what happened after that". She did see Hall had a pistol in his hand. Deceased and Hall were a meter or a meter and a half apart. Her testimony as to what happened thereafter in substance corroborated that of her husband (R. 33,34). She further testified that a statement she gave to the French Police was not the truth in all particulars and that was because she "was so afraid of the negro soldiers" (R. 35).

After the shooting, according to Devin, Hall, "the Sergeant with the revolver", said to them "speak" and pointed the revolver at him. Hall also said "speak, fini" making a motion with the revolver. Hall also said "pickaninnies finished if you speak". Devin had three children. Accused then left, taking the body with them. A few minutes after they left Devin heard them and saw them running (R. 20). The next morning Devin saw the body of deceased a few meters from a "gourbi" 150 or 200 meters from his house (R. 21). Devin, asked if he knew where deceased was wounded, replied "The ball was on the right temple" (R. 24). Also asked if he ever saw deceased threaten accused with the pistol, he replied "He didn't actually threaten him and pointed at him. He tried to pull it out several times; there was the Sergeant who kept his hand down". Asked when he first saw the "entire pistol" he answered "When the Sergeant had it in his hand; George had never taken it out completely from his pocket" (R. 25).

Medical testimony was received that an autopsy performed on deceased showed a gunshot wound, 3/8 inch in diameter, entering the right temple, of such a nature that death resulted "within a minute or minutes". That wound and the resulting injury from the bullet penetrating the skull and the brain were the cause of death (R. 5,6).

Prosecution introduced sworn written statements of both accused. They were made voluntarily and after accused's rights to remain silent had been explained. Hall made two statements, Lewis one. The defense stated before these were introduced "there is no objection as to whether the 24th Article of War is complied with" (R. 8). No remark was made as to whether the statements made by Hall were to be considered as evidence as to the guilt of both accused. In these statements accused used substantially the same nomenclature as Devin and his wife. However, they nominate Devin "the Frenchman" and "John", Bell "George's friend" and "Coffee", and Mrs. Devin "Fifi".

Hall's first statement in its pertinent part states that he and Lewis

**CONFIDENTIAL**

259308

**CONFIDENTIAL**

left the house an hour after Bell and at that time deceased was left alone with Devin and his wife, and that he had not noticed that anyone had a gun with him (R. 8). Two days later Hall made a second statement in which he stated that deceased did have a gun, that Hall and Lewis both advised deceased to leave the gun with Devin as "the pistol would only get him into trouble", that finally deceased jumped up with his right hand in his pocket. Hall, thinking deceased was about to shoot Lewis grabbed both arms "and we fell on the couch together", and that while he was holding deceased's arms the pistol was fired. Hall did not know where the shot came from but did see a pistol lying on a table just to his left. Hall and Lewis laid deceased on the floor. Devin then told accused "get out" so they ran out of the house to a truck which they had near by. Hall further stated he was afraid to report the shooting because he thought they would accuse him of murder, and that in a previous sworn statement he did not tell all the truth for fear of being involved in a murder (R. 9,10).

The statement of Lewis was offered and accepted by the court, the law member ruling "the court will disregard anything in the statement which pertains to anyone other than Lewis. Any reference to Hall is to be disregarded by the court" (R. 10). Lewis stated deceased at one time during the evening displayed a revolver in his hand and then put it back in his pocket. About midnight Hall and deceased were arguing about going home. Hall insisting he was going to drive deceased back to camp, but deceased said he would go "when he was ready". Deceased made a motion to draw his revolver. Hall pushed deceased against Lewis, the three falling onto a studio couch. Lewis had a pocket knife in his right hand but did not use it. Deceased had grabbed Lewis' arm but released it when Lewis fell. In an instant the three were back on their feet. While Lewis was standing within reach of and facing deceased, and deceased was facing Hall, Hall being on the opposite side of a table from deceased, a shot was fired and deceased dropped to the floor. Lewis looked at Hall and saw a revolver in his right hand. Hall "put the revolver on the table" and shortly said "Let's get out of here". When back in camp, Hall said to Lewis, "I don't want to hear nothing about this". Lewis just looked at Hall "but did not reply". Hall had a wine bottle when he got back to camp and he said to Lewis "I took this off the table, I wasn't going to leave this, there". Lewis didn't know whether Hall also took the gun (R. 11,12).

Hall testified that while the group were seated in the Devin house they "had a couple of drinks". When deceased asked Devin to "give me my gun" Hall spoke up and said deceased should let Devin keep it as it would get deceased "into trouble". "Lewis repeated the same thing". After a few more drinks and talk, deceased repeated his request and accused repeated their advice, Lewis adding "I am going to have to take it away from you". Deceased "seemed offended at those remarks". Deceased and Lewis were on their feet and Lewis said "brother, you don't have to scratch in your pocket; you can talk to me without scratching in your pocket". The words "scratching in your pocket" meant "threatened he had a gun in his pocket and he wanted to come out; he didn't have to keep his hand in his pocket to talk to him". It was a threatening attitude. As accused could talk to Lewis "with his hand out of his pocket instead of having it in his

# CONFIDENTIAL

pocket" Hall grabbed both of deceased's arms "just above the elbow below the wrist". Deceased had the gun in his hand and told Hall "not to be holding him". They fell onto the bed. Mrs. Devin was then sitting on the corner of the bed. Hall was "still holding when the gun fired" and deceased "was still holding the gun" (R. 27).

Hall further testified Mrs. Devin was standing opposite and he at first thought she had shot deceased trying to shoot Hall. When the gun was fired Hall had both hands on deceased's wrists (R. 27). Mrs. Devin was "the only person that could have had her hand on the gun". Hall never touched it, "never had the gun at no time" and had deceased's hand trying to keep his hand in his pocket" (R. 30). The gun was fired while deceased was holding it and it sounded to Hall like it came "just about my head". He "thought the lady had shot the man from behind". He took the bottle of wine with him when he left the house because he "figured that somebody might think" they were drunk (R. 29). They "left the body right there; \*\*\*never reached to see whether it was wounded or not" (R. 28). Hall helped hold deceased after the shot and he saw the blood coming from his temple (R. 29), "behind his ear" (R. 27). Hall did not know who fired the gun and had seen it in Devin's pocket. Neither he nor Lewis had the gun at any time (R. 28). The gun went off while Mrs. Devin was "trying to raise herself up". Hall still had his back to her (R. 30). After the shooting Hall saw Mrs. Devin lay the pistol "there". That was on a table (R. 31). Hall thought deceased had the gun before the scuffle but he did not feel it and "didn't get my hand down there", he had his hands "around the arm pulling his hand out of the pocket" (R. 32).

Accused Lewis elected to remain silent.

4. There is evidence that, on the date alleged, Technician Fifth Grade George Robinson, the person named in the Specification, was killed by a bullet from a pistol fired by accused Hall who, immediately prior to the fatal shooting, had forcibly taken the pistol from the deceased who had it concealed on his person. There is evidence that accused Lewis had previously started an argument with Robinson, apparently concerning the pistol and that Hall had joined Lewis in that verbal altercation. This was presently followed by a concerted physical assault upon Robinson. In the ensuing struggle Lewis drew a knife and struck at Robinson with it but the latter succeeded in averting the blow by grasping his assailant's hand. At or about this time, Hall got possession of the pistol and thereupon pointed and fired the pistol at Robinson, killing him. There is evidence that at the time of the shot Robinson had backed away about four feet from Hall and that he was still holding Lewis' hand restraining him from using the knife. It also appears that the pistol had been in Robinson's pocket up to the time it was taken away from him by Hall.

The act of Hall clearly constituted murder. The circumstances under which it was committed, following his participation in a deliberate and wrongful assault, exclude any theory of legal excuse or justification. Self-defense was not asserted by accused and since Robinson was not armed when he was shot, there could be no legal basis for such a defense. That the homicide was committed with the requisite malicious intent is inferable from

# CONFIDENTIAL

259308

**CONFIDENTIAL**

(125)

the kind of weapon used and the knowledge on Hall's part that the shooting of a pistol at Robinson would probably cause his death or inflict upon him grievous bodily harm (MCM, 1928, par. 148a). (Lewis, on the other hand, is also guilty of the offense charged. The findings as to him are sustainable under the rule that, )

"All who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a homicide committed by one of them while acting in pursuance of, or in furtherance of, the common design" (29 C.J. 1073).

And, as elsewhere stated,

"If the unlawful act agreed to be done is dangerous, or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design" (26 Am. Jur., Homicide, sec. 66).

Consistently therewith:

"An assault and battery may be committed under such circumstances or in such a manner as to make the killing, if it results, murder, although there was no formed design to take life" (26 Am. Jur., Homicide, sec. 195).

It is inferable from the evidence that the accused were motivated by a common unlawful purpose when they commenced the assault upon deceased. Whatever the ultimate purpose in view, whether it was merely, as it appears, to obtain possession of the deceased's firearm by force or, as indicated by the unbroken sequence of events, to accomplish the homicide, it is clear that the assault, from its inception, involved ominous contingencies. Its dangerous and violent character became definitely fixed when Lewis drew his knife and in the ensuing struggle attempted to stab deceased. Involving the use of a dangerous weapon, his act denoted knowledge that, if successful, it would probably cause the death of, or grievous bodily harm to, the deceased. Malicious intent is thus inferable. ( If Lewis had succeeded in inflicting a mortal wound on his intended victim, it would have constituted murder, for which Hall as well would have been responsible. The fact that the homicide was actually accomplished by Hall and by means of a different weapon does not affect Lewis' liability, for all the attendant circumstances justify a finding that the former's deadly use of the pistol was a natural and probable consequence of the violent encounter occasioned by concerted action in the furtherance of a common design.) And with the presence of a like malicious intent on the part of Lewis, it was particularly appropriate

253308 **CONFIDENTIAL**

(126)

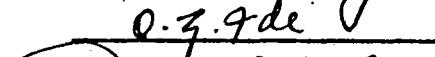
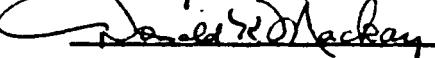
# CONFIDENTIAL

for the court to infer that the homicide was a plain and direct result of that design. Attaching to Lewis are the further incriminatory circumstances that he was the provocator of the assault upon the deceased and that before the fatal shot was fired he did not at any time withdraw from the difficulty he had created. His felonious assault with a knife, which only momentarily preceded the act of his confederate, clearly signifies that his malevolent purpose persisted throughout. It follows that Lewis is equally responsible with Hall for the homicide.

The Specification alleges that the killing was at Koudiat, near Bizerte, while the record shows it was done at Oued-Merdj, near Bizerte. As the place is not of the essence of the offense alleged and particularly as the accused was not misled by the variance, the failure to prove the place to be as alleged is immaterial (NATO 419, Addison; NATO 544, Helton).

5. The charge sheet states that accused Hall is about 37 years old. He was inducted into the Army 3 June 1942 and had no prior service. Accused Lewis is about 32 years old. He was inducted into the Army 5 June 1942 and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentences. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

 Donald R. MacKay, Judge Advocate.  
 O. J. G. de Vries, Judge Advocate.  
 Donald R. MacKay, Judge Advocate.

253308

- 8 -

# CONFIDENTIAL

**CONFIDENTIAL**  
 Branch Office of The Judge Advocate General  
 with the  
 North African Theater of Operations

APO 534, U. S. Army,  
 8 March 1944.

Board of Review

MATO 1489

UNITED STATES	)	FIFTH ARMY
v.	)	Trial by G.C.M., convened at
Privates WILLIAM L. TIMBERS	)	Naples, Italy, 19 November
(33212356), EUGENE W. MINOR	)	1943.
(38071354), DANIEL H. McKEITHEN	)	As to each accused: Dishonorable
(31010676) and WILLIAM M.	)	discharge and confinement for
WILLIAMS (13105577), all of	)	20 years.
Company C, 480th Port Battalion,	)	Eastern Branch, United States
Transportation Corps.	)	Disciplinary Barracks, Greenhaven,
		New York.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were tried upon the following Charge and Specification:

CHARGE: Violation of the 66th Article of War.

Specification: In that William L. Timbers, Eugene W. Minor, Daniel H. McKeithen, and William M. Williams, each a Private of Company C, 480th Port Battalion, Transportation Corps, acting jointly and in pursuance of a common intent, did, near Paestum, Italy, on or about 30 September, 1943, attempt to create a mutiny in quarters by concertedly refusing to obey the lawful orders of First Lieutenant Edgar L. Venzke, Company C, 480th Port Battalion, their superior officer, to cease drinking aboard ship and to retire, with the intent to subvert and override, for the time being, lawful military authority.

270227

**CONFIDENTIAL**

**CONFIDENTIAL**

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions by summary court-martial, one for unlawfully striking a soldier and the other for failure to obey the lawful order of a superior officer, each in violation of Article of War 96 was introduced as to accused Timbers; evidence of one previous conviction by special court-martial for being drunk and disorderly in camp, in violation of Article of War 96, was introduced as to accused McKeithen. No evidence of previous convictions was introduced as to accused Minor and Williams. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentences but reduced the period of confinement to 20 years as to each accused, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 29 September 1943, the Liberty ship James Russell Lowell was at anchor about one and one-half miles off the beach at Paestum, Italy (R. 5.6). First Lieutenant Edgar L. Venzke was the senior officer in charge of troops on the ship, consisting of 75 or 80 soldiers (R. 20). These were divided into five stevedore "gangs" which were charged with the duty of unloading the ship's cargo (R. 6). The only other Army officer aboard was a transport quartermaster lieutenant (R. 20). The men were on 24 hour duty and the "gangs" were rotated (R. 7.17).

At about 2100 hours 29 September 1943, it was reported to Lieutenant Venzke that there was a commotion aboard the ship. This officer testified that, attended by First Mate Moran, he proceeded to a room on the first deck, below the main deck (R. 6) known as the "scuttle-butt" (R. 9.64) where he found about 20 soldiers who were drinking, gambling, arguing and fighting or scuffling among themselves (R. 6). Some men were tussling. The men had been drinking and the place reeked of alcohol (R. 8). There was a "very loud commotion and general disorder" (R. 6). Accused McKeithen was half-crouched in a corner "shooting crap". Lieutenant Venzke did not notice the other three accused when he first arrived (R. 8). He ordered all of the men to retire from the room and go to bed whereupon all of them except the four accused slowly made their way down the corridor. The four accused stood at the bottom of the companionway and made no attempt to go. Lieutenant Venzke repeated the order, addressing the men directly. Instead of leaving, the four accused "got together in a compact group and stood", "muttering and cursing among themselves" (R. 6.7). Lieutenant Venzke moved toward them and repeated the order whereupon accused Timbers told the lieutenant "sneeringly" not to "get rough". Lieutenant Venzke testified:

"The group stood toe to toe with me, looking me directly in the eye. Timbers stood with his fists clenched at his side, stripped to the waist. At that point, I drew my pistol. Then, Minor said, 'Hit him, hit him! He won't shoot,' \*\*\*As there was no movement of the group of four men, I stepped forward and jammed the pistol into the bare mid-riff of Timbers" (R. 7).

**CONFIDENTIAL**

**CONFIDENTIAL**

The group stood for a few moments, then started to slowly retire down the corridor. Lieutenant Venzke lowered his pistol, returned it to the holster and proceeded to the ship's bridge where he signalled the military police (R. 7,21).

The men aboard ship had been working during the day but at this time had been unoccupied for about two hours as there was no craft to load. They had been drinking alcohol which they had taken from medical supplies in the ship's cargo (R. 14). The sailors and merchant marines on the ship had also been drinking and the ship's captain was drunk. There were very few sober people on the ship (R. 21). A military police officer, responding to signals from the ship, went aboard with twenty men, arrested the four accused and another soldier and sent them ashore in custody of ten men. He testified that they had been drinking, were drunk and belligerent and were reluctant to obey orders which, however, they appeared to understand. At the request of Lieutenant Venzke, he remained aboard ship overnight with ten of his men (R. 22-26).

Accused Williams testified that he was not in the scuttle-butt of the ship at the time of the disturbance. He had been there early in the evening but began playing cards with some merchant marines at about 1900 hours in the merchant marine mess hall (R. 27,28). He was the only soldier in the game (R. 29). He had had nothing to drink and was perfectly sober (R. 27,28). Lieutenant Venzke came in where he was playing and ordered him to go to his quarters. Accused gathered up his money and went on deck where he had been sleeping, laid down and went to sleep. He did not refuse to obey any orders of Lieutenant Venzke (R. 27). He did not know about the trouble in the scuttle-butt until he was awakened by the "M.P.s" and arrested (R. 28,29).

Accused Minor testified that at the time of the disturbance he was in the scuttle-butt watching a card game when a merchant marine or a sailor who was drunk drew a pistol on him, and said "he was shooting me". Minor reported the incident to Lieutenant Venzke who told him to "go back and lay down" and "I went on and laid down" (R. 31,32). This was at about 2100 or 2130 hours. Lieutenant Venzke was standing at the water fountain "telling the boys to break up the game". Minor was not in company with the other three accused. He did not hear any loud shouting, talking or scuffling (R. 31). The man that drew a gun on him wore khaki pants. Minor did not see Lieutenant Venzke at that time, "He must have just come down stairs" (R. 33). Minor did not remember hearing Lieutenant Venzke shout attention when he came down the stairs. "He didn't say anything".

"When he (Lieutenant Venzke) first came down, he asked how many were sleeping in those beds. I saw him twice. I told him I didn't know. He went on back" (R. 34).

The second time Minor saw Lieutenant Venzke was after the merchant marine had drawn a gun on Minor. The light was very bad and he "didn't recognize Lieutenant Venzke was there". He did not hear Lieutenant Venzke tell the men to go on up and go to bed. The lieutenant told him to go to bed. It was not like an order from an officer. Minor did not know where the other

**CONFIDENTIAL**

**CONFIDENTIAL**

three accused were at that time (R. 34). He had nothing to drink that night. Lieutenant Venzke did not tell the soldiers to break up the game. The captain of the ship told them to break up the game and they said "Yes, sir" (R. 35,36). Lieutenant Venzke was not in the room at the time (R. 36).

Staff Sergeant Eugene J. Meyers, Company C, 480th Port Battalion, a defense witness, testified that he knew all of the accused and that he was present when there was a "ruckus" on the ship James Russell Lowell (R. 36).

"I saw two men arguing. I came up the troop compartment, and went out to see what the noise was about. I saw Timbers, here, arguing with another man. At that time, I believe it was the first mate of the ship, came out and ordered Timbers and this other man, and all the soldiers in this compartment to go back into the troop compartment. At that time, our officer in charge, Lieutenant Venzke came down. He also ordered them back to the troop compartment, and the men went back into the troop compartment" (R. 37).

Timbers and McKeithen were present but Williams and Minor were not there at the time (R. 37). Witness testified that he was in the scuttle-butt before Lieutenant Venzke. While he was there the mate of the ship came down brandishing a pistol and ordered the men back to the troop compartment (R. 41). Witness then went up and reported to Lieutenant Venzke that there was some difficulty in the scuttle-butt and brought the lieutenant to the place. The lieutenant preceded him. Witness saw Timbers depart from the scuttle-butt. Lieutenant Venzke did not have his pistol out of the holster and did not hold a pistol against Timbers' bare belly. There was no other "rumpus" of this kind that night in the troop compartment or the scuttle-butt (R. 37,38). He and Lieutenant Venzke were in the scuttle-butt about 20 or 25 minutes. There was some "mumbling" when the men walked off after receiving orders from Lieutenant Venzke. Sergeant Meyers did not see the men drinking but "saw the effects of it" (R. 39). He remained and talked with Lieutenant Venzke after the men had left (R. 41). It was the "mate that got the soldiers to leave". At no time did witness observe four men refuse to obey an order given by Lieutenant Venzke (R. 42).

Staff Sergeant Leroy L. Jackson, Company C, 480th Port Battalion, a defense witness, testified that a soldier asked him to go down between decks as they were "having a little argument".

"I went down there, and as I got down there, Lieutenant Venzke and the ship's mate were down there. They told the men, 'Now, all you men there go to Number 1 Hatch and go to sleep, or the place where you sleep at.' There were no quarters. We slept the best we could. Timbers was the closest to me. He turned to Timbers and told Timbers to come on and get out of here. He said, 'Can I have a drink of water'. He got a drink of water, and turned and started to go back to the steps where he turned, and I said, 'No. Up to Number 1 Hatch.' He said, 'I don't sleep at Number 1 Hatch. I sleep between decks in

**CONFIDENTIAL**

**CONFIDENTIAL**

(131)

Number 3 Hatch.' Then he started back to there, him and another soldier by the name of Washington. They went back behind there. I started to clear the decks. They went down between decks. So, after going up to the top deck and clearing the steps there, I walked away on the top deck, and I went to bed" (R. 44).

Witness knew each of the accused. He saw Timbers there but did not see the other three. He saw Sergeant Meyers there. He did not see the four accused "gang up together" or refuse to obey the orders of Lieutenant Venzke (R. 45, 53). The light was "fair" and witness could easily recognize everybody in the place. He told them to "come on and go to bed". One of the men asked for a drink of water (R. 47). Timbers was standing near the water faucet as Sergeant Jackson came down the steps, with a soldier named Washington. Lieutenant Venzke was standing with his right hand on his hip and "he had a disgusted manner on his face" (R. 48, 54). His gun was in the holster. He did not see any drinking (R. 49) and saw nobody drunk on the ship that night (R. 54). He did not hear Lieutenant Venzke issue any orders to the men but Lieutenant Venzke ordered him to "make the men go to their respective places and go to sleep", and he started to carry out the orders. To the best of Sergeant Jackson's knowledge every man left. He did not know whether or not they all left at that particular moment as he "went to make sure that they slept where they said they slept". Sergeant Jackson was not the last to leave (R. 51). Lieutenant Venzke, the mate and seven or eight soldiers were there when he last saw them (R. 51, 52). He saw accused Timbers leave (R. 52). "He went right in front of me" (R. 53).

Staff Sergeant Meyers was recalled as a court witness and testified that he and Sergeant Jackson were the very last to leave the scuttle-butt (R. 59). He did not recall whether or not Sergeant Jackson left with any soldier (R. 57). When Lieutenant Venzke ordered the men out of the scuttle-butt Minor, Timbers and McKeithen were within arms reach of each other (R. 61), but at no time did he see Williams there (R. 60). When Lieutenant Venzke left "Jackson and the men were following him right up the stairs". Lieutenant Venzke told both Sergeant Meyers and Sergeant Jackson "Let's get these men out of here to bed" and the three of them immediately started clearing the scuttle-butt. He heard Timbers tell Lieutenant Venzke about the mate drawing a gun on him. Everyone was disturbed about it (R. 62). The mate had a pistol in his hand when he came down stairs (R. 63).

Lieutenant Venzke, recalled as a rebuttal witness by the prosecution, denied that he received a report by Sergeant Meyers to come to the scuttle-butt. He did not recall seeing either Sergeant Meyers or Sergeant Jackson in the scuttle-butt. He gave the order to clear the scuttle-butt directly to the men themselves. He was standing within a foot of the four accused (R. 64). "They were roughly grouped almost two behind the other" (R. 66). The light was "quite bright" (R. 64). When he went upstairs the compartment was cleared of men. He saw Sergeant Meyers when the military police were preparing to take the men from the ship after their arrest. He was attempting "rather strongly" to intercede for accused (R. 65, 67, 68), and told the officer he was making a mistake and asked why the military police were

**CONFIDENTIAL**

coming aboard (R. 68). Witness did not recollect that Timbers asked permission to get a drink before retiring. Both Sergeant Jackson and Sergeant Meyers had a good reputation in his company (R. 66). He had found them to be truthful and reliable most of the time but not always (R. 70). He was "unable to figure" why they placed a different construction on the incident than he did (R. 67). Had he seen either of the two sergeants there he would not have issued the orders to them to clear the scuttle-butt, but, under the circumstances, would have issued the orders himself (R. 70).

The accused Timbers and McKeithen elected to remain silent (R. 57).

4. It thus appears from competent evidence that at the time and place alleged, while accused and other soldiers were carousing aboard a cargo ship on which they were on duty, First Lieutenant Edgar L. Venzke, the senior Army officer aboard the ship, went to the scene and ordered all of the men to retire from the scene. All but the four accused departed. Lieutenant Venzke repeated the order but the four accused drew together in a compact group, assumed a defiant attitude and stood muttering and cursing among themselves. Lieutenant Venzke moved toward the group and repeated the order. Accused Timbers told the officer "sneeringly" not to get rough. He stood with his fists clenched and all the men stood fast and looked the officer "directly in the eye". The officer drew his pistol. Minor said "Hit him, hit him, he won't shoot". The officer stepped forward and thrust his pistol into the bare midriff of Timbers. The group stood their ground momentarily before they then retired. The four accused thus concertedly defied lawful military authority and in aggravation of their act of insubordination, exhibited minacious behavior.

The defense testimony conflicted with that of the prosecution as to the events described and as to the presence of certain accused, but it was within the province of the court to determine the accuracy and veracity of the witnesses before it.

The Manual for Courts-Martial (par. 136a) states:

"Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority \* \* \* The concert of insubordination contemplated in mutiny or sedition need not be pre-conceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent".

Applying these definitions it is clear that the elements of attempted mutiny were present. The deliberate failure by accused to obey the orders, given substantially as charged, constituted collective insubordination and the concert of physical action by all accused together with the remarks of two of accused carried a plain inference that the insubordination was the result of a combination, a tacit understanding, to resist lawful military

**CONFIDENTIAL**

**CONFIDENTIAL**

authority. Only an attempt to create a mutiny is alleged. The proof establishes the requisite mutinous intent and the acts done in furtherance thereof plainly tended to consummation of the mutiny contemplated. The findings of guilty are supported by the evidence.

It is not shown that McKeithen or Williams expressly refused to obey the orders as given or made any defiant remarks other than by participating in the "muttering and cursing". Their physical actions and demeanors were alone sufficient to show insubordination in combination with the other two accused. It was not necessary to prove with respect to any accused a previous deliberate combination for mutual aid and encouragement or any preconcerted plan of operations to effect the illegal object (Winthrop's, reprint, p. 582, note 65); and the voluntary abandonment of purpose was no defense (MCM, 1928, par. 136a).

5. The charge sheet shows that:

Accused Timbers is about 24 years old. He was inducted into the Army 10 September 1942 and had no prior service.

Accused Minor is about 26 years old. He was inducted into the Army 31 January 1942 and had no prior service.

Accused McKeithen is about 33 years old. He was inducted into the Army 12 February 1941 and had no prior service.

Accused Williams is about 41 years old. He enlisted 1 October 1942 and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as to each accused and the sentences.



Judge Advocate.

D. J. G. de, Judge Advocate.

(sick), Judge Advocate.

**CONFIDENTIAL**



**CONFIDENTIAL**

(135)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army.  
1 April 1944.

Board of Review

NATO 1490

U N I T E D   S T A T E S	)	FIFTH ARMY
v.	)	Trial by G.C.M., convened at
Technicians Fifth Grade IVAN J.	)	Naples, Italy, 18 November
JOHNSON (38022249), WILLIAM S.	)	1943.
BROOKIN (33321285) and Private	)	Accused Johnson and Whitaker:
JAMES WHITAKER (34320364), all	)	Dishonorable discharge and
of Company B, 49th Quartermaster	)	confinement for 15 years.
Truck Regiment.	)	Accused Brookin: Dishonorable
	)	discharge and confinement for
	)	20 years.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were jointly tried upon the following Charge and Specifications:

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Technician Fifth Grade Ivan J. Johnson, Technician Fifth Grade William S. Brookin and Private James Whitaker, all of Company B, 49th Quartermaster Truck Regiment, acting jointly and in pursuance of a common intent, did, at Naples, Italy, on or about 7 October 1943, unlawfully enter the dwelling of Mr. Formicola Gennaro, Via Campagna 12, with intent to commit a criminal offense, to wit, robbery therein.

Specification 2: In that Technician Fifth Grade Ivan J. Johnson,

**CONFIDENTIAL**

267450

CONFIDENTIAL

Technician Fifth Grade William S. Brookin and Private James Whitaker, all of Company B, 49th Quartermaster Truck Regiment, acting jointly and in pursuance of a common intent, did, at Naples, Italy, on or about 7 October 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Doctor Mario Guenzi, two 500 Italian lire notes and one 1000 Italian lire note, value about twenty dollars (\$20.00) and one watch, make unknown, value about forty dollars (\$40.00), all of the aforementioned, the property of Doctor Mario Guenzi.

Specification 3: In that Technician Fifth Grade Ivan J. Johnson, Technician Fifth Grade William S. Brookin and Private James Whitaker, all of Company B, 49th Quartermaster Truck Regiment, acting jointly and in pursuance of a common intent, did, at Naples, Italy, on or about 7 October 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Mr. Rino Gerrini, eight 1000 Italian lire notes and one 100 Italian lire note, value about eighty one dollars (\$81.00), and one wristwatch, make unknown, value about twenty-five dollars (\$25.00), all of the aforementioned, the property of Mr. Rino Gerrini.

Each accused pleaded not guilty to the Charge and Specifications. Each was found guilty of the Charge and of Specification 1. Each was found guilty of Specification 2 except the words, "value about forty dollars", substituting therefor the words, "of some value", of the excepted words, not guilty, of the substituted words, guilty. Each was found guilty of Specification 3 except the words "value about twenty-five dollars", substituting therefor the words, "of some value", of the excepted words, not guilty, of the substituted words, guilty. Evidence of one previous conviction by summary court-martial for absence without leave, in violation of Article of War 61, was introduced as to both the accused Brookin and Whitaker. No evidence of previous convictions was introduced as to Johnson. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Johnson and Whitaker for 15 years, and Brookin for 20 years, three fourths of the members of the court present concurring as to each sentence. The reviewing authority approved each of the sentences, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence as it pertains to Specification 1 shows that about 1300 hours on 7 October 1943, three American soldiers opened the door of the home of Formicola Gennaro on Via Campagna, Naples, Italy, and entered without invitation. One of the soldiers carried an axe in his hand which he waved while saying, "give me pistol, pistol" (R. 5,6,16,17,18). Gennaro and his wife, witnesses for the prosecution, positively identified Brookin as the soldier carrying the axe. Gennaro testified, "I am sure of one, and the other two I am doubtful" (R. 5,15,16,18,19). Gennaro gave Brookin a pistol (R. 6,8,17,18) "because I was afraid. They asked for a pistol, and

CONFIDENTIAL

267450

he had an axe in his hand" (R. 8). Brookin fired the pistol outside the window and the three soldiers went away. The three returned soon, Brookin with the pistol in his hand. Brookin asked for more pistols. They broke some furniture, took a 50-lira note from a drawer (R. 8,9,18,19) and Brookin fired a shot in the direction of Gennaro, saying "Pistol, Pistol" (R. 11,12). Later in the day the three accused were apprehended and searched. The pistol taken from Gennaro was found in Brookin's pants leg (R. 43,54). Several rounds of Italian ammunition and Italian currency was taken from each of the accused (R. 43,44,45). The pistol was identified by Gennaro by its serial number (R. 7), and was received in evidence (R. 10; Ex. 1). Mrs. Gennaro was asked under cross-examination about her having been called upon the day following the incident, to identify accused from a group of colored soldiers and testified that "I said I think this is the one" (R. 20).

Pertaining to Specification 2 the evidence shows that on 7 October 1943, Dr. Mario Guenzi was the vice-manager of a plant at Via Campagna, 31, Naples, Italy (R. 22). At about 1330 or 1400 hours (R. 24) he was in his office and heard a shot fired outside. He saw three colored soldiers approaching the door (R. 22,24). He called Domenico Carbonelli, one of his employees (R. 20,22) and they went to the gate. One of the soldiers asked Carbonelli if he had any arms, and they searched him and took his key chain. One of the soldiers then seized Dr. Guenzi's wrist and attempted to take his wrist watch. He resisted and another soldier fired a shot "on the ground". Dr. Guenzi removed his wrist watch and gave it to the soldier who had seized his wrist (R. 21,23). Carbonelli ran away (R. 21). The soldier took Dr. Guenzi's purse from his hip-pocket, extracted two 500-lira notes and returned the pocket book. He also took some cigars and a 1000-lira note from Dr. Guenzi's pocket. The same soldier then "wants to take my pocket-book, and I didn't want to give it to him, and he shot another time on the ground". The watch was a chronometer bearing the trade-mark, "Bertu, Geneva" (R. 23,25). It was made of silver and chromium and was of some value. Dr. Guenzi could not identify any of the three accused but he was of the impression that the tallest of the three accused was the one "who pointed the gun at me" (R. 24,25,26). One had a "yellow box" in his possession (R. 40).

Raffaele Neri, a typist in Dr. Guenzi's office, testified that he heard one shot outside the gate (R. 26,31). He went near the window when the three soldiers arrived and observed them from a distance of four or five yards (R. 27). He did not see Dr. Guenzi or "Mr. Gerrini" at that time, but saw the soldiers taking a wallet from one "Sacko". He saw no other colored men there that day (R. 27,30). Witness testified that the soldiers afterwards entered the offices and there they took from witness some money and a silver "hexagonal" pencil (R. 27). There were two shots fired before they came into the office and three shots afterwards (R. 31). Witness identified the accused Whitaker and Brookin. Brookin "was shooting". The third soldier had in his hand a yellow colored box about 16 inches long (R. 28). Witness identified accused Johnson but later testified, "He looks like him, but I am not sure" (R. 28,29). Later, upon cross-examination as to the identity of the accused witness testified:

"I believe that they are, sir, but I am not sure if they are. I couldn't swear that they are them" (R. 29).

267450

CONFIDENTIAL

Ramondo Milone, an employee of the establishment at 31 Via Campagna saw all three soldiers enter. One had a revolver, another had a small box in his hands and the other had a raincoat "across his hand". The one with the gun held it in his left hand and with his right hand "searched the pocket". While he was doing this "the other was begging him to stop everything and go away" (R. 68). He testified that the one with the gun had gold or silver teeth "shiny on both sides". The court directed the three accused to show their teeth and the witness indicated Brookin. However, when asked if he were positive that Brookin had the revolver witness testified:

"Naturally, I can't swear. You see, as we never see any colored boys around here it is very difficult for us to learn a face of that kind" (R. 69).

As it pertains to Specification 3 the evidence shows that on 7 October 1943, at about 1430 hours (R. 32,34,38) three colored soldiers entered the dwelling house of Rino Guerrini at Via Campagna, 21, Naples, Italy, which is about 100 yards from the establishment at 31 Via Campagna. Mr. Guerrini was going home for lunch when the soldiers entered. They took his watch. He tried to defend himself but one of the soldiers shot (R. 32,39) into the ceiling (R. 35,39). They also took his wallet containing eight 1000-lira bills and one 100-lira bill of Italian money (R. 32). He thought that Brookin was the soldier who shot, but was not sure (R. 36,37). Another eye witness to the incident identified Brookin as one of the three soldiers who took Guerrini's watch and while "in doubt" formerly, at the time of trial thought he was sure of the identity of the other two accused (R. 39,40). One of the soldiers had a small yellow box in his back pocket. Two wore helmet liners and one wore an overseas hat (R. 33). The watch was a "Tavaness" (R. 34); it was keeping time and was of some value (R. 35).

First Lieutenant Eugene E. Trapp, Company B, 49th Quartermaster Truck Regiment, testified that on 7 October 1943, at approximately 1400 hours, he was ordered to investigate a disturbance in the area near by. He saw the three accused back of a tree. They started walking away and then ran. He recognized accused Whitaker and called his name. They all stopped and came toward him in the rear of a building. They were carrying something that looked like a "meat block loaf can". When they got to where the officer was waiting for them the can was gone. A civilian recovered the can from behind the building. It was about 3" x 3" x 14" and of "real light brown" color (R. 41,42). Brookin had a holster "sticking out of his raincoat". The officer searched him for a pistol but could not find one (R. 45). The three accused were then taken to the bivouac area and searched (R. 42,43). The pistol was found in Brookin's "G.I." coveralls, through a hole in the pocket, in the pants leg. There were at least two cartridges in the chamber and an empty cartridge case (R. 43). Four 1000-lira notes, two 500-lira notes and the ammunition were taken from the person of Brookin. From accused Johnson there were taken four 1000-lira notes, one 100-lira note, a "Fedatta" wrist watch and some ammunition (R. 44). The witness was not sure whether or not more than one wrist watch was taken from the three accused (R. 47). From Whitaker there were taken 132 lire in small denominations and a number of

CONFIDENTIAL

267450

~~CONFIDENTIAL~~

(139)

cartridges (R. 45). The ammunition found on all three accused fitted the revolver found on Brookin (R. 48). A silver pencil was also taken from one of the three accused. It was described as a silver mechanical pencil with "sides shaped in an octagon or hexagon" (R. 47,53,54).

The accused were apprehended solely upon the assumption that they were drunk and disorderly. Therefore while the pistol with the ammunition was confiscated, the money, watches, pencil and other items considered personal were returned to them. When the articles were returned the pencil was given to accused Whitaker, who said that he did not want it (R. 54); "We put it on him but he didn't want it". Whitaker held the pencil for a while then tried to give it to an officer, who would not accept it. Whitaker then offered it to another officer and became insistent that he take it. He kept saying he "didn't want it" and finally tossed it into a little wood box near by. When a search was made for it later it could not be found (R. 54, 55).

The investigating officer testified, on cross-examination by the defense, that on 18 October 1943, he arranged for a number of witnesses to view a line-up of colored soldiers to ascertain whether or not they could identify the persons who had committed the various offenses. There were nine soldiers in the line-up including the three accused (R. 64). After looking at the nine soldiers, Gennaro was "not certain" and neither Mrs. Gennaro nor Carbonelli could identify any of them. Dr. Guenzi thought that Whitaker and Brookin were two of the three soldiers who participated in the robbery at his establishment but he was "not positive". Guerrini "partly identified" Johnson and picked out a Private Skelton, whom he thought was connected with the robbery in his house, but his identification was "not positive". He made no identification at all of Brookin. One witness "thought" Whitaker and Brookin "were two that were involved in the robbery" (R. 65). After the witness had testified on cross-examination that only one of the persons at the line-up identified the accused positively (R. 65), he was asked by the court who this person was. Witness then testified that it was Ramonda Milone (R. 67), the employee at the establishment at 31 Via Campagna.

The investigating officer also testified that he arranged for Gennaro to view six pistols. The pistols were placed on a table and he originally picked out an Italian pistol with a "sexagonal barrel" which "didn't have a trigger guard". Later he was handed the pistol which was found on Brookin and asked "Is this your pistol?" He inspected it for a moment and then answered affirmatively. Prior to picking out the pistol Gennaro gave the investigating officer two numbers "as thinking they might be the ones" on his pistol (R. 66). "He said it was either '5590', or '9055'". The correct number on the pistol was 9055 (R. 67).

A military police officer who investigated the case testified that he questioned the three accused after their arrest and each of the accused admitted that he was in the presence of the others that day (R. 59,60,61). The officer had not warned the accused that they had a right to remain silent, and his testimony was admitted over the objections of defense counsel (R. 59,60).

~~CONFIDENTIAL~~

267450

CONFIDENTIAL

Dr. Guenzi testified that he did not think the men who entered his office were drunk "because they were standing up naturally, just as any sober man". He had the impression that "they were drinking a little bit, but without being intoxicated". They walked in a "very wavering way\*\*\* They looked happy. They didn't walk straight\*\*\*people who are happy don't walk straight, they make motions with their hands" (R. 68). Another witness who saw them at the time they were in the office at 31 Via Campagna testified, "The one who had the gum (Brookin), he was in a state of quite intoxicated, sir" (R. 69). The officer who apprehended accused testified that Johnson "definitely" did not appear to know what he was doing. He "passed out" about five minutes after he was placed under guard (R. 42). This witness testified, "The other two didn't have their normal senses\*\*\* but if they did or didn't know what they were doing, I couldn't say". They were able to talk and walk but they could not talk "intelligently at all" (R. 43). Johnson was "very drunk", the other two were "fairly drunk" (R. 49). When arrested they were brought to the area in a "jeep". They had been seen running through an orchard before they were apprehended. The witness could not see whether Johnson was being supported by the other two but he got into the "jeep" unassisted (R. 51).

An officer who saw the accused as they were brought in, testified that Johnson was "definitely intoxicated". He could tell that the other two had been drinking but he did not think they were "drunk or intoxicated" (R. 56). Brookin and Whitaker could talk coherently and appeared to know what they were doing. He considered them in suitable condition to go on guard duty at that time (R. 57).

A military police officer who questioned the three accused in "the early part of the afternoon" after their arrest (R. 58), testified that they had been drinking. They were not intoxicated to the extent that they did not know what they were doing. They discussed matters coherently (R. 59).

Accused Brookin testified that on 7 October 1943, he had purchased the pistol found on him from an Italian guard, about a block away from his "area". He also got the ammunition from the "Italian fellow" (R. 71,75, 82). He had met the guard in an alley and had not seen him before (R. 72). He denied that he or the other accused had participated in any of the offenses charged in the three Specifications and denied that before the line-up he had seen any of the Italians who were robbed (R. 72,73). He had been paid \$31.20 in American money on the ship (R. 75,80), and had left the ship on the "third or fourth" (R. 79). He had been given no opportunity to exchange the money before leaving the ship (R. 74). He had exchanged his money for Italian currency with an Italian in a park near the docks (R. 77,79). He had \$55.00 and most of the Italian money he received was in 1000-lira notes. After exchanging his money he gambled but "broke even" (R. 81). On 7 October 1943, he and another soldier, whose name he did not know, spent one dollar each for some wine which they drank (R. 79,80). He spent no more money from the "fourth until the seventh" (R. 82). He testified that on the day in question he and the other accused left their company area at about 1030 hours and went about a block away to a house in the alley where they "get cognac" (R. 74). At 1100 hours (R. 89) a lady

CONFIDENTIAL

267450

**CONFIDENTIAL**

(14)

whom he did not know (R. 82,88), living about a block and a half from the area, invited them into her house because it was raining. She gave them some wine "as a present". In the house he drank about three glasses of cognac (R. 82,88). They remained in her house about a half hour (R. 82), and returned to the area for "chow" (R. 75). About 15 minutes later they returned to the alley. It was then that he bought the pistol (R. 75). He fired the pistol about five times in the alley (R. 76). They heard a "jeep" and knowing that they "were out without permission" they went into the orchard because they did not "want to get caught" (R. 75).

The accused Whitaker and Johnson elected to remain silent (R. 89).

The Law Member stated:

"On the court's motion, the testimony of Brookin will be considered only with reference to the Charge against Brookin. It will not be considered as having any bearing against the other accused" (R. 89).

4. The evidence shows that at the time and place alleged, the three accused intruded the dwelling of Formicola Gennaro. Accused Brookin, brandishing an axe in his hand minaciously, demanded a pistol and Gennaro, frightened, gave him one which was found on that accused when subsequently apprehended. He fired a shot outside the window and then departed with the other two accused. The three soon returned and Brookin discharged the pistol in the direction of Gennaro apparently demanding more pistols. They broke furniture and rifled some money from a drawer in the house. It is manifest that accused acted jointly and in pursuance of a common intent. The entry was unlawful and the intent to commit the crime alleged is inferable from the facts and circumstances. All elements of the offense set forth in Specification 1 of the Charge are clearly established (MCM, 1928, par. 149e).

Following the above incident, the three accused accosted a Dr. Mario Guenzi and by force and violence and by putting him in fear, obtained from Guenzi the watch and money as alleged in Specification 2. When the victim demurred one of the accused discharged a pistol shot into the ground. There is evidence that about the same time other persons in the immediate vicinity were searched by accused and deprived of articles of personal property. Other shots were heard and Brookin was identified as the one with the pistol. Accused Whitaker was also identified as being present with Brookin. The evidence further shows that the three accused afterwards entered the dwelling of one Rino Guerrini and there with force and violence and by putting him in fear, took from Guerrini the personal property described in Specification 3 of the Charge. When Guerrini resisted, the accused with the pistol, whom the victim thought was Brookin, fired a shot into the ceiling. The identity of the three accused was more positively made by another witness. That the accused acted concertedly and in pursuance of a common larcenous intent in each instance is clearly inferable from many significant circumstances. It is manifest that the taking was against the will of each victim and that it was accomplished by means of present violence and intimidation. Each victim

67450

**CONFIDENTIAL**

~~CONFIDENTIAL~~

resisted to some extent and the situation presented a well-founded apprehension of present danger if further resistance were offered. The elements of the offenses here charged are fully established (MCM, 1928, par. 149f).

The identification of accused as the offenders is amply established by evidence, both direct and circumstantial. Moreover, each accused admitted to the investigating officer that he was present with the other accused on the day the offenses were committed. Such constituted mere admissions, not confessions (MCM, 1928, par. 114b). Accused were apprehended together and other circumstances clearly show their joint participation in each of the succession of crimes. Brookin was positively identified in connection with each of the offenses charged. While some of the witnesses were not sure of their identification, their testimony went only to the weight of the evidence. The testimony of the investigating officer concerning the extrajudicial identifications was objectionable as hearsay, for the proceedings were conducted through an interpreter and the witness only testified to what the interpreter reported to him. Insofar as this testimony was produced by the defense for purposes of impeachment, it was not objectionable except for the fact that the identifications came through an interpreter. The testimony as to the extrajudicial identifications by Milone was not offered by the defense and being hearsay as well as substantively incompetent to prove identity (NATO 1069, Scott), should have been excluded. Except as to the witness Milone, the extrajudicial identifications were ineffectual and favorable to accused. In view of the compelling nature of the other evidence in the case, the admission of the incompetent testimony cannot be said to have injuriously affected the substantial rights of the accused. The same objection and conclusion apply with respect to the testimony of Gennaro's identification of the pistol.

While there is some testimony that all three accused were under the influence of liquor and other testimony that Johnson was "definitely" in a drunken state, there is substantial evidentiary basis for the view, which the court properly adopted, that all accused were capable of entertaining, and did in fact have, the specific intents involved in the offenses charged. The circumstances connected with their acts of depredation and their subsequent apprehension, evince the presence at all times of a single common purposeful design in the effectuation of which each of the accused played a consistently rational and coordinate part.

5. The charge sheet shows that:

Accused Johnson is 24 years old and was inducted into the Army 1 July 1941. No prior service is shown.

Accused Whitaker is 24 years old and was inducted into the Army 17 April 1942. No prior service is shown.

Accused Brookin is 31 years old and was inducted into the Army 7 July 1942. No prior service is shown.

6. The court was legally constituted. No errors injuriously affecting

267450

~~CONFIDENTIAL~~

the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentences. Penitentiary confinement is authorized by Article of War 42 for the offenses of house-breaking and robbery here involved, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year, house-breaking by Section 22-1801, Title 22, Code of the District of Columbia and, robbery by Section 463, Title 18, United States Code.

Donald K. Thompson, Judge Advocate.

E. J. Dill, Judge Advocate.

Donald K. Mackay, Judge Advocate.

CONFIDENTIAL



**CONFIDENTIAL**

(145)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
29 March 1944.

Board of Review

NATO 1556

U N I T E D   S T A T E S	)	MEDITERRANEAN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private WILTON (NMI) BOUDREAU	)	Oran, Algeria, 3 February
(38090857), Battery C, 90th	)	1944.
Coast Artillery (Antiaircraft).	)	Dishonorable discharge and
	)	confinement for life.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Mackay, Judge Advocates.  
-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Wilton (NMI) Boudreux, Battery "C", Ninetieth Coast Artillery (AA), did, at Oran, Algeria, on or about 12 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Benzerga Benzerga Ben Mohamed, also known as Benzerga Mohamed, also known as Benzerga, a human being, by shooting him with a gun.

He pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three fourths of the members present at the time the vote was taken concurring. The reviewing authority approved the sentence, designated the "United

267065

**CONFIDENTIAL**

CONFIDENTIAL

States' Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 504.

3. The evidence shows that on 12 December 1943, at about 1900 hours, an Arab named Maafa Ahmed Ould Miloud was in front of his house, known as Maison Hamadi, on Boulevard Circulaire, in Oran. With him at the time was another Arab whom Maafa referred to in his testimony as "Benzerga Benzerga". Maafa testified that when he was about to open the door of the house he heard footsteps and "just at that moment behind us we heard a shot, several shots" (R. 4,5). The shots were fired from a distance of about seven meters and came from a group of four or five American "black" soldiers, who went away after the shooting (R. 5). It was dark and witness testified that before the shots the street was calm and that they had heard no crying, noise or disturbance of any kind. No other Arabs or soldiers were there (R. 4,6, 7) and they had had no conversation with the soldiers (R. 6). When the shots were fired, Benzerga cried and started to fall. Witness helped him into the house where he laid him on his back. Benzerga "made some prayers" (R. 5) and witness observed blood "leaking out of the upper part of his left haunch" (R. 6).

A short distance away from Maafa's house was the bivouac area of the 90th Coast Artillery (Antiaircraft), to which organization accused and the soldiers with him on the evening of 12 December 1943, belonged (R. 9,13,20, 22,36). Three soldiers were witnesses for the prosecution. It appears from their testimony that between 1830 and 1900 hours that day "hollering and screaming" was heard out in the street by the bivouac area. One witness testified he thought it sounded like a woman while two others could not tell whether it was a man's or a woman's voice (R. 16,20,31,38).

One witness who was with accused that evening testified that he went out to the gate where four other soldiers, including accused, soon gathered. Accused had "came up" last and was wearing a raincoat. Witness suggested that they "go over and see what it is all about" (R. 19,20,21,26). It had been raining and at the time it "might have been sprinkling a little bit" (R. 21). There was no noise on the street at this time (R. 21,26). They were "trotting" up the street and when they had gone a distance of between 300 and 500 yards they came to a house where two Arabs were standing, one in, the other near, a doorway (R. 22). They had not picked up any rocks and were without weapons so far as witness knew (R. 26). It was dusk and "there were not very many lights out there on the street" (R. 23). The soldiers had not stopped when accused shouted at the Arabs, "Who are you beating around here?" (R. 22,23,27) and before "the sound died down, the shooting went on" (R. 23). The Arabs did not say anything and "didn't even move" (R. 23,27). Accused, who was standing six or eight feet from witness, held a sub-machine gun in firing position at his right hip and fired two "bursts" (R. 22,24). There was no disturbance at the time and witness did not know of any reason why accused fired the gun (R. 28). There had been some previous trouble between soldiers and Arabs in general (R. 25). Witness saw the gun and the flash (R. 24). The Arab who was near the door turned and grasped himself at the middle of his body. Witness was "scared and left"

267065

CONFIDENTIAL

(R. 25). Witness was of the opinion accused was sober; there was nothing unusual in accused's walk, speech, or appearance (R. 29).

Another witness, also of the same organization, testified that when they were at the gate he heard "some of the boys" say "We will go down there. It may be somebody whipping an American soldier". This witness saw "something" under accused's raincoat when they "went on down there" but he did not know what it was. He also testified he was about 22 feet from the accused at the time of the shooting and that he heard eight or ten rounds, twice, "on rapid fire". "Both the Arabs", he testified, "were there beside the door. One Arab started in the door and that is when the Tommy gun went off" (R. 14). Witness did not hear any conversation between accused and the Arabs (R. 15). He saw accused point and fire the gun in the direction of the two Arabs, but did not know what caused him to shoot (R. 14,17). The Arabs were about 18 feet from accused. Witness first saw the gun when about 30 feet from the place of the shooting (R. 18). He did not see any other Arabs, such as a group of them coming toward the soldiers with sticks; he "didn't see anything of that" (R. 17).

Another testified:

"I was with them. I caught up with them across the street. We went on down there and met two Arab men and two Arab women. When we got there the two Arab women went on the inside of the house. Then when Mohamed started to go inside of the house himself, and he started to open the door, and by the time he started to open the door, Boudreux opened fire on him" (R. 37).

Witness further testified that there were other Arabs near the place of the shooting and in answer to a specific question, answered he did not see them come toward the soldiers with "sticks". The two Arabs in the doorway had walking sticks but made no motion with them (R. 40). He was about six paces from accused when the latter fired the gun and knew of no reason for the shooting (R. 37,40,41). He testified there had been no conversation between accused and the Arabs before accused fired; but that when they arrived at the house there was loud talk and "fussing" going on between two Arab men and two Arab women (R. 37,39). He testified that somebody said "Mohamed, why are you beating this woman for?" but "I could never understand who it was" (R. 40). The women had gone inside the house and everything was quiet and peaceful just before the shooting (R. 41,42). Witness used the word "Mohamed" because all Arabs are called by that name (R. 42).

A "Commissaire" of police testified that, pursuant to information received at 1900 hours on 12 December 1943, he went to the house known as Maison Hamadi, on Boulevard Circulaire, in Oran, and there found an Arab with a wound in the left leg. He was "losing very much blood". The Arab stated to witness that his name was "Benzerga Benzerga". An Arab named Maafa Ahmed was present. First aid was administered and the wounded man was then sent to the "civilian" hospital (R. 8,9).

Maafa Ahmed Ould Miloud testified that Benzerga was carried to an

267065

**CONFIDENTIAL**

(148)

CONFIDENTIAL

ambulance and sent to the hospital (R. 6).

It was stipulated that a Madame Catala would testify that as desk assistant at the Civil Hospital of Oran on 12 December 1943, she made out an entrance slip for "a wounded Arab" from information given her by members of his family, that "he was identified as Benzerga Ben Mohamed", and that the entrance slip was an official record of the hospital. A duplicate original of the entrance slip was admitted as Exhibit "A". Defense stated the stipulation was "agreeable to the defense" and "No objection by the defense" to the exhibit (R. 10). The entrance slip shows the name "Benzerga Ben Mohamed". It was further stipulated that a Sister Elizabeth would testify that she was in charge of the ward service in the building at the Civil Hospital of Oran "where Benzerga Ben Mohamed died at about 0800 hours, 13 December 1943", that under her supervision the usual ticket bearing his name with other data was made out and attached to deceased's shroud, and that the body was delivered to the morgue of the hospital. Defense stated that the stipulation "is satisfactory" (R. 12). It was also stipulated that another witness would testify he was in charge of the morgue at that hospital, that he received the body of Benzerga Ben Mohamed, that he knew the name from the slip attached to the shroud, and that he was present when Dr. R. Anduze-Acher performed an autopsy on the body. Defense stated this stipulation "is agreeable" (R. 13).

A French military officer testified that on 15 December 1943, he performed an autopsy upon the body of a man whose name, as told to witness by the attendant of the morgue, was "Benzerga". The autopsy showed a wound "by a projectile that was fired on the external part superior" of the left hip. The bullet had fractured the hip bone and penetrated the rectum. While it did not touch any vital organ, the witness testified that "the autopsy didn't show any other cause of death" and that in his opinion such a wound "in an old man, not being resistant, \*\*\*could really kill him" (R. 34,35).

Accused after having been advised that he need not make a statement and that what he said could be used against him, made a statement to an investigating officer. It was received in evidence without objection (R. 44,45,46). He stated that:

"On 12 December 1943, at about 1800 or 1900 hours, a few of the boys and myself were sitting at the Motor pool, playing cards. We were interrupted when we heard someone screaming, outside our gate. We all came out of the tent to see what was happening. Some of the fellows said lets go out and see what its about. I said I was not going out empty handed, because in the past the arabs were beating several of our boys up. I went to my tent and got my tommy-gum and put a clip in it. It was not a full clip. I think it was about 18 or 20 in it. I went up the corner near the guardhouse and met Sgt. Boykins, Arthur Reed, Sam Anderson and a couple more, I did not recognize. We started down the street and met a bunch of Arabs, who had sticks. I did not know who they were. Sgt. Boykins and the other boys knew

them. Sgt. Boykins, and the other boys, threw some bricks at these arabs. I was standing there and hadn't said anything.

"Two or three of the arabs started towards us and when they got about 8 or ten feet from us I held my tommy gun at my hip and shot about five or six times. I estimate that amount of times because it was on full automatic and I did not pull the trigger hand. After I shot the tommy gun we all turned and ran back to camp. The gun that was shown to me, in the C.I.D. office, by Agent Dwyer, is the gun that I did the shooting with" (Pros. Ex. C).

The gun referred to was what is known as a Thompson submachine gun (R. 46; Pros. Ex. D).

The accused elected to remain silent (R. 47).

4. It thus appears from uncontradicted evidence that at the place and time alleged accused shot the person named in the Specification with a gun, and that in consequence of the injury sustained death ensued the next morning. There is evidence that sometime before the fatal shooting noise and screaming by unknown persons had been heard on a public street and that the accused, with three or four members of his organization, left their nearby bivouac area to ascertain the reason for the commotion. The accused had a tommy gun concealed under his raincoat. There was no noise or disturbance on the street at the time but when two Arabs were seen about to enter the door of a dwelling accused shouted, "Who are you beating around here?", and thereupon fired upon them with his gun. The deceased sustained a bullet wound in his thigh which, as the evidence shows, resulted in his death the next morning. The act of accused was unlawful, wanton and deliberate and wholly devoid of excuse or justification. The requisite malicious intent to constitute murder is clearly inferable and it is immaterial, when he fired the gun, whether accused's intended victim was the deceased or his companion or both (Wharton's Crim. Law, sec. 443,444). All elements of the crime charged are fully established (MCM, 1928, par. 148a; Winthrop's, ~~peprint~~, p. 672 et seq.).

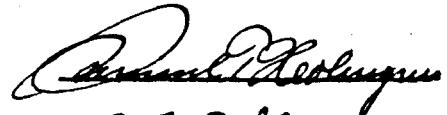
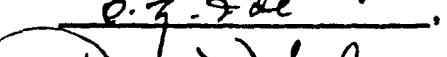
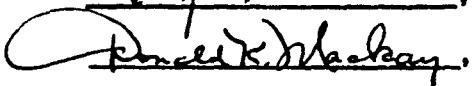
The stipulations agreed upon at the trial (R. 10,12,13) were not agreements as to the facts recited but merely agreements as to what the persons would testify to if present as witnesses. While much of the stipulated testimony was incompetent as hearsay, it is clear that the identity of the victim was not disputed. There is sufficient evidence that the person shot by accused was the person on whom the autopsy was performed, and that the shots fired by accused killed the man described in the Specification.

5. The charge sheet shows that accused is 26 years old. He was inducted into the Army 17 February 1942. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. A sentence to death or imprisonment for life is mandatory upon a court-martial

267065

upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

 Donald P. Colquitt, Judge Advocate.  
 O. J. T. de, Judge Advocate.  
 Donald K. Mackay, Judge Advocate.

**CONFIDENTIAL**

(151)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
10 March 1944.

Board of Review

NATO 1566

U N I T E D   S T A T E S	)	EASTERN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private JOHN J. DONOHUE	)	Bizerte, Tunisia, 15 February
(32885202), attached casually	)	1944.
to Company C, 5th Replacement	)	Dishonorable discharge and
Battalion, 7th Replacement	)	confinement for 25 years.
Depot.	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Beekman, New York.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John J. Donohue, attached casually to Company C, 5th Replacement Battalion, APO 372, did, at Company C, 5th Replacement Battalion, APO 372 on or about 5 November 1943, desert the service of the United States with intent to shirk important service to wit: having been duly alerted for a shipment by sea to a place unknown, in accordance with paragraph 2, S/L 170, Headquarters 7th Replacement Depot, dated 2 November and paragraph 2, of SO #236 Headquarters 7th Replacement Depot, dated 3 November, did absent himself without proper leave from Company C, 5th Replacement Battalion, APO 372 and did remain absent until he surrendered himself at APO 372, on or about 10 November 1943.

ADDITIONAL CHARGES

271928 CHARGE I: Violation of the 69th Article of War.

**CONFIDENTIAL**

(152)

Specification: In that Private John J. Donohue, attached casually Company C, Fifth Replacement Battalion, Seventh Replacement Depot, APO 372, having been duly placed in confinement in Seventh Replacement Depot Stockade APO 372 on or about 10 November 1943, did, at APO 372 between 1830 hours on or about 19 December 1943 and 0600 hours on or about 20 December 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE II: Violation of the 61st Article of War.

Specification: In that Private John J. Donohue, attached casually Company C, Fifth Replacement Battalion, Seventh Replacement Depot, APO 372, having been duly placed in confinement in Seventh Replacement Depot Stockade APO 372 on or about 10 November 1943, did, without proper leave or authority absent himself from said confinement on or about 20 December 1943 and did remain absent without proper leave or authority from 20 December 1943 to about 4 February 1944.

He pleaded not guilty to the Charge and Charge I of the Additional Charges and the Specifications thereunder and guilty to Charge II and the Specification thereunder. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 25 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Breeckman, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that accused had been attached to Company C, 5th Replacement Battalion, at 7th Replacement Depot, since 11 October 1943. He was "a general replacement" shown as "full duty" (R. 13,14). About 5 November 1943, there were "a lot of shipments, a lot of men being alerted". Accused was alerted through a roll call formation two days before the actual shipment and "was told the sailing list he was on and the number" (R. 8). The destination of the shipment was secret and the men were not told "exactly where" they were going (R. 15). Likewise they didn't know "what kind of a job" they were to have. The general feeling in the unit was that "if a man was in the Infantry he probably went to combat; that was just the feeling among the men" (R. 12) - "the general feeling at that time among the men was that there was a trip across the water to Italy" (R. 9). Groups of men had "been on Sailing lists which weren't going to combat zones in the true sense of the word 'combat'." Men "going to the States are not on a Sailing List" (R. 16). Accused was supposed to embark on 5 November. He was informed of that fact the night before about 1800 hours (R. 9) by his platoon sergeant (R. 8) who further testified that on the following morning he saw accused about 0700 hours, at which time accused was "checking his bags". The sergeant "happened to walk in the tent". Accused "was putting clothing, everything in the bag. The bags were practically packed; he was standing there with his friend". The shipment was supposed to have gone out at 0700 hours but the

271928

CONFIDENTIAL

**CONFIDENTIAL**

trucks were late. When the trucks did arrive accused was not with the group. The sergeant

"Searched the area and all through the area and outlying distance and couldn't find him anywhere. Shortly after the trucks left, we searched the area. He was not seen any place" (R. 9).

Accused came back five or six days later "with his friend and turned in" (R. 10). Accused stated to his company commander that he had been alerted for shipment and that "he had known that" (R. 17). The morning report entries of accused's unit showed him as having absented himself without leave on 5 November 1943, and as returned to military control 10 November 1943 (R. 7; Ex. A).

Paragraph 2 of Special Order Number 236, Headquarters 7th Replacement Depot, APO 372, dated November 3, 1943, was admitted in evidence and marked Prosecution's Exhibit B, and Sailing List Number 170, Headquarters, 7th Replacement Depot, dated 2 November 1943, was received in evidence as Exhibit C. Exhibit B, which is an extract copy setting forth paragraph 2 of the above Special Order (R. 10), reads in pertinent part as follows:

"2. The EM listed in Pars 1-5, Sailing List 170, part of this order, are reld fr asgd 7th Repl Dep Pool, fr atchd 3rd, 5th & 30th Repl Bns, & fr conf Stockade, 7th Repl Dep, & asgd, reasgd or transhipped to orgns indicated. WP o/a 4 Nov '43 by 1st available T to Bizerte, Tunisia, North Africa, embarking therefrom by U S Naval Craft to Italy. RAT to CO orgns indicated for dy. TIN. TBA equipment carried. TQM O of Sailing List indicated thereon.

Par 1, S/L 170:

PAC NATOUS USA Cable 1215, dtd 6 Sept '43, (EBS Req #250), the EM listed in Par 1, Sailing List 170, are reld fr atchd 3rd, 5th, & 30th Repl Bns, 7th Repl Dep, & asgd in gr to 52nd QM Trk Bn." (Pros. Ex. B).

Paragraph #1 of Sailing (Passenger) List #170 contains the name of accused and shows him to be "Infantry" and "to 52d Quartermaster Bn". The defense stated "No objection" when Exhibits B and C were offered (R. 10).

Accused was placed in confinement in the 7th Replacement Depot Stockade when he returned 10 November 1943. There were no organizational orders releasing him from confinement (R. 15). Accused was not in the stockade 20 December 1943 and though a search was made he could not be found (R. 18). Extract copies of the morning report entries of the Stockade were admitted, the defense stating it had no objection, (R. 18, Ex. D) which read as follows:

"10 Nov 1943 - Pvt John J. Donohue atchd & jd in conf at 1930 hrs by authority of Lt. Cowan CO, Co C, 5th Repl Bn. JKC

**CONFIDENTIAL**

CONFIDENTIAL

20 Dec 1943 - Pvt John Donohue, fr conf to A.W.O.L.  
 (Escaped fr stockade) btwn 1830 hrs Dec  
 19, 1943 0600 hrs Dec 20, 1943. JKC\*

No orders had been issued authorizing accused's release (R. 19).

A corporal of the 7th Replacement Depot was in Tunis on or about 4 February 1944, met accused on the street and recognized him. Witness informed the military police and showed them a building into which he had seen accused go. The police came out with accused (R. 21).

Accused elected to remain silent and defense stated it submitted "the case without further comment". Prosecution then said to accused:

"Private Donohue, have you any other evidence to offer, testimony to give, or statement or argument to make, or is there anything you want to tell this court before it reaches its findings in this case?" (R. 22).

to which accused replied:

"Concerning the shipments I missed; I missed two shipments before that and I was picked to be sent as a guard in one shipment. When I missed them before, there was nothing done about it. I know several other boys who missed shipments and there was nothing said about it except to give them extra duty or KP or some other similar punishment. That's about all I have to say" (R. 22).

4. It thus appears from uncontroverted evidence that at the time and place alleged in the Specification of the original Charge, accused absented himself without leave from his command and remained unauthorizedly absent therefrom for a period of five days, at the end of which time he surrendered himself. At the time accused left he had been alerted for a shipment by sea to an unknown destination. The general belief in the unit was that the destination was Italy. Accused's intent to shirk the duty for which he had been selected is clearly shown by both his statement to the court and the evidence generally. That the service was "important" as alleged, is manifest. That the absence was of short duration is immaterial. The offense was complete when accused intentionally missed the shipment. Judicial notice may be taken of current exigent conditions incident to the prosecution of the war. The court was fully warranted in concluding that the absence was deliberate and with the specific intent alleged and in finding accused guilty as alleged in the original Charge and its Specification (MCM, 1928, par. 130a).

The additional Charge I and its Specification is likewise supported by the evidence. The undisputed evidence is that accused had been placed in confinement in the 7th Replacement Depot Stockade, that no orders were issued for his release, that he was in fact absent and was apprehended in Tunis. The conclusion is inescapable that he had committed the offense alleged.

271928

CONFIDENTIAL

~~CONFIDENTIAL~~

(155)

The offense alleged in the additional Charge II and its Specification was established by evidence, including morning report entries, and accused's plea of guilty.

5. The charge sheet shows that accused is about 23 years old, that he was inducted into the Army 8 April 1943 and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

Samuel H. Polley, Judge Advocate.

O. G. J. de J., Judge Advocate.

Donald W. Mackay, Judge Advocate.

271928

-5-  
~~CONFIDENTIAL~~



**CONFIDENTIAL**

(157)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
28 March 1944.

Board of Review

NATO 1603

U N I T E D   S T A T E S	)	PENINSULAR BASE SECTION
v.	)	Trial by G.C.M., convened at
Private SIDNEY C. CIMENTAL	)	Naples, Italy, 27 January
(39841882), 190th Port Company,	)	1944.
488th Port Battalion, Trans-	)	Dishonorable discharge and
portation Corps.	)	confinement for life.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----

**REVIEW by the BOARD OF REVIEW**

Holmgren, Ide and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

**CHARGE I: Violation of the 92d Article of War.**

Specification: In that Private Sidney C. Cimental, One Ninetieth Port Company, Four Hundred Eighty Eighth Port Battalion, Transportation Corps did, at Naples, Italy, on or about 9 December 1943, forcibly and feloniously, against her will, have carnal knowledge of Assunta Langella Capparelli.

**CHARGE II: Violation of the 96th Article of War.**

Specification: In that Private Sidney C. Cimental, One Hundred Ninetieth Port Company, Four Hundred Eighty Eighth Port Battalion, Transportation Corps did, at Naples, Italy, on or about 9 December 1943, unlawfully and feloniously have carnal knowledge of one Assunta Langella Capparelli, a female under the age of sixteen (16) years.

**CONFIDENTIAL**

**CONFIDENTIAL**

(158)

CHARGE III: (Findings of guilty disapproved).

Specification: (Findings of guilty disapproved).

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority approved the findings of guilty of Charges I and II and the Specifications thereunder, disapproved the findings of guilty of Charge III and its Specification, approved the sentence and forwarded the record of trial to the confirming authority pursuant to Article of War "50 $\frac{1}{2}$ ". The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The evidence shows that at about 1815 hours (R. 17,27) on 9 December 1943, Raffaele Capparelli (R. 13,14), accompanied by his daughter, Assunta Langella Capparelli (R. 14,27), aged 15 (R. 14,27; Pros. Ex. 1), proceeded to the vicinity of the "blackguard" building in Naples, Italy, for the purpose of delivering a package of cognac to a colored American soldier whom he had known for several months (R. 14,16,27,34,35). It was dark (R. 14,27) and when they got near the building to look for this soldier, accused appeared. The latter asked Raffaele what he was doing there, flashed a light on them and told them to go into a room. Inside the room accused searched Raffaele, took his billfold, cognac and pen knife away from him. Accused told the father to go outside. When the latter said he must take his daughter out with him, accused told the father to go out "before I have you arrested" and pushed him out the door, accused remaining with the daughter in the room (R. 14,27). When accused told witness to leave the room the daughter called for help. When outside after being ejected he could not hear what went on in the room (R. 16).

Assunta, the daughter, testified that after her father left the room accused said "\*\*\*would you want to doicky-ficky with me" (R. 26,27) but she told him, "I could not". Accused threatened that he would put her in jail with the Germans and then forcibly put her on a table, removed her coat and underclothing, opened his pants and put them half way down his legs and got on the table and on top of her. She started to cry out but he put his hand over her mouth. He threatened her with his hands as if he were going to strike her. He was on her about 15 minutes and she was trying to get away when her father with two unarmed "carabinieri" entered the room. Accused got off the table, took his pistol and "chased" the three men from the room. Witness got off the table and attempted to go to her father but accused would not permit her to go. He threatened her with the pistol and "made me get back on the table". He started again to fight with her. She testified "there was an entry because I could feel a great pain". She was sure he "put it in because at one time I felt a great pain and I cried out" (R. 28). He was in motion "always with force while I was trying to pull away and he was pulling back

**CONFIDENTIAL**  
CON-2

**CONFIDENTIAL**

(159)

and forth" (R. 30). In about half an hour her father returned with the two "carabinieri" and some other soldiers. She had never seen accused prior to that time (R. 28). Accused did not use a "rubber". She did not help him. When her father returned to the room the first time she called to him in a loud voice "Father help me, I cannot bear it any longer", and accused pointed the pistol at her father. She had gotten off the table and tried to escape but accused had already chased the others out and closed the door (R. 31). Assunta testified that she weighed 45 kilos (98 pounds) and without being questioned on the subject stated:

"When we arrived at the Questura Building this accused asked one of the carabinieri to say that he had given me one hundred lire but the carabinieri refused to say it" (R. 29).

The building into which accused took Capprelli and his daughter was a part of the barracks of the 480th Port Battalion, and one room was used as a stockade (R. 11,12). A soldier who was acting as a guard that evening testified that he saw two Italian policemen and a civilian standing near the stockade door (R. 7). They tried to speak to him in Italian but he could not understand them. He knew that accused, who was also a guard that night, could speak Italian and was inside the room. The guard called to accused two or three times (R. 8) "pretty loud" (R. 10), then the Italian civilian pushed the door of the room and the witness and three Italians entered. As he stepped in he saw a little girl in a corner of the room on a table. Her dress was up above her stomach (R. 8). She was not crying but commenced crying when she saw her father (R. 8,9). She did not seem excited (R. 9) and was not struggling with accused. She was not trying to push accused off the table. Her hands were "on her stomach and pants". Her knees were back, drawn up on the table and her heels were "flat on the table, open toed, drawn up" (R. 10). Her hair was combed back on the side and did not look like she had been fighting with anybody (R. 11). After accused got off her legs were still open. He had not heard the girl screaming (R. 10). He would not say that accused was drunk (R. 11). As they entered the room accused "seemed to be on the table" (R. 9). Witness did not see actual intercourse taking place and he did not see accused's penis (R. 10). Accused started walking away from the table, pointed a pistol at the guard, and "told us he was alright and to get out". About ten minutes later American military police came and brought accused out (R. 8).

Raffaele, the girl's father, testified that about 15 minutes after having been ejected from the room by accused, he returned, accompanied by the two Italian "carabinieri". They opened the door and inside found accused "standing over my daughter". Accused turned toward them, "took out his pistol and pointed it at us and told us to leave" (R. 14,15,16). He returned later, in about half an hour, with an Italian police sergeant, the two "carabinieri", and an "American M. P." and another soldier. They forced the door and upon entering the room, found accused "kneeling over my daughter in the same position at which we had seen him the first time". Accused got off the table and the girl was crying "with dolore" (meaning sorrow or pain) (R. 15,16). Accused's trousers were opened at the front; they were not down around his knees (R. 17,18).

**CONFIDENTIAL**

**CONFIDENTIAL**

The military policeman who came back with Raffaele testified that when he entered the guard room he saw accused "on top of a girl on a desk" (R. 22,26). A gun was on the corner of the desk (R. 24). His pants were down by his knees. He got off the table, tucked in his shirt and pulled up his pants (R. 22,23,25). He kept repeating that he had paid the girl a dollar and "never got his money's worth" (R. 22,23). The girl was in a reclining position. Her pants were below her knees (R. 26). She did not appear "mussed up a bit" and "was pretty calm" (R. 23). She was not crying when they first entered the room but her face was very "red and shiny" (R. 25). She started crying when she saw them (R. 23,25,26). It did not appear that she had been fighting with anybody. She was sobbing but was not acting "crazy and hysterical or upset". Witness did not see sexual intercourse taking place (R. 24). Witness could not state whether or not accused was under the influence of intoxicating liquor. He did not smell anything on his breath (R. 23).

Accused made a voluntary statement to the investigating officer which was admitted in evidence. It reads:

"On 9 December 1943 I went off duty at 1200 hours. My next shift was 2400 hours. I met a few other fellows, and we went into a place about 1230 hours where we started drinking. About 1430 hours we went to another place about one block away and continued drinking. We argued with the owner over the price of the cognac and he agreed to sell it to us for 50¢ a bottle. We were drinking quite a lot of cognac. I remember around 1630 hours some colored MPs came into the place to break up a fight between two colored soldiers, and we were all chased outside. I don't remember what happened after that. I do not recall going to the guardhouse and relieving the guard. I had about \$40.00 when we started drinking, but had only \$24.00 left when I counted my money the next day. We were drinking heavily of cognac and anasette. It was the first time I had consumed any amount of cognac as I usually drank wine. I remember nothing after leaving the shop. I don't remember seeing the girl or her father. The next thing I remembered is when I awakened the following day and one of the fellows asked me what I was doing in jail. I told him I was not in jail. But when I looked around I realized I had been locked up, but I did not know the reason why.

"I had been a heavy drinker in the States, but it never effected me like this before. I have never caused any trouble whenever I became drunk and was always fully conscious of what I was doing. But this time I was in a daze and remember nothing of what happened" (R. 32).

A corporal whose duties were to supervise the guard testified that on the night of 9 December 1943, accused was not "officially on" guard duty.

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(161)

A Private Charles F. Conner was on duty at that post from 1600 hours to 2000 hours. The corporal had not authorized accused to take over Conner's guard that night (R. 19). There would be no objection to a guard getting another member of the guard to relieve him during a temporary absence. The place where the offense was alleged to have taken place was the guard room (R. 20), and there was no way of locking the door (R. 22). It was no concern of witness if Italians were selling cognac around there. The guards' duty was to guard prisoners and there were guards in the city for the other duties. The corporal doubted if a cry from a person in the guard room could be heard by anyone else in the building (R. 21).

The soldier to whom Raffaele was attempting to deliver the cognac on the night of the incident, testified he was a close acquaintance of, and had friendly relations with, Raffaele and his family. He had given Raffaele business advice from which the latter had profited and for which he was appreciative. Raffaele had given witness a bottle of "old vintage" (R. 34, 35, 36) and had volunteered to bring it to him. They arranged to meet back of the "air recovero". When witness arrived at the meeting place, it was getting dark and he could not find Raffaele. On 18 December he received a letter from the Italian "telling of the disgrace that had come to his family". There was no objection to this testimony (R. 35).

Accused testified that he was of Portuguese and Basque nationality and knew only a few Italian words (R. 44). His weight is 165 pounds (R. 46). He took another guard's duty on the desk at about 1850 hours and while sitting at the desk he heard somebody at the door. When he opened the door to investigate "they seen me with side arms" and started to run. Accused "shined my flash light on him and he came back where I was". Accused brought him inside "to see what he was doing around the building" and saw that he had two bottles of cognac. Accused searched the man and asked the girl if she was in the "whoring business" and "this old man hollered a dollar so I thought that was what she charged". Continuing, the accused testified:

"I asked her if she would screw and when I turned around the old man was gone. This girl didn't give me any kind of argument, no back talk or anything and the first time we were disturbed she was lying up on the table with her knees cocked up and my knees on the table there. Then this colored guard came in there and wanted to know if I understood Italian and I said I got a bitch in here that I'm going to fuck. That is what I told him. Then he went back out and she was still on the table when I came back to her and then about five or ten minutes later two M. P's and the old man came back. They came back in there and took me down there and locked me up down to the jail" (R. 45).

Accused made the statement as received in evidence but explained that he was locked in the stockade at the time and "hadn't been advised by the Major". The investigating officer would not let him talk to anyone about the case and accused told him he was drunk. He relieved the regular guard because he wanted the next day off and asked him to change places. He did not see the

~~CONFIDENTIAL~~

CONFIDENTIAL

"carabinieri" come in but when the "colored fellow" came in accused picked up his gun. When the girl's father came in the second time accused told the guard to take him out (R. 46). He did not have sexual intercourse with the girl although he attempted to (R. 47). When asked how, in detail, he attempted to have intercourse accused replied:

"then when she was on the table she took her pants off and pulled her dress up to her belly. She let one hand hold her dress and the other she put behind her head. I got on the table and unbuttoned my pants and started to try to have intercourse with her and was disturbed by the guard. The second time I got on and started going again and then the other M. P's came in and took us away" (R. 48).

His penis never entered her body. He paid the girl a dollar (R. 48). It was a 100-lire note (R. 49).

Assunta was examined by a medical officer on the night of the alleged assault. His report, which was read in evidence by stipulation, showed that the examination was made at approximately 2045 hours and "showed no trauma, tearing or bruising of the genitalia or body in general". Microscopic examinations showed no spermatozoa or gonococci. The vagina admitted two fingers "which is sufficient to permit penetration without undue difficulty". A certificate of another medical officer, dated 12 December 1943, states that a "smear" did not reveal the presence "of either blood or spermatozoa in fresh and stained specimens" (R. 49,50).

A soldier testified for the defense that he knew Assunta and that he had met her about a month and a half before the trial when he was asked by a boy whether witness wanted "a date with her". Witness testified that, "She said let's go to a house so I went to this house and\*\*\*". She told witness she would charge one dollar "to go to bed" with him. He further testified that it was when he saw the girl a second time that he picked her up and "went to a house with her" (R. 37,38,40). A motion by the prosecution that "the entire testimony of this witness be stricken on the ground that it is irrelevant and immaterial" was "sustained" by the court (R. 41). However, interrogation of witness continued and testimony was again given that he "picked her up and we went up the street to a woman's house and\*\*\*". Witness also testified that he recognized the girl in court and that she recognized him (R. 42,43).

Assunta, being recalled as a rebuttal witness, denied that accused had given her anything and when the soldier who testified that he had been with her was brought into court, she denied that she had ever seen him before (R. 51).

4. There is evidence that at the time and place alleged accused, who was on a guard detail at the port stockade, brought Assunta Langella Capparelli, the girl named in the Specifications of Charges I and II, and her father into the guard room, searched the father, took from him certain personal articles,

CONFIDENTIAL

**CONFIDENTIAL**

(163)

and forced him out of the room. Alone with the girl he asked her to "ficky-ficky", threatened to put her in jail with the Germans, forced her on a table, removed her coat and underclothes, let down his pants and got on the table on top of her. He prevented her from crying by putting his hand over her mouth and threatening to hit her. His pistol was lying on the corner of the table. When her father entered the room with two Italian policemen, accused chased them out with the pistol. Assunta got off the table and attempted to go to her father but accused threatened her with the pistol and made her get back on the table where he again attacked her. She was 15 years old. There is substantial evidence that he had sexual intercourse with her and that it was by force and without her consent. Penetration however slight is sufficient. While the doctor's examination revealed no trauma of the genitalia, it also showed that penetration could have been effected without "undue difficulty". The absence of spermatozoa is of significance, though explainable. However, to constitute the offense, emission is not a necessary element (MCM, 1928, par. 148b).

Defense introduced evidence suggestive of acts of sexual intercourse by the girl with another soldier. On motion of the prosecution the testimony was stricken but upon a continued interrogation of the witness, substantially the same testimony was again adduced. But aside from the question of the competency of such evidence in cases involving common law rape, the testimony falls short of a showing of sexual intercourse. Assunta however testified she had never seen the soldier before. In any event accused had the benefit of the court's consideration of his evidence, with all of its implications, and regardless of its apparent incompetency.

The testimony of the soldier to whom Raffaele was to deliver a bottle on the day of the alleged offense was for the most part incompetent. While its purpose was ostensibly to explain the presence of Raffaele and his daughter in the vicinity of the guard room on the evening in question and to show that he was not engaged in the illegal sale of intoxicants, the witness was permitted to testify without being questioned on the subject matter. He testified as to the hard-working respectability of Raffaele, and lastly of a letter telling of the disgrace that had come to his family through the actions of accused. This testimony was incompetent. However, upon the whole record, the substantial rights of accused do not appear to have been injuriously affected by the admission of this testimony.

Accused was charged with rape in violation of Article of War 92 and also with "statutory" rape in violation of Article of War 96. The age of consent under Federal Statute is sixteen years (18 U.S.C. sec. 458). The two offenses were but different aspects of the same act and under the circumstances the Specifications were appropriate. Moreover, a sentence of death or life imprisonment is mandatory upon conviction of rape under Article of War 92.

5. The charge sheet shows that accused is 23 years old. He was inducted into the Army 29 May 1942, and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the

**CONFIDENTIAL**

(164)

CONFIDENTIAL

reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

James H. Hollingshead, Judge Advocate.  
O. J. Gill, Judge Advocate.  
Donald R. Mackay, Judge Advocate.

CONFIDENTIAL

~~CONFIDENTIAL~~

(165)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
28 March 1944.

Board of Review

NATO 1603

U N I T E D   S T A T E S	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Naples, Italy, 27 January
Private SIDNEY C. CIMENTAL	)	1944.
(39841882), 190th Port Company,	)	Dishonorable discharge and
488th Port Battalion, Trans-	)	confinement for life.
portation Corps.	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

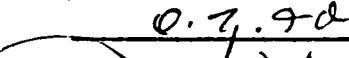
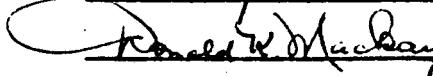
-----

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Mackay, Judge Advocates.

-----

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

 Donald E. Holmgren Judge Advocate.  
 O. T. Ide, Judge Advocate.  
 Donald W. Mackay, Judge Advocate.

NATO 1603

1st Ind.

Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army,  
28 March 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Private Sidney C. Cimental (39841882), 190th Port Company, 488th Port Battalion, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved.

NATO 1603

(166)

CONFIDENTIAL

NATO 1603, 1st Ind.  
28 March 1944 (Continued).

Under the provisions of Article of War 50 $\frac{1}{2}$ , you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 1603).



HUBERT D. HOOVER  
Colonel, J.A.G.D.  
Assistant Judge Advocate General

---

(Sentence as commuted ordered executed. GCMO 24, NATO, 28 Mar 1944)

**CONFIDENTIAL**

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
24 March 1944.

Board of Review

NATO 1614

UNITED STATES )  
v. )  
Second Lieutenant RAYMOND L. )  
LANGER (O-1309075), Company L, )  
133d Infantry Regiment. )

34TH INFANTRY DIVISION

Trial by G.C.M., convened at  
APO 34, U. S. Army, 27 Decem-  
ber 1943.  
Dismissal and confinement for  
five years.  
Eastern Branch, United States  
Disciplinary Barracks,  
Greenhaven, New York.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Mackay, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that RAYMOND L. LANGER, Second Lieutenant, 133rd Infantry Regiment did, near Scapoli, Italy, on or about 3 December 1943, misbehave himself before the enemy, by refusing to advance with his command, which had been ordered forward by Second Lieutenant Dennis F. Neal, Commanding Company "L", 133rd Infantry Regiment, to engage with the Germans, which forces, the said command was then opposing.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for ten (10) years. The reviewing authority approved the sentence and

**CONFIDENTIAL**

267114

**CONFIDENTIAL**

(168)

forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence, remitted five (5) years of the confinement adjudged, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence shows that on 3 December 1943, accused was on duty as platoon leader of the second platoon of Company L, 133d Infantry. The company was in a battalion reserve at Coll'Alto, Italy, two other companies of the battalion being "actually engaged" with troops of the German Army. At 1600 hours the company commander, First Lieutenant Dennis F. Neal, 133d Infantry, received orders, a plan of attack for the company (R. 7,8) for the purpose of taking an enemy outpost (R. 14), the attack to commence at 2300 hours of that day (R. 9). Upon receipt of the orders the company commander called his platoon leaders together "to give them a tactical order". Accused was not present at this meeting, and the company commander asked the platoon sergeant of accused's platoon, a Sergeant Peterson, as to the whereabouts of accused, and if he was coming. The sergeant reported accused "wasn't going". On the basis of advice received the company commander reported to the battalion commander that accused had stated he did not intend to take part in the attack, and the battalion commander directed that accused be placed in arrest. The company commander thereupon, at about 2000 hours, went to a building occupied by accused's platoon, found accused in a room "separated from his platoon", called him "outside", and told accused that it had been reported that "he wasn't coming on the attack with his platoon that night". Accused replied, "That is right; I could not take it any longer". Accused was then placed in arrest (R. 8,9), relieved of his duties and told to go back to the room that he was in, and to report to the battalion commander the following morning (R. 12). The attack was made. Accused was not present (R. 9).

Accused had joined Company L, 133d Infantry, about May 1943, and had served with it in numerous engagements in Italy after the regiment landed there in September 1943 (R. 15,28,30,31). A noncommissioned officer who had been in the company during this time testified that when accused had first taken part in battle he did not seem to be nervous and had good control of his platoon (R. 15) but that "as we kept moving up the resistance was getting stiffer all the time and I noticed that there was a change in him". He appeared to become nervous. When giving attack orders he would become pale and his voice would become "shaky" (R. 16). On 3 December accused told witness "if there was another attack that he couldn't make it" (R. 14).

On 17 December 1943, after having been warned by an investigating officer that he need not make any statement and that any he made could be used against him, accused made an oral statement, later reduced to writing (R. 19,20; Ex. 4), in which he related an incident of about 30 November 1943, in which, during combat, an acting noncommissioned officer had been killed and one other man had been wounded in the presence of accused, by the burst of a German mortar shell. Accused and the men with him lost contact with the company, but found it the next day. Accused relayed an order for a company attack for early the following morning (R. 21) but "I knew I

**CONFIDENTIAL** 267114

**CONFIDENTIAL**

(169)

wouldn't be of any good to myself nor to any one else" so did not accompany his platoon on the attack. On the day after this occurrence accused was ordered to rejoin his platoon, then on guard at a bridge, and did so (R. 22). Accused continued:

"About 1800 hrs. S/Sgt. Peterson and I returned to the company CP to find out when the First Bn. was going to relieve us. At that time, to the best of my recollection, Lt. Neal issued his attack order for the night of Dec. 3rd. I went back to where my equipment was in a house and remained there until sometime later when Peterson came to check whether I was going with them. I told him that I couldn't go. Later that evening Lt. Neal called me out-side and told me that Peterson had reported to him that I wasn't going and I told him that that was correct and that I just couldn't make it" (R. 22).

Accused testified that he is 26 years of age and married. He completed high school and one year of "night college", after which he was engaged in the printing and advertising business (R. 26). He was inducted on 26 May 1942, and graduated from Officers Training School in January 1943 (R. 27). After joining the 133d Infantry, he took part with his platoon in engagements with the enemy in Italy at Benevento, at the first crossing of the Volturno River, at San Angelo, at the second crossing of the Volturno, and at Santa Maria Oliveto (R. 31). During the first engagements he was frightened as was "everyone else", but seemed to be able to perform his duties satisfactorily (R. 32). At Santa Maria Oliveto the platoon was subjected to machine gun, rifle, mortar and artillery fire. Enemy planes flew low over them and "scared the devil out of us". A few men were lost from the platoon and the battalion suffered heavily. Thereafter accused thought he was doing the same as usual but

"I know I was getting a little jumpy, nervous; and every time the company commander called me, for any reason that it was, I would sweat it out even if it was to go down to the battalion and I don't think that I was losing control of the platoon or anything, it was just my own reactions, feelings" (R. 33).

Following the action at Santa Maria Oliveto accused's company was under artillery fire, and then after a few days advanced for an attack. During this attack the acting noncommissioned officer, a close friend of accused, was killed by the mortar shell burst which knocked "the rest of us in the building and covered us with dirt" (R. 34,35). Accused was shocked. "I went to pieces for a few minutes and I just sat down and cried" (R. 35). When he later went to the vicinity of his platoon at the bridge, he found the bridge was under observation and "had been fired on", waited for a time in a fox-hole until a shadow "from the hill" fell over the bridge and then "took off like a bat out of hell and made it back to where the platoon was" (R. 36,37). It was on that afternoon that he told the noncommissioned officer that he could not engage in further combat - it "was just as a matter of fact".

**CONFIDENTIAL**

267114

CONFIDENTIAL

Accused was not present when the company commander gave the attack order on 3 December, but on that day, when accused returned to the company command post he saw the company commander "looking over a map" (R. 37) and "showing approximately where the company was going to go" (R. 42), heard him talking with others about the "general situation" (R. 37,38,39), and knew an attack order "would be" issued. When the company commander later asked accused if he was "going", accused understood him to mean "was I going with the company when they moved out that night" (R. 40). Accused replied that he could not make it (R. 38,40). When, in his statement to the investigating officer, he referred to the company commander's attack order of 3 December, accused thought that the company commander's remarks in connection with the map "might have been the attack order" (R. 42).

By stipulation there was received in evidence, in behalf of the defense, a report by two medical officers, psychiatrists, dated 20 December 1943, with respect to a psychiatric examination of accused. This report, after recitals of the personal history of accused and of certain of his combat experiences including that involving the killing of the acting noncommissioned officer by a mortar shell burst (R. 46,47), as related by accused, contained the opinion that accused was suffering from an "anxiety state" (R. 47) and that the examiners:

"feel that although this officer is not insane and does know the difference between right and wrong, yet the condition from which he suffered made it very difficult for him to adhere to the right" (R. 49).

4. The evidence thus shows that at the place and time alleged, while his company was in the immediate presence of the German enemy, accused declared that he could not advance on a scheduled attack in which his platoon was to participate. He was not at the meeting at which the order for the attack was announced and testified that he never received an explicit attack order. His own testimony however shows that the plans for and the imminence of the attack were known to him and that he twice declared his inability to take part in this attack which was in fact ordered and carried out. His declarations were considered ones and were tantamount to a refusal to advance with his company for engagement with the enemy. Such refusal was plainly misbehavior before the enemy within the meaning of Article of War 75..

Upon a motion for findings of not guilty the defense contended that the evidence did not support the allegations, in that at the time of the advance accused was under the restraint of arrest and could not advance as previously ordered. The gravamen of his misbehavior as alleged was not however his failure to make the advance, but was his avowal of his intention not to go forward. The refusal charged lay in his declaration rather than his physical actions. His statements of themselves amounted to conduct not conformable to the "standard of behavior before the enemy set by the history of our arms" (MCM, 1928, par. 141a).

Accused testified that he had suffered from progressive fear and

CONFIDENTIAL

267114

nervousness in combat and implied that his avowal of inability to advance with his company was the result of his mental incapacity to control his actions. The report of the psychiatrists, though finding accused sane, tended to support this implication. The psychiatrists found an "anxiety state" but limited their conclusion of possible incapacity to the proposition that accused's mental or emotional condition made it "very difficult" for him to adhere to the right. There was no evidence of insanity and the question of the mental responsibility of accused was a matter for the court. Upon all the evidence and in the light of its knowledge of human behavior and experience, the court was justified in concluding that accused was mentally responsible for his acts and had the mental power to adhere to the right.

5. The charge sheet sets forth accused's age as 25 years, and states that he was commissioned a second lieutenant on 23 January 1943.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence.

*Paul E. Lengue*, Judge Advocate.  
O. J. Gde, Judge Advocate.  
*Donald W. Mackay*, Judge Advocate.

CONFIDENTIAL

**CONFIDENTIAL**

(172)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army.  
24 March 1944.

Board of Review.

NATO 1614

UNITED STATES

v.

Second Lieutenant RAYMOND L.  
LANGER (O-1309075), Company L,  
133d Infantry Regiment.

34TH INFANTRY DIVISION

Trial by G.C.M., convened at  
APO 34, U. S. Army, 27 December  
1943.

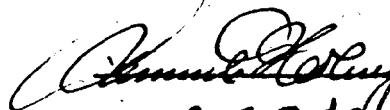
Dismissal and confinement for  
five years.

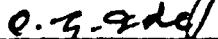
Eastern Branch, United States  
Disciplinary Barracks,  
Greenhaven, New York.

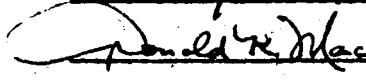
HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Mackay, Judge Advocates.

The record of trial in the case of the officer named above has been  
examined and is held by the Board of Review to be legally sufficient to  
support the sentence.

 Holmgren, Judge Advocate.

 Ide, Judge Advocate.

 Mackay, Judge Advocate.

NATO 1614  
Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army.  
24 March 1944.

1st Ind.

TO: Commanding General, NATOUS, APO 534, U. S. Army.

1. In the case of Second Lieutenant Raymond L. Langer (O-1309075), Company L, 133d Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient

267114

**CONFIDENTIAL**

NATO 1614

~~CONFIDENTIAL~~

(173)

NATO 1614, 1st Ind.  
24 March 1944 (Continued).

to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$ , you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 1614).



HUBERT D. HOOVER  
Colonel, J.A.G.D.  
Assistant Judge Advocate General

---

(Sentence as modified ordered executed. GCMO 23, NATO, 24 Mar 1944)



~~CONFIDENTIAL~~

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army.  
15 April 1944.

Board of Review

NATO 1618

UNITED STATES	) PENINSULAR BASE SECTION
v.	)
Private JAMES (NMI) MAJORANA (32342697), Company G, 40th Engineer Combat Regiment.	)         Trial by G.C.M., convened at Naples, Italy, 30 December 1943. Dishonorable discharge, sus- pended, and confinement for five years. NATOUSDA Disciplinary Training Center, Casablanca, French Morocco.

---

OPINION by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

---

1. The record of trial in the case of the soldier named above having been examined in the Branch Office of The Judge Advocate General with the North African Theater of Operations and there found legally insufficient to support the findings in part, has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General for the North African Theater of Operations.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 84th Article of War.

Specification: In that Private James (NMI) Majorana, Company "G", 40th Engineer Combat Regiment did, Near Naples, Italy, on or about 8 December 1943, wrongfully dispose of by giving away to a civilian, two (2) pair of shoes of the value of seven dollars and thirty two cents (\$7.32), issued for use in the military service of the United States.

CHARGE II: Violation of the 93d Article of War.

258814

~~CONFIDENTIAL~~

CONFIDENTIAL

Specification: In that Private James Majorana, Company "G", 40th Engineer Combat Regiment did, in the vicinity of Naples, Italy, on or about 8 December 1943, unlawfully, enter the tent dwelling of Private first class Clyde W. Moore, 34594702, Company "G", 40th Engineer Combat Regiment, with intent to commit a criminal offense, to wit Larceny, therein.

CHARGE III: Violation of the 94th Article of War.

Specification: In that Private James (NMI) Majorana, Company "G", 40th Engineer Combat Regiment did, in the vicinity of Naples, Italy, on or about 8 December 1943, feloniously take, steal, and carry away two (2) pair of shoes, value about seven dollars and thirty two cents (\$7.32), property of the United States Government.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of one previous conviction by special court-martial for violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the NATOUS USA Disciplinary Training Center, Casablanca, French Morocco, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 42, Headquarters Peninsular Base Section, 23 February 1944.

3. The evidence shows that on 8 December 1943, accused was bivouacked with his company about six miles northwest of Naples, Italy. Accused was seen coming from the bivouac area with his field jacket bulging as though he had a bundle under it (R. 7,9). Accused went over a bank and an Italian civilian followed him (R. 8). Two soldiers from accused's organization went to the place where accused had been seen and found two pairs of government issue service shoes in a barracks bag (R. 8,9,10). The testimony of the witnesses for the prosecution is in conflict as to whether the bag in question was found in the possession of an Italian civilian or found abandoned on the ground (R. 8,9,10,11,14). The shoes had been issued to two soldiers in accused's organization and the owner of one pair had placed them under his bed in a pup tent. The owner described his tent as follows:

"In a little pup-tent we got. We got a little pup-tent built out there. It was in a little pup-tent, under the bed" (R. 12).

The other pair of shoes had been placed in front of another pup tent (R. 12, 13). The court was requested to take judicial notice of Army Regulation 30-3000, 31 August 1943, Page 13, showing the price of a pair of Army service shoes as \$3.80 (R. 18). Without objection the following sworn statement, signed by accused, was introduced in evidence:

"At about 1745 on December 8, 1943 I went down to the end

258814

CONFIDENTIAL

**CONFIDENTIAL**

(177)

of our bivouac area to an Italian civilian whose name I do not know but have seen him about the area before. I asked him if he wanted a pair of shoes. He said, 'Yes', so I went back to the bivouac area and picked up two pair of shoes. One was in a pup tent and the other was outside of another pup tent. Neither pair were mine. One pair belonged to Pfc. Clyde Moore of Company "G" and the owner of the other pair I did not know.

"I then took the shoes back to the Italian civilian but he was not there. There was a young boy there who I knew was the civilian's nephew. I gave him the shoes and returned to the bivouac area intending to go back the next day to see what the civilian would give me for the shoes" (Ex. 1; R. 18).

Accused elected to remain silent and no witnesses were offered by the defense (R. 19).

4. The only evidence in the record tending to support the conviction of housebreaking under Charge II and the Specification thereunder is to the effect that a soldier to whom a pair of Army service shoes had been issued placed them under a bed in "a little pup-tent" from which place they were wrongfully removed by accused. No description of the "little pup-tent" is found in the record and there is no evidence as to the size thereof, the material of which it was constructed nor as to how long it had been located at the place in question on the date of the alleged offense. The standard Army shelter tent, consisting of two shelter halves, is commonly described as a "pup-tent". Other than the inference to be drawn from the fact the pup tent had a bed in it and was referred to in the testimony as "Moore's tent", there is no evidence showing the purpose for which the tent was used.

"Housebreaking" was incorporated as an offense within Article of War 93, in the revision of 1920. No definition of the offense was given. Inasmuch as no offense known as housebreaking is recognized by the common law, the question arises as to what offense was intended to be condemned by the Congress. At the time of the revision of 1920 the Code of the District of Columbia (sec. 823, now sec. 22-1801) recognized, defined and made punishable such an offense in the following words:

"Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other water craft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal

258814

- 3 -

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(178)

offense, shall be imprisoned for not more than fifteen years (Mar. 3, 1901, 31 Stat. 1323, ch. 854, sec. 823.)".

It is reasonable to conclude that "housebreaking" as defined by the Code of the District of Columbia was the offense intended to be included in and condemned by Article of War 93. This conclusion is substantiated in some degree by the fact that the form to be used in charging housebreaking as set out in Appendix 4, Manual for Courts-Martial, 1928, Page 250, suggests the use of the words "dwelling", "bank", "store", "warehouse", "shop" and "stable", which are the exact words and appear in the same order as those in the above statute. The word "tent" does not appear either in the statute or in the form. All structures mentioned have the characteristic of permanency and become real property when affixed to the soil as distinguished from a tent which, by its inherent nature, remains personal property and is not in any real sense ever affixed to the land.

"Housebreaking" is defined in Paragraph 149e, Manual for Courts-Martial, 1928, as "unlawfully entering another's building with intent to commit a criminal offense therein".

The term "building" generally, though not always, implies the idea of a habitation for the permanent use of man, or an erection connected with his permanent use (Rouse v. Catskill and N.Y. Steamboat Co., 13 N.Y.S. 126, 127, 35 N.Y. St. Rep. 491; Vallejo and N.R. Co., v. Reed Orchard Co., 169 Cal. 545, 147, P. 238).

Bouvier's Law Dictionary (Rawle's Third Revision), Page 400, defines "building" as:

"An edifice, erected by art, and fixed upon or over the soil, composed of brick, marble, wood, or other proper substance, connected together, and designed for use in the position in which it is so fixed."

The term is defined in Black's Law Dictionary, Third Edition, Page 255, as:

"Ordinarily, a structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof. Small v. Parkway Auto Supplies, 258 Mass. 30, 154 N.E. 521, 522, 49 A.L.R. 1361; State v. Gates, 197 Iowa, 777, 197 N.W. 908; State v. Elliott, 198 Iowa, 71, 199 N.W. 270, 271.

258814

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~

(179)

"A structure or edifice erected by the hand of man, composed of natural materials, as stone or wood, and intended for use or convenience. Truesdell v. Gray, 13 Gray (Mass.) 311; State v. Moore, 61 Mo. 276; Clark v. State, 69 Wis. 203, 33 N.W. 436, 2 Am. St. Rep. 732; State v. Crouse, 117 Me. 363, 104 A. 525, 526; Mecca Realty Co. v. Kellogg's Toasted Corn Flakes Co., 166 App. Div. 74, 151 N.Y.S. 750, 753; Sacks v. Legg, 219 Ill. App. 144, 147."

Webster's New International Dictionary, 1943 edition, Page 351, defines "building" as:

"That which is built\*\*\*As now generally used, a fabric or edifice, framed or constructed, designed to stand more or less permanently, and covering a space of land, for use as a dwelling, storehouse, factory, shelter for beasts, or some other useful purpose."

The word "fabric" as employed in the above definition, and as hereinafter used, is defined in Webster's Dictionary, supra, Page 906, as:

"A building; hence, a framework; a structure.\*\*\*To frame; build; construct."

The following statement supported by numerous cited authorities is taken from Volume 9, Corpus Juris, Pages 683, 684, 685:

"BUILDING. A fabric built or constructed; an edifice for any use; an edifice erected by art and fixed on or over the soil, composed of brick, stone, marble, wood, or other proper substance connected together, and designed for use in the position in which it is so fixed; a fabric or edifice constructed for use or convenience, as a house, a church, a shop, etc.; a fabric or edifice, such as a house, church, or the like, and designed for the habitation of man or animals, or for the shelter of property; a structure; any structure with walls and a roof; in the nature of a house built where it is to stand, which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property; a structure or edifice inclosing a space within its walls and usually covered with a roof, such as a house, a church, a shop, a barn, or a shed; a structure or edifice erected by the hand of man, composed of natural materials, as stone or wood, and intended for use or convenience; a tenement; a thing built; that which is built, as a dwelling house, barn, etc.; a block of brick or stone work, covered in by a roof. As commonly understood, a house for residence, business, or public use, or for shelter of animals or storage of goods; and imports

258314

~~CONFIDENTIAL~~

a structure of considerable size and intended to be permanent or at least to endure for a considerable time."

Housebreaking is an offense closely related to and necessarily included in the crime of burglary (Dig. Op. JAG, 1912-40, p. 315; Bull. JAG, May 1943, p. 189). Housebreaking is the unlawful entering of another's building with intent to commit a criminal offense therein while burglary is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein (MCM, 1928, pars. 149d, 149e). One definition employs the term "building" while the other uses the term "dwelling house". Any structure subject to housebreaking could, if occupied as a dwelling, be subject to burglary. It follows that in a case where, as here, the sole inquiry is as to whether the character of the shelter invaded is such that it may be a subject of housebreaking, the law as applied to the crime of burglary becomes pertinent and may be consulted for a solution.

Paragraph 149d, Manual for Courts-Martial, 1928, specifically provides that a tent cannot be a subject of burglary.

In Wherton's Criminal Law, 12th Edition, Section 1003, the author says:

"The offense (burglary) cannot be committed in a tent or booth in a market or fair, even though the owner lodge in it; because it is not a permanent but a temporary edifice. But if it be a permanent building, though used only for the purposes of a fair, it is a dwelling house."

Blackstone, commenting on the conclusion that a tent cannot be a subject of burglary, said:

"\*\*\*for the law regards thus highly nothing but permanent edifices . . . and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances" (4 Blackstone Comm. 226, cited in 9 C.J. p. 1022, sec. 31, note 11e).

The term "house" or "building" used in some of the statutes, although obviously very much broader in its scope than "dwelling house", has been held not to include a tent closed at one end only (Callahan v. State, 41 Tex. 43; 36 C.J. p. 756, sec. 69, note 43).

In the case of Knowles v. State, 19 Ala. 476, 98 S. 207, it was held that a canvas tent, in a lumber camp, containing as the only article of furniture a bed on which a saw mill employee was temporarily sleeping was not a house within a statute punishing the shooting of a firearm at, into, or through a dwelling house or other house or building, the court saying: "Such a structure as that described\*\*\*would in common language be called a tent and not a house".

~~CONFIDENTIAL~~

(181)

The Specification in the instant case employs the term "tent dwelling". No definition of this term has been found, however, both "tent" and "dwelling" have well defined meanings.

Webster's New International Dictionary, 1943 Edition, Page 2602, defines "tent" as:

"A portable lodge of skins, canvas, or strong cloth, stretched and sustained by poles, used for shelter, esp. by soldiers in camp."

The term is defined in Black's Law Dictionary, Third Edition, 1933, Pages 1715, 1716, as:

"A shelter of flexible material supported by poles stretched by cords that are secured by pegs in the ground. Knowles v. State, 19 Ala. App. 476, 98 So. 207, 208; City of St. Louis v. Nash, 266 Mo. 523, 181 S.W. 1145, 1146, Ann. Cas. 1918B, 134; Killman v. State, 2 Tex. App. 222, 28 Am. Rep. 432."

Webster's New International Dictionary, 1943 Edition, Page 803, defines "dwelling" as: "Habitation; abode; residence; domicile".

In Volume 28, Corpus Juris Secundum, Page 599, the word "dwell" is considered in the following language:

"DWELL. The word is derived from the Danish 'dwelger,' and has been defined as meaning to abide, to abide as a permanent resident, or for a time, to be domiciled, to have a habitation for some time or permanence, to inhabit, to live during a considerable period in a place, to live in a place, to remain, to reside."

Corpus Juris Secundum, Volume 28, Page 599, considering the terms "dwelling or dwelling house" states:

"The term is not free from ambiguity, but is one of multiple meanings. Many definitions have been given in adjudicated cases, and they are not entirely harmonious\*\*\*In its broadest significance the word denotes a building used as a settled human abode; any building, edifice, or structure inclosed with walls and covered, whatever may be the materials used for building; and, in common parlance, when not qualified, conveys the notion of a home\*\*\*the term has been defined as\*\*\*a building or edifice for the habitation of man\*\*\*a house in which one regularly and habitually sleeps in the nighttime; a house intended for human habitation; a house intended to be occupied as a residence\*\*\*a house or structure in which people dwell\*\*\*some permanent abode or residence with intention to remain; usual place of abode."

Proof that accused took a pair of shoes from a "little pup-tent" is not

258814

proof that accused entered another's building with intent to commit a criminal offense therein. The evidence is therefore legally sufficient to support a finding of guilty of the Specification, Charge II, but not legally sufficient to support a conviction of housebreaking, in violation of Article of War 93, under Charge II.

5. The record of trial is legally sufficient to support the findings of guilty of the Specification and Charge I and the Specification and Charge III, which will support the sentence insofar as it imposes dishonorable discharge, total forfeitures and confinement for one year. The question arises, therefore, as to what offense, if any, was accused convicted of under the Specification and Charge II and, if convicted of an offense, what sentence will such conviction support.

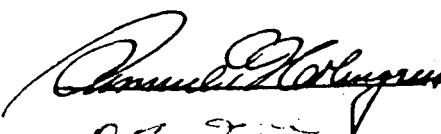
In C.M. 202846 (1935) accused was charged with unlawful entry with intent to commit an assault (A.W. 93, housebreaking). It was held that although the offense alleged, housebreaking, was not proved because of the failure to prove a co-existing intent to commit an offense at the time of entry, nevertheless the record was legally sufficient to support a finding of guilty of wrongful entry of the quarters in question in violation of Article of War 96 (Dig. Op. JAG, 1912-40, p. 322).

The evidence is legally sufficient to support a finding of guilty of unlawfully entering a tent of another soldier with the intent to commit an offense therein, to wit, larceny, a trespass, in violation of Article of War 96.

The Table of Maximum Punishments, Paragraph 104c, Manual for Courts-Martial, 1928, does not prescribe a maximum sentence for the offense supported by the record but prescribes a maximum sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for ten years for the offense of housebreaking to which the supported offense is closely related.

6. The charge sheet shows that accused is 36 years old. He was inducted into the Army 23 May 1942. He had no prior service.

7. The court was legally constituted. Except as noted no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charges I and III and their Specifications and the sentence, but legally sufficient to support only so much of the findings of guilty of Charge II and its Specification as involves findings of guilty of the Specification in violation of Article of War 96.

 Charles Kottinger, Judge Advocate.

O. T. D., Judge Advocate.

Gordon Simpson, Judge Advocate.

**CONFIDENTIAL**

(183)

NATO 1618

1st Ind.

Branch Office of The Judge Advocate General, NATOUS A, APO 534, U. S. Army,  
15 April 1944.

TO: Commanding General, NATOUS A, APO 534, U. S. Army.

1. There is transmitted herewith for your action under the fifth subparagraph of Article of War 50½ the record of trial by general court-martial in the case of Private James (NMI) Majorana (32342697), Company G, 40th Engineer Combat Regiment, together with the opinion of the Board of Review in this Branch Office that the record of trial is legally sufficient to support the findings of guilty of Charges I and III and their Specifications and the sentence, but legally sufficient to support only so much of the findings of guilty of Charge II and its Specification as involves findings of guilty of the Specification in violation of Article of War 96. I concur in the opinion of the Board of Review and recommend that so much of the findings of guilty of Charge II and its Specification be vacated as finds accused guilty of an offense other than that alleged in the Specification in violation of Article of War 96, and that all rights, privileges and property of which accused has been deprived by virtue of that portion of the findings so vacated be restored.

2. Although the sentence is not affected, the findings of guilty of Charge II and its Specification involve an illegal conviction of house-breaking, a felony as denounced by Article of War 93. The action herein recommended is designed to vacate the illegal conviction of that felony and to confirm so much of the findings under this Charge and Specification as involves conviction of the military offense involved in the acts alleged in the Specification.

3. There is inclosed herewith a form of action designed to carry into effect the recommendation herein above made, should it meet with your approval.



HUBERT D. HOOVER  
Colonel, J.A.G.D.  
Assistant Judge Advocate General

2 Incls.

- Incl. 1 - Record of trial.  
Incl. 2 - Form of action.

---

(Findings vacated in part in accordance with recommendation of  
Assistant Judge Advocate General, GCMO 26, NATO, 30 Apr 1944)

258814

**CONFIDENTIAL**



Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army.  
30 May 1944.

Board of Review

NATO 1626

UNITED STATES	)	PENINSULAR BASE SECTION
v.	)	Trial by G.C.M., convened at
Able Bodied Merchant Seaman	)	Naples, Italy, 10 February
JOHN E. HARRIS, Steamship	)	1944.
Timothy Bloodworth.	)	Confinement for 30 years.
	)	U. S. Penitentiary,
	)	Leavenworth, Kansas.

---

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

---

1. The record of trial in the case of the person named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that John E. Harris, merchant seaman, a person serving with the armies of the United States in the field, did, at Brindisi, Italy, on or about 15 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with pre-meditation kill one Peter Sambol, a human being by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to confinement at hard labor for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, reduced the period of confinement to 30 years, designated the U. S. Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that after the evening meal on 14 December 1943, accused, a merchant seaman and member of the crew of the United States Steamship Timothy Bloodworth, which was then docked at Brindisi, Italy, went to the cabin of Peter Sambol aboard that vessel where he drank rum with Sambol and some of the latter's guests (R. 14,18,24,25; Pros. Ex. 1; Def. Ex. C). About 1900 hours Sambol went ashore, returning about midnight. Accused, who in the meantime had remained aboard the vessel and continued drinking, saw Sambol in the mess room upon his return and asked if he had "any more to drink". Sambol replied in the affirmative and the two men went to Sambol's room where presently they started fighting (R. 18, 25,26; Pros. Ex. 1). In a voluntary statement which was received in evidence without objection (R. 18; Pros. Ex. 1), accused claimed that Sambol had unexpectedly attacked him shortly after they had reached the latter's cabin; that after knocking him down, Sambol kicked him on the arm and in the face and then began choking him violently, almost strangling him. Accused stated that he managed to get away, ran to his room and armed himself with a German bayonet which had been fashioned into a hunting knife. He stated further that

"I was afraid he would follow me up and choke me more. I went back to his room, I might have waited a minute or two, I don't remember. He was standing right in the middle of the room. What I meant to do was go to his door and threaten him with the knife so he would leave me alone. Just as I got to the door he jumped for me. He should have seen the knife, I had it right up in my hand in front of me. I suppose when he jumped for me I cut him, but I wasn't conscious of it, naturally when a man comes at you like that you want to protect yourself. I wasn't aware that I had cut him until he staggered back from me, and then I saw that he had been cut" (Pros. Ex. 1).

After the stabbing, Sambol "rushed" to the master's room and reported that accused had cut him. The master hastened down and encountered accused who admitted he had cut Sambol and said he had thrown the knife in the water (R. 27; Pros. Ex. 1; Def. Ex. C).

At the request of the ship's master, two British military policemen went aboard the vessel after the fight (R. 8,14,15,22). Accused was heard to ask "Is he dead?" and upon being told "No", he remarked, according to one of the British soldiers, "Let me go and finish him off". According to the other soldier, he said "Take me to him", "I will stick it in the bastard again" (R. 8,16). Upon arriving, these soldiers observed the injured man being taken off the ship (R. 12,15). One of the soldiers testified that accused "had had some drink" and was "rather excited" (R. 10). The other soldier testified accused was unsteady on his feet and that his speech was thick (R. 17). Both soldiers observed that accused had abrasions on his face and was bleeding (R. 13,14). One of the soldiers testified that accused said "he had been in a drunken brawl with some seamen, and nobody got away with it", and that accused "looked in bad shape" (R. 14,15).

The British soldiers took accused off the ship and put him in the stockade (R. 12,13). A British medical officer examined him on 16 December 1943, and reported him as "suffering from severe bruising around (L) orbit with a large conjunctival hemorrhage in that eye. He also has a small conjunctival hemorrhage in the (R) eye" (R. 20). When accused's voluntary statement was taken on 10 January 1944, the officer to whom it was made observed that accused's face was "scarred up a little bit" and had a scab on it; that his left eye was "badly bloodshot" and his right eye was "partly bloodshot" (R. 19).

Sambol was admitted to a hospital about 0130 hours 15 December 1943. A British "Surgical Specialist" testified, by stipulation, that when admitted to the hospital, the injured man was suffering from a penetrating wound, was not fully conscious and was unable to answer questions put to him. He was suffering from a wound which had entered the abdominal cavity and penetrated several "coils of gut", had torn the spleen and cut the blood vessel supplying "the gut". Sambol died of his injuries at about 0700 hours that same day (R. 7).

About two months before the stabbing accused and Sambol had had a fight in Canada (R. 25; Pros. Ex. 1; Def. Exs. D,E,F,J). Following that difficulty, Sambol was heard by four defense witnesses to say that he was going "to get" accused or words of like import (Def. Exs. D,F,H,J). In his voluntary statement, accused said he "had had at least 4 men tell me to watch out for Sambol, as he was after me" (Pros. Ex. 1).

The defense introduced depositions of four witnesses attesting to accused's peaceable reputation (Def. Exs. C,D,E,I) and of seven witnesses that Sambol's reputation in this regard was poor or bad (Def. Exs. C,D,E,F,G,I,J). The master of the ship described Sambol as "the poorest specimen of a man I ever saw on an American ship" and added that he "had trouble with him in every port" (Def. Ex. C).

Accused testified that on the day in question he finished work about 1400 hours and drank gin until about supper time (R. 24). He told of going to Sambol's room after supper and drinking rum with him and some Army personnel after which he "got to where" he did not remember very well. He saw Sambol next "close to-midnight" and asked if he had a drink (R. 24,25). He testified that when they reached Sambol's room, the latter "brought up this old fight in Canada" and knocked him down with a blow above the right eye. Sambol then kicked accused tearing the skin from his arm and forehead and then began choking him (R. 25,26). From the violence of the choking, accused testified he thought Sambol was trying to kill him. He managed to get away, ran to his own room, secured a German bayonet that had been made into a knife and, as he testified,

"walked over with the intention of showing him I had a knife and telling him that if he did bother me any more that if he didn't leave me alone, I would knife him. I thought by threatening him with the knife it would make him leave me alone" (R. 26).

Accused had seen a seaman arm himself with a knife on another occasion when Sambol was threatening him and Sambol "didn't bother him when he had the knife" (R. 26). It was about 50 feet from accused's cabin door to the door of Sambol's room (R. 29). Accused testified that possibly he could have stayed in his room when he went there but "if I stayed there, he would have come there" or that he could have gone ashore that night "but it was late and after hours" (R. 26,30). He further testified that he ran from his own cabin to the door of Sambol's room (R. 31) and when he got there

"the man jumped at me, and he hit at me with his right hand. When he hit at me, I ducked and the man closed with me, and that is when I cut him" (R. 27).

Accused testified that Sambol was over six feet tall, would weigh "two twenty or two thirty pounds" and had a "large rangy frame, long arms, wide", that Sambol was a "much more powerful man than I am" (R. 25). Another witness testified that Sambol was six feet two or three inches tall and would weigh 190 to 210 pounds, "possibly more", and was very strong (Def. Ex. J). It was stipulated that a soldier would testify that he viewed Sambol's corpse and "The body was that of a large well nourished male, weighing approximately 250 pounds and was approximately six feet in length" (R. 31).

Accused testified further that it

"was common knowledge on the ship that the man was after me. I was told several times about it" (R. 27).

However, he also testified that these threats did not bother him, that

"I knew the man didn't like me, but when he was sober, he didn't show any evidence of not liking me" (R. 30).

Accused testified he did not know anything about the statements the British soldiers attributed to him when they came aboard the ship and that he did not "remember making them" (R. 28). Accused in his voluntary statement stated that if both the British soldiers said he expressed himself as "wanting to have another go at Sambol", he "might have said it, but I don't remember it" (Pros. Ex. 1).

The master of the ship testified that on the night in question, accused was "very drunk" (Def. Ex. C). Accused testified that when he broke away from Sambol and started to his own cabin, he "was frightened out of" his wits, that he had been drinking a good deal up until the fight but he thought he was "more or less sobered up" afterwards (R. 31).

The Steamship Timothy Bloodworth was owned by the War Shipping Administration, an agency of the United States Government. It was operated by Lykes Brothers Steamship Company of New Orleans, Louisiana, and the operator employed and paid the crew members who were known as "merchant marines" (R. 6,7; Def. Exs. C.G.). The ship was engaged, according to one witness, in "carrying war materials from North Africa to the port of Beri"

(R. 6).

The master of the ship testified that at the time of the fatal stabbing

"we were chartered by the Sea Transport Office of the British Admiralty" (Def. Ex. C).

He also testified:

"We were working under the United States Government as far as I was concerned, but as far as the ship was concerned, it was chartered by the Sea Transport Office of the British Admiralty from the War Shipping Administration, which is the official representative of the American government" (Def. Ex. C).

The master testified further that the ship flew the American flag and as far as he was concerned,

"we were under American rules, and all the crew were. The British had just chartered the ship for the express purpose of bringing British army supplies to the Meditter(r)anean front" (Def. Ex. C).

One of the seamen on the ship testified that it was flying the American flag and was carrying British supplies (Def. Ex. G).

The ship's complement included 21 United States naval personnel commanded by a naval lieutenant. They were responsible for the protection of the ship against hostile aircraft and submarines (Def. Exs. E,F).

4. It thus appears from the uncontradicted evidence that at the place and time alleged, accused wounded Peter Sambol, the person named in the Specification, by stabbing him with a knife and that Sambol as a result of the injury so inflicted, died a few hours afterwards. While there is evidence that Sambol had started the fight which led to the fatal stabbing, accused was able to escape from that aggression. He ran to his own room but instead of remaining there, he armed himself with the knife and returned to the scene of the fray. While accused claimed he only armed himself in order to intimidate his adversary, the court was warranted in concluding that when he returned to Sambol's room accused intended to renew the difficulty and that his attack upon Sambol with the knife was deliberate and premeditated. He thereby assumed the role of an aggressor. The resultant homicide was without legal excuse or justification. Malice may be inferred from the nature and use of the deadly weapon, from accused's expressed malevolence when he announced a desire after the fight was over to stab his victim again, and from the other circumstances in evidence. Accused's claim that he was impelled by sudden fear and excitement when he stabbed his victim was for the court to evaluate and its conclusion that accused acted deliberately in pressing the fatal attack has ample support in the evidence. While there is evidence that accused had been drinking, the court was justified in

concluding from all the attendant circumstances that he was sufficiently in control of his faculties to be held accountable for his acts. With the concurrence of the jurisdictional factor, presently considered, the court properly found accused guilty of murder as charged (MCM, 1928, par. 148a; Winthrop's, reprint, pp. 672,673).

5. The accused was a civilian member of the crew of the Timothy Bloodworth, a vessel owned by the United States, controlled by the War Shipping Administration and operated through the agency of a shipping corporation. The vessel carried only American personnel, including a detachment of United States Navy personnel in charge of her antiaircraft and antisubmarine guns. The offense was committed on board the vessel while she was docked at Brindisi, Italy. She had been engaged in transporting "war materials" from North Africa to the Port of Bari, Italy. There is also testimony that she "was chartered by the Sea Transport Office of the British Admiralty from the War Shipping Administration" for the "purpose of bringing British army supplies to the Meditter(r)anean front". American and British forces were then in joint occupation of southern Italy, including the town of Brindisi, and were engaged in a unified and coordinated offensive under the supreme command of an American general officer against a common enemy. The American Army so engaged also included British and British Dominion units and the lines of communication within this theater were maintained in common by American and British forces (See Adm. Memo., AFHQ, No. 13, 20 Oct. 1942; id., No. 19, 30 Nov. 1942; id., No. 11, 24 Jan. 1943; id., No. 71, 21 Oct. 1943).

The test of the jurisdiction of this court-martial to try accused is whether at the time of the alleged offense the accused was accompanying or serving with the Armies of the United States within the meaning of Article of War 2. Of the classes of civilians contemplated by that statute accused, a merchant marine, was clearly within the definition of those in the employment and service of the government (Winthrop's, reprint, 1920, p. 99).

It has been stated that,

"The following categories of persons, while on board American vessels, are subject to the military jurisdiction of the United States: (I) All persons on board United States Army transports or Army cargo transports or other vessels operating under the jurisdiction and command of the United States War Department, for purposes connected with the operations of the Army. (See *Ex parte Gerlach*, 247 Fed. 616, and *Ex parte Falls*, 251 Fed. 415); (II) on board other vessels:\*\*\*<sup>(e)</sup> all retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field, both within and without the territorial jurisdiction of the United States though not otherwise subject to the Articles of War;\*\*\*\* (Dig. Op. JAG, 1912-40, sec. 369 (6), p. 182).

(191)

The War Shipping Administration, as recited in the preamble of Executive Order Number 9054, dated 7 February 1942, was established "to assure the most effective utilization of the shipping of the United States for the successful prosecution of the war". By that order:

"2. The Administrator shall perform the following functions and duties:

"a. Control the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States, except (1) combatant vessels of the Army, Navy, and Coast Guard; fleet auxiliaries of the Navy; and transports owned by the Army and Navy; and (2) vessels engaged in coastwise, intercoastal, and inland transportation under the control of the Director of the Office of Defense Transportation.

"b. Allocate vessels under the flag or control of the United States for use by the Army, Navy, other Federal departments and agencies, and the governments of the United Nations".

It is further ordered that,

"4. Vessels under the control of the War Shipping Administration shall constitute a pool to be allocated by the Administrator for use by the Army, Navy, other Federal departments and agencies, and the governments of the United Nations. In allocating the use of such vessels, the Administrator shall comply with strategic military requirements".

And:

"6. In the discharge of his responsibilities the Administrator shall collaborate with existing military, naval, and civil departments and agencies of the government which perform wartime functions connected with transportation overseas, in order to secure the most effective utilization of shipping in the prosecution of the war. The Administrator particularly shall maintain close liaison with the Departments of War and the Navy through the Assistant Chief of Staff for Transportation and Supply and the Director, Naval Transportation Service, respectively, with respect to the movement of military and naval personnel and supplies".

\*Note: It appears that while a vessel can be acquired by the Administrator by charter, she can be chartered by him only to a citizen of the United States (par. 3, Executive Order No. 9054; 50 USC 1273,1285,1295).

(192)

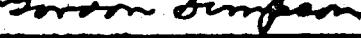
It thus becomes apparent that the Timothy Bloodworth had been allocated by the War Shipping Administration for use in the movement of military supplies. The presence of the vessel in Brindisi, Italy, must be deemed to have been in consequence of her utilization on a mission of that character and incidentally of a compliance with shipping orders of a military command set up in this theater under the sanction of the War Department. To all intents the Timothy Bloodworth was an instrumentality within the jurisdiction and command of that department of our government, specifically furthering in the present instance the strategic military requirements of the operations of the United States Army in Italy. It is of incidental moment that forces of the United States and Great Britain were then under the unified command of an American general officer. Under the flag and control of the United States, the vessel was in fact an integral part of a line of communication connecting our forces in the field and accused's employment thereon rendered him subject to military jurisdiction.

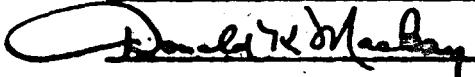
It is of no material consequence that the Timothy Bloodworth may have carried only British supplies to the combat zone in Italy. Irrespective of any contractual arrangement for such transportation the vessel, with the American crew and personnel thereon, was in fact serving in connection with the military operations of the United States Army in the field. Strategic military requirements against a common enemy, under the plan of operations effective in this theater, involved mutual accord and accommodation and any supplies for the allied combatant forces in Italy not only contributed to the success of a common military objective but tended to support and assist the Army of the United States there engaged. The principle is similar to that enunciated in the case of a civilian employed by an aircraft company in an overseas aircraft depot, a military installation in former enemy territory occupied by American and British forces and under the supervision of United States Army officers, where, though both American and British planes were being repaired at the depot, the petitioner worked only on British planes. In sustaining the exercise of military jurisdiction over the petitioner, the court held it "is immaterial that his work was upon British planes only" (Bull. JAG, September 1943, sec. 359 (12), pp. 337, 338).

For the foregoing reasons the Board is of the opinion that the assumption of jurisdiction by this court-martial over the accused in the instant case was warranted by the Articles of War.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

 Charles M. Kehoe, Judge Advocate.

 Gordon Simpson, Judge Advocate.

 Donald K. Mackay, Judge Advocate.

**CONFIDENTIAL**

(193)

branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
25 March 1944.

Board of Review

NATO 1627

U N I T E D   S T A T E S	)	PENINSULAR BASE SECTION
v.	)	Trial by G.C.M., convened at Naples, Italy, 4 January 1944.
Private First Class GUADALUPE (NMI) ESPINOSA (38350174) and	)	As to Espinosa: Not guilty.
Private JOHN (NMI) NAVROCKY (32370563), both of 473d	)	As to Navrocky: Dishonorable discharge and confinement for ten years.
Engineer Maintenance Company.	)	U. S. Penitentiary, Lewisburg, Pennsylvania.

-----  
**REVIEW by the BOARD OF REVIEW**

Holmgren, Ide and Mackay, Judge Advocates.  
-----

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private John (NMI) Navrocky, 473rd Engineer Maintenance Company, and Private First Class Guadalupe (NMI) Espinosa, 473rd Engineer Maintenance Company, acting jointly, and in pursuance of a common intent, did, at Miano, Italy, on or about the 25 November 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Clifton Ballard, Company A, 386th Engineer Battalion (Separate), a human Being by shooting him with a rifle.

Each accused pleaded not guilty to the Charge and Specification. Espinosa was found not guilty of the Charge and Specification. Navrocky was found

272550

**CONFIDENTIAL**

**CONFIDENTIAL**

(194)

guilty of the Specification except the words, "and Private First Class Guadalupe (NMI) Espinosa, 473rd Engineer Maintenance Company, acting jointly and in pursuance of a common intent", and "with malice aforethought", and "and with premeditation", of the excepted words not guilty. He was found not guilty of the Charge, but guilty of violation of the 93d Article of War. Evidence of one previous conviction by summary court-martial for being drunk and disorderly in a camp area in violation of Article of War 96, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 10 years. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 25 November 1943, accused Navrocky and Espinosa, armed with carbines, went to a tavern in Miano, Italy, where wine was sold (R. 7,25,27,34). A number of soldiers were present, white and colored, English, American and North Africans (R. 7,9,26). Navrocky became nauseated and a Private Abraham Kaplan, of the 473d Engineer Maintenance Company, brought him outside "to throw up". Navrocky had his carbine with him when he went outside (R. 7,56). About three minutes later, while they were outside, a shot was fired inside the tavern. Kaplan left Navrocky and ran inside (R. 7,10,12,41). A witness testified he saw "a colored boy" hitting Espinosa over the head with a gun, and that deceased, Private Clifton Ballard, Company A, 386th Engineer Battalion (Separate), and Kaplan stopped the fight (R. 7,10). Espinosa ran outside, his forehead "cut up and bleeding" (R. 7,10,11,55). There is evidence that other soldiers participated in the fight on the inside (R. 29), and that at one time accused threw a chair across the room (R. 34). However, when accused was on the outside a shot was fired into or through the door and somebody yelled, "Come on out you black bastard" (R. 7,8,11,30). Some soldiers inside told deceased to go with them out of a window and not out the door, but the latter stated "he was going out the door, that that was how he came in" (R. 29,31). Deceased "tore the door open and started out at an angle" (R. 11). He walked about three feet, "just walking peaceful-like," when Navrocky yelled, "Stop! Halt! Halt!". Then two shots were fired (R. 7,8,11). There is evidence that deceased, while in the light of the door, was seen to "double up" and fall (R. 57). Photographs of the scene of the shooting were admitted in evidence (R. 19; Ex. 3).

In a voluntary statement which was received in evidence, defense stating "no objection made" (R. 17), Navrocky stated in pertinent part:

"We went inside and a colored soldier told me that there was a rule not to have any clips in the gun. I took out the clip and gave him my gun. I had a drink of wine and began to feel sick. So I got my gun and Kaplan took me out. While I was throwing up, I heard a commotion and a shot inside the house. Not knowing what it was all about I got scared. Espinosa came running out hollering, 'Shoot, 'Rocky', shoot.' The door was then shut and I hollered, 'Come out with your hands up.' No one answered; I fired

272550

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(195)

over the door. Then it opened and a colored fellow came out with his hands down. I hollered 'Halt' and he kept coming. I hollered 'Stop' several times and he still kept coming. I took it for granted he was armed and as he was coming straight at me I heard sho(u)ts of 'Shoot! Shoot!' By this time he was pretty close to me, about fifteen feet, so I got scared and shot twice, and I took off" (Pros. Ex. 1).

A medical officer testified that on 25 November 1943; he identified deceased as Private Clifton Ballard, examined him and pronounced him dead. He found two wounds "presumed to be bullet wounds", one in the left side of the chest, the other in the upper abdomen. In his opinion death was probably due to "internal hemorrhage or damage to a vital organ" (R. 24). He testified that, "The body was lying on it's back" in the street; estimated to be about five yards from the doorway, with the feet pointed in that direction (R. 25).

Espinosa testified that when he entered the place he asked the woman attendant for some vermouth and, when told they had none, started to leave. Thereupon he was officially accosted by the deceased (R. 41,45). Witness testified:

"I turned around and went towards the door. He said, 'You aren't going anyplace.' He grabbed my carbine away from me and one boy who was standing on the side of me took up my jacket and shot at me. I moved, and the shot went over my head, and I dropped my helmet and this boy started hitting me over the head with a pistol. I put my hands out, but he hit me over the head two or three times. Kaplan came in and the fighting stopped, so I ran out the door. When I ran out, Navrocky was there. I said, 'It is me, Espinosa.' So, Navrocky stood by the door. He said, 'Come out with your hands up.' He shot over the door and then he backed up across the street. Then he says, 'Come out with your hands up,' so the door opens and this colored boy who was shot comes out and walks out the door towards Rocky. Then Navrocky yelled at him. He said 'Stop'. He didn't stop. He said 'Halt'. He would not stop, so Navrocky shot at him" (R. 41).

Navrocky testified he heard the commotion inside the building and saw Espinosa run out, "blood streaming down off his head and his face". He testified that he "placed a shot over the door, hoping that whoever was coming out after him, and me, too, for that matter, would give me just at least a minute's time to get out of there" (R. 48). As he shot over the door he yelled "Whoever is coming out, come out with your hands up" (R. 49). Deceased came out immediately after the shot, closed the door and jumped aside (R. 48). It was about a minute after Espinosa had come out (R. 52). He testified that he "had no reason to believe that he wasn't armed because \*\*\*all the men in there were", and "could not see why he should be advancing towards me, while I was hollering 'Halt'". He let deceased advance for 15 or 16 feet (R. 49), and fired when deceased was about eight feet away.

272550

~~CONFIDENTIAL~~

**CONFIDENTIAL**

(196)

He testified, "It was dark enough that I could not name the man" and that "I was edging out, with him coming after me". He became panicky and pulled the trigger a couple of times (R. 48). Deceased had not said anything and came out with his hands by his sides (R. 51). He testified, "There could not have been any doubt but he was coming towards me because there was no building, no intersection but the wall in back of me, that a man would want to go to" (R. 52) and that he shot "to stop him or startle him or scare him"; "I was pretty scared". He testified:

"I remember that I pulled the trigger twice after I shot at the door. I didn't aim at the man. I had no intentions of killing the man. I thought I was shooting at the door. I wanted to get out of there. I don't know whether I hit the man or not", and "I meant to shoot towards him to give him a scare to stop him" (R. 54).

Navrocky, recalled by defense testified that deceased, though his hands were "down by his side," "was walking the streets towards me in a very belligerent manner". He also testified he himself "was just heavily drunk" (R. 59).

4. It thus appears from the evidence that at the place and time alleged accused Navrocky shot and killed Private Clifton Ballard with a rifle. There is substantial evidence that accused had previously fired a shot into the tavern and had shouted, apparently directed toward the deceased, "Come on out, you black bastard". Other soldiers inside the tavern became afraid of this exhibition of violence and went out through a window. They tried to induce deceased to go the same way but the latter boldly proceeded out through the door. When he had walked a few feet outside accused exclaimed "Halt!" and "Stop!" and then, almost simultaneously with the words, fired the fatal shots. Deceased was unarmed, had made no threats and admittedly by accused, came out with his hands at his sides. While these and other circumstances are suggestive of a malicious homicide, there is substantial basis for the court's findings. Manifestly all required elements of the offense of voluntary manslaughter as found are present (MCM, 1928, par. 149a). Accused cannot complain that he was found guilty of the lesser offense (NATO 581, Grant).

The defense interposed the right of self-defense. It is sufficient to point out that accused was the aggressor and intentionally provoked the difficulty and that there is evidence which at least countervails against any proposition that accused had reasonable grounds to believe the killing was necessary to save his own life or prevent great bodily injury to himself. Moreover, instead of withdrawing from the difficulty he had provoked, the accused stood his ground and persisted in maintaining an aggressive role until the end. Self-defense is not available (MCM, 1928, par. 148a).

5. The charge sheet shows that accused is about 39 years old. He was inducted into the Army 1 June 1942. It also shows that he served as a private in the 18th Infantry from 8 November 1923 to 12 December 1923, and was discharged because of fraudulent enlistment.

6. The court was legally constituted. No errors injuriously affecting

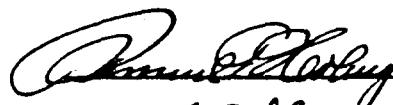
272550

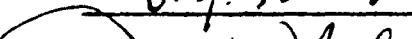
**CONFIDENTIAL**

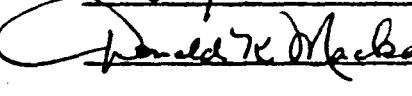
**CONFIDENTIAL**

(197)

the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of manslaughter, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

 Donald P. O'Hagan, Judge Advocate.

 O. J. G. de \_\_\_\_\_, Judge Advocate.

 Donald R. Mackay, Judge Advocate.

272550

**CONFIDENTIAL**



**CONFIDENTIAL**

(199)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
23 March 1944.

Board of Review

NATO 1631

U N I T E D   S T A T E S	)	XII AIR SUPPORT COMMAND
v.	)	Trial by G.C.M., convened at
Private First Class ALLEN B.	)	APO 374, U. S. Army, 9 February
LUCKY (35120894), 315th Fighter	)	1944.
Squadron, 324th Fighter Group.	)	Dishonorable discharge and
	)	confinement for life.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private First Class Allen B. Lucky, 315th Fighter Squadron, 324th Fighter Group, did, at Cercola, Italy, on or about 30 November, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Bruce F. Vaughn, Private, 315th Fighter Squadron, 324th Fighter Group, a human being by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

**CONFIDENTIAL**

270550

3. The evidence shows that on the evening of 30 November 1943, a group of soldiers including accused and deceased, both of whom were members of the 315th Fighter Squadron, 324th Fighter Group, were seated at two tables in a small cafe in Cercola, drinking wine and eating (R. 15-18). In the group was Corporal William Lachmanski, also of the 315th Fighter Squadron 324th Fighter Group (R. 15,16). He testified that there was an Italian singer at the end of the bar singing a familiar tune. Witness didn't know the words but tried to sing the tune. Accused told witness to "shut up" and the latter replied he was "free, white and twenty-one" and could sing if he wanted to. The next thing he remembered happening was deceased stood up and said "Go ahead and sing, if you want to". Then he heard the report of a gun. Witness was looking at deceased when the shot was fired and testified the latter was standing up erect, had turned slightly toward accused, did not appear to be angry, and had a grin on his face. Deceased "stood there just about a second or so and then slumped to the floor". Witness further testified he saw a slight flash in the room and the sound of the gun "sounded in the room" (R. 19). A few minutes later witness saw accused outside the cafe and the latter said to him "I didn't mean to shoot him" (R. 20).

Corporal William S. Collins, also a member of the 315th Fighter Squadron, 324th Fighter Group, was among those present in the cafe (R. 7). He testified that the Italian singer

"was singing 'Santa Lucia' and I guess Lucky and Witkowski must not have liked the song for Lachmanski and myself were trying to follow him as much as we knew how in American" (R. 14);

and

"We were all singing and Lucky said, 'Shut up' and Lachmanski said, 'I am free, white and twenty-one. If I want to sing I can sing' and Private Vaughn came to Private Lachmanski's rescue and said, 'If he wants to sing, he can sing'" (R. 10).

The remark "shut up" could have been addressed to anyone present (R. 14). Witness testified he did not know whether accused "was trying to sing or not" (R. 9). Witness did not have a gun and at the time did not know if anyone else had a gun. He was looking at deceased who was facing the wall opposite "the wall where he was sitting", having made "a half turn". He had a smile on his face. "When Vaughn come up I heard a shot" (R. 10). The shot sounded very close, it made ears ring, and though witness was quite sure he smelled powder he did not see any flash (R. 10,11,12,14).

Collins looked at accused and testified "His face was pretty red". "He was looking towards Vaughn". At that time Witkowski had his back to Collins and "had his arms up". Witness thought Witkowski "had a hold of" accused, but he wasn't sure. Collins told accused and Witkowski "to get out" and they left (R. 11). Deceased "was dead, as far as appearance goes". Collins remained until a doctor and ambulance arrived (R. 12).

270550

CONFIDENTIAL

CONFIDENTIAL  
Private First Class Edward J. Witkowski, also of the 315th Fighter Squadron, 324th Fighter Group, was present (R. 24). The discussion about singing, according to Witkowski

"all started off when this Italian brought in a bunch of Italian records and started playing them. Lachmanski and the other boys wanted to join in with the music even though they didn't know the words and they wanted to sing them and we started singing American numbers" (R. 37).

There was about five minutes of singing before the shooting. When the music stopped witness told "Lachmanski to shut up and started singing American numbers", and deceased, who "wasn't angry", told witness to shut his mouth or he would knock the rest of his teeth out (R. 37). Deceased "was getting up, he was pushing his chair back and had his hand on the chair" when he was shot. Witness did not know of any weapon of any kind in deceased's hands then nor did he notice any when deceased was lying on the floor after being shot (R. 36). Witness did not see accused draw a gun, and did not see a flash, just heard the shot (R. 39,40). When deceased fell "he had blood rolling down each side of his lips" (R. 38). Blood was coming from his mouth when he was on the floor (R. 39). Witness, asked what immediately preceded the shooting said

"That was when the records were being played and we started singing and Lachmanski said someth~~ting~~ing and I told him to shut his mouth and Vaughn said to me, 'You keep your mouth shut or else I will knock the rest of your teeth out', and then I just turned around and didn't pay any attention to him and Lucky said something to Vaughn. I don't know what he said and that is when the shooting occurred right after that" (R. 29).

Witness also testified that at the time deceased was shot the latter was "standing erect", "standing up straight" facing in the direction of witness and "coming up towards" him. He further testified accused then said "Don't come any closer or you will regret it". Deceased made no answer and accused did not say anything further (R. 35,36). Witness hearing the shot looked at deceased and then at accused. The latter "seemed to be putting something in his pocket and started buttoning up his jacket". It was the left back pocket. Deceased's face "looked quite funny", and accused had a "doubtful look on his face" and was holding his head "in a slight droop". Witness asked accused "'What did you do it for?' and he didn't answer and that's when he walked outside" (R. 30). Outside, Witkowski asked "What the hell did you do it for?" and accused said "I am in a helluva jam" (R. 36).

Most of the group had arrived at the cafe in the vicinity of 1800 hours (R. 7,8,16). After about an hour some of the soldiers went to a "cat house" and returned about 2000 hours (R. 8,12,17,22). The shooting occurred at about 2130 hours (R. 9,22). During the time from the return to the cafe and the shooting the soldiers were drinking wine, eating and singing. The

270550

CONFIDENTIAL

# CONFIDENTIAL

(202)

atmosphere was friendly. There was no argument and everyone was feeling good. At first they were in groups, accused and Witkowski having their own bottle and sitting at a separate table but after a while all joined together (R. 8,13,22). They "were all friends there together, just like everybody in the outfit" (R. 25). Accused and deceased were both "medics". "They were friends" and had not been known to be otherwise (R. 16,25). The men sat together "joking and talking" (R. 22).

The room was small. It was about 15 or 20 feet across (R. 10) and contained two large tables and one small one. The group from the 315th Fighter Squadron had one of the large tables and the small one attached to the former. The room was rather dark, illuminated by two kerosene lamps, one on "our table" (R. 21,58). There were some other people at the other table (R. 58). The tables occupied by the group, pushed together, were between six and nine feet long (R. 10,18). On one side deceased, Collins, Witkowski and accused sat, in that order, deceased being next to the wall. Lachmanski sat opposite (R. 17). Accused had a Berretta "gun" with him that evening (R. 29). Witness didn't know whether anybody else had a pistol. He didn't see one in the room (R. 44,45). He had looked it over before leaving camp and put it in his left rear pocket. Accused was left-handed, "he would always write lefthanded". He ate with his left hand, he held everything with his left hand, and he shot with that hand (R. 29,44).

Collins testified they had about three bottles to drink, "anyway we had a bottle and a half after we returned" (R. 13). He had six, seven, eight, or more glasses himself (R. 14,15). Lachmanski thought it was only two bottles (R. 22). Lachmanski had said to accused "It wasn't you, it was the wine that did it" after accused had stated he didn't mean to shoot deceased, but Lachmanski testified he didn't know why he made the remark "unless it was just to console him" (R. 20). Lachmanski wouldn't say accused was drunk (R. 24). He also testified he himself wasn't "exactly sober" (R. 23). Witkowski further testified deceased "seemed to talk allright" and to "act natural". Witness was talking with accused prior to the shooting and testified he "seemed to talk natural" but "he didn't appear too natural, wobbling around here and there" (R. 28). "He seemed to appear to know what he was saying and doing" (R. 29). Witness further testified that at the time of the shooting they were not "drunk, sorta medium drunk, half drunk and half sober". He testified that all the fellows at the table were drinking in the same way that he and accused were, that "as soon as we got finished with one bottle we got another bottle". All were groggy (R. 37). Up until the time of the shooting accused and Witkowski drank six or eight bottles of wine and by the time of the shooting they "were pretty drunk and in medium humor, half drunk and half sober" (R. 36).

Both Collins and Lachmanski testified they observed deceased's condition immediately prior to the shooting. He looked all right, was talking to the rest of the men and appeared to know what he was doing (R. 9,18). Collins further testified accused looked all right and was talking to the rest of the men (R. 9). Lachmanski noticed accused immediately prior to the shooting. He was talking to Witkowski and looked natural. Witness did not notice anything at all unusual about him (R. 18).

270550

# CONFIDENTIAL

**CONFIDENTIAL**

(203)

After the shooting, as Witkowski and accused started back for camp, accused said "Do me another favor, take me to the cathouse before they send me away because I want to get another piece of ass". They walked about two miles, "maybe more than that" (R. 31). They were "holding each other walking down to the cathouse"; "staggering along" (R. 40). A "couple of more times" witness asked accused "why he done it for" and accused replied "I don't know why I done it for". During the walk accused gave his gun to Witkowski and said "Hold this for me. I will ask for it and you give it back to me". They arrived at the house "anywhere around eleven or twelve o'clock". The "cathouse" consisted of one room in which were two British soldiers, an old woman, an Italian, and two girls. They waited for the "soldiers to get finished and leave" (R. 32). The Italian was a civilian, armed with a pistol. The pistol was of the same type as accused's gun (R. 33). They were identical weapons (R. 46). Accused obtained his gun from witness and spent five minutes with the civilian comparing their guns. The clips were removed and accused pulled his slide back (R. 33). Witness went to bed with one of the girls, while the talk went on between accused and the Italian (R. 41). When witness finished, accused gave him the gun saying, "Put it back in your pocket" and "he went on with this girl" (R. 33). Witness testified he was not exactly "pissy-eyed" drunk and "knew what was going on". While in the room accused drank some cognac and "threw up" (R. 42). Some American soldiers had come in to the house and accused tried to sell the gun to one of them. The accused asked a price higher than the soldier would pay. They returned to camp stopping for a few minutes at another house of prostitution. While returning to camp witness asked accused "What did you do it for?" and accused "said he didn't know why" (R. 34).

At 0100 or 0200 hours the next morning Lachmanski, the officer of the day and a Captain Jacob, who had gone in search of accused and Witkowski met them in a little town about half a mile from camp. The captain asked accused if he had a gun. Accused "just reached for his left hip pocket" but Captain Jacob wouldn't let him do so and got it himself out of the pocket toward which accused had reached. The officer of the day placed accused in arrest (R. 20,21,53,54). The officer of the day identified the gun by its serial number. He examined the gun and found it to be free of "dirt, powder, or any other matter" and testified "there was no odor to the barrel at all" (R. 54,55). He further testified as to accused and Witkowski:

"Both of them looked haggard and you could still see traces of drink in both their actions and their eyes. They looked, especially Lucky looked as though he had been sick, while Witkowski didn't look quite half as bad as Lucky did. Both their eyes were bloodshot and there was the odor of wine about them" (R. 55).

A post mortem examination (R. 59; Ex. 5) showed that deceased had a bullet wound on the right side of the face near the nose, surrounded by powder burns, which entered the brain. There was no exit wound. The medical officer who performed the post mortem testified he recovered a bullet from the brain and described the wound as set forth in the report.

**CONFIDENTIAL**

(204)

CONFIDENTIAL

The wound was the cause of death. Death from a wound of that type would be almost instantaneous (R. 73,74).

An empty cartridge case identified as found in the cafe (R. 49; Ex. 2), the bullet removed from the brain (R. 59; Ex. 1) and the pistol taken from accused (R. 59; Ex. 3) were examined and tested by a ballistics expert. He testified neither the bullet nor the case had been fired from that pistol (R. 46,47).

Accused testified:

"I gets me and Witkowski and we goes over to this wine place and starts drinking wine and we eat some potatoes and steak. I don't know how long we stayed there, probably one hour or one and one-half hours and drinking wine, one bottle right after another. The last thing I remember was drinking wine" (R. 62).

He also testified he had been drinking cognac all afternoon "about a bottle and a half" (R. 63). He drank 18 ounces of cognac between 1400 and 1700 hours (R. 68,69). At the cafe they "ordered one bottle right after another". The next thing he remembered he was vomiting in the "cathouse" (R. 63). He recalled some of the soldiers in the cafe. He did not remember seeing Collins or Lachmanski or deceased in the cafe (R. 66,67). He did not change his clothes before going to the cafe (R. 69) but did take his gun with him because of rumors of Germans and spies (R. 63). There were four shells in the magazine. He picked the gun up just before leaving camp (R. 66). He was on friendly terms with deceased; they never had any trouble. They had worked together in the same department about ten months. The shooting was on pay day; they were paid right after dinner. His last meal in camp was dinner at 1200 hours; he didn't eat supper there. He is left-handed (R. 65,66). Accused remembered eating at the cafe but does not recall how he got to the "cathouse" and could not say if Witkowski went with him (R. 67,68).

He "laid" one of the women after vomiting on the floor and remembered leaving the place. He gave his gun to Witkowski when he was removing his pants in the house and got it back half way to camp. He has no recollection of an Italian civilian in the house. He did not recall Witkowski ever mentioning a shooting after they were in the "cathouse". The gun taken from accused looked like accused's gun but witness wouldn't swear it was his. His gun had a "pitted" place on the side but a similer mark on the exhibited gun didn't "look like it". Accused drank quite a bit. He had "gotten company punishment and like that" but that was all the trouble he had gotten into on account of drinking (R. 64,65).

A witness for the defense, accused's tentmate, knew accused three years. He did not see any cognac in the tent 30 November. He testified:

"He always did drink quite a bit and I have been out with him on occasions when we have been drinking and to my

270550

CONFIDENTIAL

~~CONFIDENTIAL~~

(205)

knowledge he drinks quite a bit. To my knowledge when he is drunk he seems to lose all sense, just completely loses himself, because mornings after I have asked him questions and he didn't seem to remember whether he had or not" (R. 70).

"When he has had a few drinks he usually tries to fool around quite a bit. Rassle around. Other times when he isn't drinking he is just nice, calm and I get along with him swell" (R. 71).

Accused had put on a clean uniform before he left that evening and was very sober. His behavior just before he went out was very good; he was calm and sober between 1700 and 1730 hours. "He looked a lot different from what he does when he is really drinking" (R. 71,72).

4. The undisputed evidence shows that at the time and place alleged accused shot and killed Private Bruce Vaughn, the person named in the Specification, substantially as alleged. That the shooting was done with a pistol, the instrumentality named in the Specification, is clearly indicated by the evidence that accused had a pistol, the only one known to be in the cafe, and immediately after the shooting put something in his left rear pocket, the place where he carried the gun. Accused's warning to deceased not to come any closer and his apparent haste to hide the pistol, as well as his admissions, all strongly indicate and clearly justified the court in believing that the shot was fired by accused and that the shooting of deceased was a conscious deliberate act. Moreover, though accused's intent might not have been directed towards deceased in particular, his act of deliberately firing a pistol in the small and crowded cafe under the circumstances as here set forth, with grievous bodily harm or death being a probable and natural consequence of the illegal and wanton act, fully warrants an inference of the requisite malicious intent (MCM, 1928, par. 148a).

With respect to the testimony of the ballistics expert, it is clearly inferable from the evidence that, at the house of prostitution where he went after the fatal shooting and before his apprehension, accused had surreptitiously or by chance exchanged his pistol for the one belonging to the Italian civilian who was there present.

A question was raised by the evidence as to the degree of drunkenness of accused, the legal consequences whereof are material, for

"\*\*\*voluntary drunkenness\*\*\* is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense" (MCM, 1928, par. 126a).

There was evidence that accused looked natural and acted naturally and from his conduct during the evening, his remarks, and his subsequent actions, the court was justified in concluding accused was not so drunk as to be

~~CONFIDENTIAL~~

270550

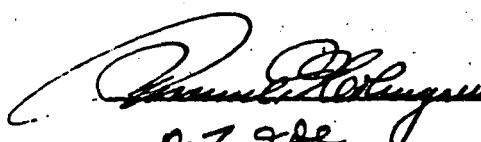
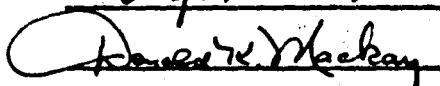
(206)

CONFIDENTIAL

unable to entertain the specific intent incident to the offense of murder. The question was one of fact and was for the court to determine. Its conclusion was clearly justified.

5. The charge sheet shows that accused is about 29 years old. He was inducted into the Army 19 March 1941. No prior service is indicated.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the sentence. Penitentiary confinement is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

 Paul D. Langford, Judge Advocate.  
0-7-982, Judge Advocate.  
 Donald Mackay, Judge Advocate.

270550

CONFIDENTIAL

~~CONFIDENTIAL~~

(207)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army.  
1 May 1944.

Board of Review

NATO 1635

U N I T E D   S T A T E S	)	XII AIR FORCE
v.	)	Trial by G.C.M., convened at
Technicians Fifth Grade	)	Naples, Italy, 24 January
WILLIAM C. HARRIS (38 180 462)	)	1944.
and RALPH MILLER (32 427 898),	)	Harris: Not guilty.
and Private CHARLES O. PENN	)	Penn: Findings of guilty and
(37 208 561), all of 1964th	)	sentence disapproved.
Ordnance Company Depot	)	Miller: Dishonorable discharge
(Aviation).	)	and confinement for life.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were jointly tried upon separate Charges and Specifications as follows:

PENN

CHARGE I: Violation of the 93d Article of War.  
(Disapproved by the reviewing authority).

Specification 1: (Motion by the defense for a finding of not guilty sustained by the court).

Specification 2: (Disapproved by the reviewing authority).

CHARGE II: Violation of the 96th Article of War.  
(Motion by the defense for a finding of not guilty sustained by the court).

267062

~~CONFIDENTIAL~~

(205)

**CONFIDENTIAL**

Specification: (Motion by the defense for a finding of not guilty sustained by the court).

HARRIS

CHARGE I: Violation of the 93d Article of War.  
(Motion by the defense for a finding of not guilty sustained by the court).

Specification: (Motion by the defense for a finding of not guilty sustained by the court).

CHARGE II: Violation of the 96th Article of War.  
(Motion by the defense for a finding of not guilty sustained by the court).

Specification: (Motion by the defense for a finding of not guilty sustained by the court).

MILLER

CHARGE I: Violation of the 92d Article of War.

Specification: In that Technician Fifth Grade Ralph (NMI) Miller, 1964th Ordnance Company Depot (Aviation), did, at or near Caserta, Italy, on or about 24 November 1943, forcibly and feloniously, against her will, have carnal knowledge of Perzia Ambrosina.

CHARGE II: Violation of the 93d Article of War.

Specification 1: (Motion by the defense for a finding of not guilty sustained by the court).

Specification 2: In that Technician Fifth Grade Ralph (NMI) Miller, 1964th Ordnance Company Depot (Aviation), did, at or near Caserta, Italy, on or about 24 November 1943, with intent to do him bodily harm, commit an assault upon Bernardo Ambrosina by willfully and feloniously choking the said Bernardo Ambrosina on the neck with his hands.

Specification 3: In that Technician Fifth Grade Ralph (NMI) Miller, 1964th Ordnance Company Depot (Aviation), did, at or near Caserta, Italy, on or about 24 November 1943, with intent to do him bodily harm, commit an assault upon Agastina Ambrosina by pointing towards the said Agastina Ambrosina and threatening to shoot him with a dangerous weapon, to wit, a rifle.

Specification 4: In that Technician Fifth Grade Ralph (NMI) Miller, 1964th Ordnance Company Depot (Aviation), did, in

**CONFIDENTIAL**

267062

**CONFIDENTIAL**

(209)

conjunction with Private Charles O. Penn, 1964th Ordnance Company Depot (Aviation), at or near Caserta, Italy, on or about 24 November 1943, with intent to do her bodily harm, commit an assault upon Perzia Ambrosina by hitting her on the back of the head with a dangerous weapon, to wit, a rifle.

A common trial was directed by the convening authority subject to objection by the accused. Before arraignment each accused expressly stated there was no objection to a common trial. Each pleaded not guilty to the Charges and Specifications. Accused Penn was found guilty, with exceptions and substitutions, of Charge I and Specification 2 thereunder relating to him. The court granted a motion for findings of not guilty of Specification 1, Charge I, and as to Charge II and its Specification relating to Penn. A motion for findings of not guilty as to the Charges and Specifications relating to Harris, was granted by the court. Accused Miller was found guilty of Charge I and the Specification thereunder relating to him. As to Specification 1 of Charge II, his motion for a finding of not guilty at the close of the prosecution's case was sustained by the court. He was found guilty of Specification 2 of Charge II. As to Specification 3, he was found guilty, except the words "with intent to do him bodily harm" and "threatening to shoot him"; of the excepted words not guilty. As to Specification 4, he was found guilty except the words "in conjunction with Private Charles O. Penn, 1964th Ordnance Company Depot (Aviation); of the excepted words not guilty. With respect to Charge II, the court's findings read, "As to Specification 2 and Specification 4, guilty. As to Specification 3, not guilty, but guilty of a violation of the 96th Article of War". No evidence of previous convictions was introduced. Penn and Miller were sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Penn for one year and Miller for the term of his natural life, three fourths of the members of the court present concurring in the sentence as to Miller. The reviewing authority disapproved the findings of guilty and the sentence as to Penn, and, as to Miller, approved only so much of the finding of guilty of Specification 2, Charge II as involves findings that accused did at the place and time alleged commit an assault and battery on the person described in that Specification by choking him on the neck with his hands, in violation of Article of War 96, approved only so much of the finding of guilty of Specification 4, Charge II, as involves findings that accused did at the time and place alleged commit an assault and battery on the person described by hitting her on the back of the head with a rifle, in violation of Article of War 96; approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Because of the disposal by the court and reviewing authority of the Charges and Specifications involving the accused Harris and Penn, summary is only made of such evidence as concerns accused Miller.

The evidence shows that at about 2030 hours on 24 November 1943, the three accused entered the home of Bernardo Ambrosina, near Caserta, Italy (R. 9,15,16,20,23,28) and started an argument regarding their laundry (R. 9, 20). Present in the house at the time were Bernardo, his wife, four daughters

**CONFIDENTIAL**

267062

**CONFIDENTIAL**

and a son (R. 10). After the argument had terminated the three soldiers talked "between themselves", then went to the room of the son, who was in bed, and placed themselves in different positions after which one of the soldiers went out and returned with two rifles (R. 9,10,17,20,21,29).

Accused Miller took one rifle and pointed it at Agastina, the son (R. 11,12, 17), who was in bed and told him not to move (R. 11,17). Thereupon Bernardo, together with his wife and daughters, seized Miller and pushed him and the other two soldiers out of the room and downstairs (R. 11,29). In the meantime the son ran upstairs and concealed himself in the attic (R. 17). As they reached the ground floor accused Miller seized Bernardo, threw him to the ground and attempted to choke him "with his thumb" (R. 12). The mother and one of the girls ran out of the house and remained away overnight (R. 21,30, 31). The soldiers went outside but Bernardo saw them, heard and recognized their voices outside until 0500 hours in the morning (R. 12,13,14).

Perzia Ambrosina, a married daughter, testified that on the night in question while asleep at her uncle's home with her children, she was awakened at about 0100 hours, by her mother who was crying. She, her uncle and her uncle's son left the house, her uncle going to her father's house while she went to her own house with the little boy (R. 34). As she stood in her doorway waiting for her husband a soldier approached her with a rifle and the little boy ran away. The soldier threatened her with a rifle, wanting to know who was in the house. He then dragged her to the back of her house where they found accused Miller and another soldier. She lost one of her shoes. The three soldiers threatened, slapped and beat her and dragged her in front of her father's house. They wanted her to open the door and stated that there was a German inside. She suggested that they go and get the police and she and Miller walked in the general direction of Fraziane (R. 34,35) while the other two soldiers remained in front of her father's house (R. 40). As they were walking along the road in the open country Miller grabbed her with both arms. She lost her other shoe and he dragged her in her barefeet and forced her to walk ahead of him with the gun pointing at her back. She tried to run away but he grabbed her, struck her on the back of the head and neck with the rifle butt and began to tear her dress. She begged him to leave her alone. He said "no, you with me\*\*\*Ficki Fick". She testified:

"It was a long fight. He actually abused me to a point where I had no further resistance. At this moment some time I even decided I would rather be dead than alive. Then thinking about my children I was trying to fight and fight as much as I could by keeping his gun away from me. Then at that time, not being able to accomplish what he wanted with one hand, he threw the rifle away then he took a small knife and put it right in my neck and then he dragged me on the ground causing me to have bruises on my right leg. At this very moment then I lost somewhat consciousness and I don't recall exactly very much about it and then he was able to tear the bloomers I had on. He opened his trousers."

She further testified she found herself lying on the ground against a small door with Miller over and on top of her. "He was in the middle between my

**CONFIDENTIAL**

**CONFIDENTIAL**

(211)

legs" which "were apart". In order to frighten him away she told him she "was diseased". He finally "arrived to have a sexual intercourse with me by placing his private parts in my private parts". She tried to "fight it out but there was no longer any resistance from me" (R. 36). She testified she did not consent to the act (R. 36), that she did "everything that an honest woman can do, resisting with all my mind, with all my strength" (R. 37). Miller had a knife near her neck at first but she "somewhat fainted" and did not know what he did with it or whether he had it in his hand during the intercourse. She was positive that Miller penetrated her. It did not hurt her, for "I am old enough, I am a married woman". She fainted and when she "came to" accused was still on top of her (R. 36). He said it was "Buono", it is good". He grabbed her again and held her very tightly. She was afraid he would kill her when he had finished because of his seizing her again and she said "\*\*\*leave me and I'll go back home" and "come back tomorrow". Thereupon Miller said "I can return tomorrow". Witness testified that she agreed to meet him at 10 o'clock. He then left. Perzia then ran to her uncle's house (R. 37).

She further testified that it was "open space country", raining and very dark (R. 37), at 0200 or 0300 hours (R. 38). No one else was present when she was being attacked. Accused had a flashlight but it was not turned on immediately prior to or during intercourse. She did not see his male organ but testified, "I felt it in me" (R. 38); that she was positive that she was penetrated by his male organ and by nothing else (R. 39). She recognized the three soldiers including Miller because she had washed "his" laundry many times (R. 41).

One sister testified that she was present when Perzia returned to her uncle's house at about "two or three o'clock" in the morning, at which time she was crying, trembling, shaking, wet and without shoes (R. 31, 32). A military police officer who saw Perzia on 25 November 1943 observed small scratches on her right leg just above the knee (R. 43).

Miller testified that on the night in question he and two other soldiers signed out of camp at about 1700 hours and visited the house referred to which is about six blocks from the post (R. 69). They had some soup and a couple of glasses of wine in the kitchen and finished eating at about 1900 hours. They then put on their "wraps" and started to leave but it was raining and they decided to wait. While they were waiting a little boy came in and asked for four cigarettes. The girl said they were for "German fiance". One of the girls said "no fiance, brother" and the soldiers asked to meet the brother. They had "been going there quite a while" and "had met all the rest of the family". The family hesitated for a while and then took the soldiers into a room by the dining room. As they were going up the stairs one of the family said something in Italian and the man in the room sat up in bed. His name was Agastina (R. 70). The man did not say anything as the soldiers entered and one of the soldiers said that "he looked like a German". They decided to "look around and see". Witness looked under the bed and under the mattress and when one of the soldiers suggested getting the military police "the family started to cry". One of the soldiers started out and the "family started saying no military police, brother good". In about 15 minutes

**CONFIDENTIAL 267062**

## CONFIDENTIAL

the soldier returned but he did not bring any military police (R. 71). He had two rifles one of which he handed to accused, who "grabbed it by the trigger guard". It was pointed "straight up", and as witness turned around Bernardo "took me by the arms his arms between mine" and "they pushed me out of the door". The soldier who had brought the rifles did not get into the room (R. 72,73). The family pushed witness downstairs where they all went. Witness offered no resistance and Bernardo was "hanging onto" the rifle all the time (R. 73). When witness "twisted and pulled the rifle" and pushed Bernardo, he slipped and fell down but "got right up again". He was down about a minute but witness did not touch him after he pushed him. When Bernardo got up witness unloaded the rifle "to show them I didn't mean any harm". He did not know there were bullets in the weapon but pulled the bolt back to make sure (R. 74). He then stood talking in the doorway. The other soldiers were outside. Bernardo slipped up behind witness and pushed the door shut. The latter's raincoat caught in the door and though he knocked on the door a few times, no one responded (R. 75). After about five minutes witness tore his coat out of the door (R. 75,85) and the three soldiers returned to camp, arriving there at about 2025 hours. They turned in their passes at the office of the charge of quarters (R. 76). Witness sat around and talked with companions until they retired, after which he went to bed at about 2300 hours (R. 77).

Miller testified further that he knew Perzia Ambrosina (R. 77) but denied that he had seen her between "the last of October" and 27 November when she came to camp "to identify us". He had not assaulted her. Her husband had previously taken the three soldiers to his house when they had given him candy, gum and soap. Witness had been to the Ambrosina home four or five times previously at which times they drank, ate and talked (R. 78). The people seemed friendly and the soldiers paid for everything they got. The soldiers did not have familiar relations with them but the girls were "more or less" the attraction (R. 79). Witness denied that he slapped, kicked, choked or struck Bernardo with a rifle. He did not have his hands on Bernardo's neck (R. 80,81), but simply pushed Bernardo with his open hand. He did not point his rifle at Agastina and was never in a position to do so. When he was handed the rifle the muzzle was pointing up and "the old man got in front of me and grabbed it". He and some other member of the family were standing between witness and Agastina (R. 81). The soldiers had been at this house every night for about three weeks (R. 82). Perzia had always seemed friendly and accused knew of no reason why she should wrongfully accuse him (R. 88).

Accused Penn testified as a defense witness. His testimony was in substantial agreement with that of accused Miller. He testified that he saw Miller while he had the rifle in his possession in the room and did not see Miller point the weapon at any person. Witness handed Miller the rifle with the butt down and the family immediately started pushing him out of the door. He saw the father and Miller struggling for possession of the rifle (R. 56). Miller held the weapon in one hand and pushed the father back with the other hand. The father stumbled backwards and fell, then got up. Miller did not put his hands around the father's throat and witness did not see Miller do anything to the father after pushing him away. Witness and the other soldier started out the door and Miller was pushed out right behind them. Miller's

267062

CONFIDENTIAL

**CONFIDENTIAL**

(213)

raincoat was caught in the door. He tore it out and they returned to camp together at about 2015 hours (R. 57,66). The third soldier who was with them signed them all in (R. 58). Penn denied that they took Perzia from her home at the point of a rifle (R. 66). He testified he did not see her that night (R. 67).

A soldier who slept in the same room with Miller testified that he saw the latter come in at about 2030 hours on the night of 24 November (R. 93, 95). Miller came in and then went out. Witness retired shortly after 2100 hours and did not see Miller again that night. He could only say that Miller was in bed when witness got up in the morning. Witness did not see Miller with a rifle with him that night (R. 95).

After the motion for findings of not guilty in his case had been granted accused Harris was sworn as "a witness for the court" (R. 100). He testified that he and Miller were pushed out of the room and downstairs as soon as Penn returned (R. 101) and witness did not see the rifles until they had gotten downstairs. At that time Miller and the father were tussling with a rifle. Witness did not see the father fall down. Miller got the rifle away from him and they immediately left for camp (R. 102). Upon arriving at camp at about 2030 hours, he signed in for all three. Both Penn and Miller were present at the time. The latter went to his room (R. 103) and witness did not see him again that night (R. 105).

4. It thus appears from the evidence that at the place and time alleged accused Miller and two other soldiers entered the home of Bernardo Ambrosina, the person named in Specification 2 of Charge II as to Miller. After engaging in an argument over laundry, they went into the bedroom of Agastina Ambrosina, the person named in Specification 3 of Charge II, and with the apparent pretext that he was a German, searchingly went about the room. One of the soldiers came back from camp with two rifles, one of which was given to Miller who pointed the rifle, which was loaded, at Agastina and told him not to move. At this, Bernardo and the other members of the family succeeded in pushing the soldiers out of the room. When they were downstairs Miller threw Bernardo to the ground and attempted to choke him. The offenses of assault and assault and battery are clearly sustainable in each instance.

Later that night after having been awakened by her mother because of the above disturbance, Perzia Ambrosina, the person named in the Specification of Charge I and in the Specification of Charge II as to Miller, was approached by a soldier armed with a rifle as she stood with her small son in the doorway of her house. The soldier dragged her to the back of the house and was there joined by Miller and another soldier. They slapped and beat her and thereupon forced her to go with them to the house of the above named Bernardo, her father, and demanded that she open the door, saying there was a German inside. She stated that she did not have a key and by way of inveiglement suggested seeking the police in the near-by town, which Miller agreed he would do with her. When they were on the way, Miller seized and maltreated her and when she tried to run away struck her on the back of the head and neck with the butt of his rifle. She struggled to get away and after disposing of his rifle and with a knife at her neck, he dragged her on the

**CONFIDENTIAL**

267062

(214)

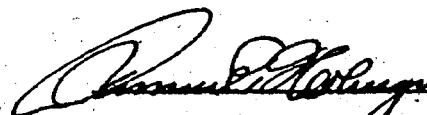
~~CONFIDENTIAL~~

ground and thereupon, against her resistance and protestations, had sexual intercourse with her by force and without her consent. This occurred early in the morning. The defense constituted a denial of having seen her that night and adduced testimony with the view of establishing an alibi. While Miller admitted having been at the Ambrosina home that night, he claimed he returned to camp with the other two soldiers at approximately 2025 hours and retired at about 2300 hours. One defense witness testified Miller came in to his quarters and immediately went out again, but that he was seen in his bed the next morning. On the other hand there was corroboration of Perzia's testimony in that at about 0200 or 0300 hours she returned to her uncle's home crying, trembling, wet and without shoes. It is within the province of the court to believe or reject the testimony of witnesses. All elements of the crime of rape (MCM, 1928, par. 148b) and of assault and battery as approved by the reviewing authority, are clearly established.

5. The charge sheet shows that accused Miller is about 31 years old. He was inducted into the Army 13 August 1942 and had no prior service.

6. All members of the court joined in a signed petition to the convening authority recommending clemency for accused Miller. Grounds for the recommendation were not stated.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused Miller were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence as to Miller. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

 James D. Whiting, Judge Advocate.

O. J. T. dc, Judge Advocate.

Gordon Johnson, Judge Advocate.

~~CONFIDENTIAL~~ 267062

**CONFIDENTIAL**

(215)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
6 April 1944.

Board of Review

NATO 1647

U N I T E D   S T A T E S	)	ARMY AIR FORCE SERVICE COMMAND
v.	)	Trial by G.C.M., convened at
Private MICHAEL J. KIRINICH	)	Algiers, Algeria, 27 January
(36323871), Headquarters and	)	1944.
Headquarters Squadron, XII	)	Dishonorable discharge and
Air Force Service Command.	)	confinement for ten years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks, Beekman,
	)	New York.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification: In that Michael J. Kirinich, Private, Headquarters and Headquarters Squadron, XII Air Force Service Command, did, without proper leave, absent himself from his station at Algiers from about 0400 hours 2 July 1943 to about 1330 hours 16 July 1943.

ADDITIONAL CHARGES:

CHARGE I: Violation of the 69th Article of War.

Specification: In that Private Michael J. Kirinich, Headquarters & Headquarters Squadron, XII Air Force Service Command, having been duly placed in confinement in the base guardhouse, Air

**CONFIDENTIAL**

262313

**CONFIDENTIAL**

Force General Depot Number Four, on or about 16 July 1943, did at Air Force General Depot Number Four, on or about 21 July 1943, escape from said confinement before he was set at liberty by proper authority.

## CHARGE II: Violation of the 58th Article of War.

Specification: In that Private Michael J. Kirinich, Headquarters & Headquarters Squadron, XII Air Force Service Command, did at Air Force General Depot Number Four, on or about 21 July 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Algiers, Algeria, on or about 26 November 1943.

He pleaded not guilty to the Charge and its Specification, guilty to Additional Charge I and its Specification, and not guilty to Additional Charge II and its Specification. He was found guilty of the Charges and Specifications. Evidence of one previous conviction by summary court-martial for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Breeckman, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. As to the Charge and its Specification, the evidence shows that at Algiers, Algeria, accused absented himself from his organization without proper leave at 0400 hours on 2 July 1943 and remained unauthorizedly absent until he was apprehended at about 1330 hours on 16 July 1943 (R. 7,8,18,20, 22,24,54,55). He had been assigned as a "permanent K.P." in the enlisted men's mess of his squadron. He failed to report for duty on 2 July 1943 and never at any time subsequently did he report for that duty (R. 7,18). Accused's first sergeant apprehended him on 16 July in a bar opposite the squadron supply room and had him taken to the Maison Blanche, Algeria, guardhouse which is also known as "Air Force General Depot No. 4 guardhouse" (R. 8,25).

As to Additional Charge I and its Specification, to which accused had pleaded guilty, it was stipulated that accused was properly confined in the guardhouse at Maison Blanche guardhouse on 16 July 1943, and that he escaped from that confinement on 21 July 1943, before he was "set at liberty by proper authority" (R. 25; Pros. Ex. A). Also an extract copy of the guard report was introduced showing that accused escaped confinement at 1530 hours on 21 July 1943 (R. 25; Pros. Ex. B).

As to Additional Charge II and its Specification the evidence shows that accused escaped confinement on 21 July 1943 (R. 25; Pros. Exs. A and B) and the guard report recites that accused was returned to confinement from having been absent without leave at 0115 hours on 28 November 1943 (R. 25; Pros. Ex. C). On the morning report of his squadron, he was marked from

**CONFIDENTIAL**

**CONFIDENTIAL**

(217)

absent without leave to confinement at 2300 hours on 27 November 1943 (R. 55). He had started living with a Frenchwoman about the last of June 1943 and from 21 July 1943 until 27 November 1943, he occupied the same quarters with her "day and night" (R. 32,33). On the latter date, he was apprehended by a lance corporal on duty with a British provost company in Algiers. He was attired in civilian clothing except he was wearing "G.I." boots (R. 26, 29,30,31). The corporal testified that it was apparent to him that accused was of "American extraction", so he took accused into custody and turned him over to American authorities (R. 30).

It was shown by accused's classification card that his parents had been born in Austria but accused was born in the United States (R. 37,38).

For the defense, a Frenchwoman who had known accused for six or seven months testified he was always dressed "like a soldier" and the day he was arrested, she saw him "with military clothing" (R. 41,42,43). The woman with whom he was living testified she saw American soldiers in winter uniform on 1 November 1943 and so advised accused who, some eight or ten days later, attired himself in some civilian clothes she gave him. She testified he wore these clothes until he was arrested, but that he objected "a little" to wearing them and after putting them on, he "would not go out any more" (R. 44,45,46,49,50). This woman also testified that after 21 July 1943, accused went back to his organization at least twice a week and brought Army food back to her apartment on those occasions (R. 47,48); that she and accused had discussed the "question of going back to the Army" and December or January was suggested as the "specific date" for his return to the service (R. 46,47).

Another Frenchwoman who had known accused since September or October 1943, testified he always wore military clothing when he came to her house and that he had said oftentimes that he intended to go back to the Army about 1 January 1944 (R. 51,52).

It was stipulated that the service record of accused contained an entry that he attended a "Sex Morale--Hygiene Lecture" on 27 September 1943 (R. 53). The squadron commander testified that when this entry was made the first sergeant could not, because of the many men present, check the individuals present at the lecture and the entry was probably made from a squadron roster (R. 56).

It appears from the evidence that all the transactions involved in the testimony occurred at Algiers and near-by Maison Blanche, in Algeria (R. 11, 20,21,30,32,37,41).

4. It thus appears from the evidence that at the place and time alleged in the Charge and its Specification, accused absented himself from his station without proper leave and remained unauthorizedly absent until apprehended on 16 July 1943. This unauthorized absence was established by the testimony of accused's first sergeant and the sergeant in charge of the enlisted men's mess where accused was assigned to duty, by a corporal who shared quarters with accused, and by the morning reports of his organization. His guilt as specified was indisputably established (MCM, 1928, par. 132).

**CONFIDENTIAL**

~~CONFIDENTIAL~~

It further appears from the evidence together with accused's plea of guilty that at the place and times alleged in Additional Charge I and its Specification, accused, having been duly confined, escaped from that confinement before he was set at liberty by proper authority. In addition to his having pleaded guilty to this offense, the prosecution established its commission by a stipulation covering the essential facts and also by guard reports showing accused's confinement and escape. He was properly found guilty as here specified (MCM, 1928, par. 139b).

It further appears from the evidence that at the place and time alleged in Additional Charge II and its Specification, accused deserted the service of the United States and remained absent in desertion until apprehended 128 days later. The requisite intent to desert is inferable from the circumstances adduced. When apprehended he was attired in civilian clothing. He had been absent from his organization without leave for more than four months and was stationed in a theater of active operations during time of war. The woman with whom accused was living while he was unauthorizedly absent testified he returned to his organization twice a week or more during his absence and there was some defense evidence that accused had made plans to return to the Army. The court was warranted in rejecting these explanations and claims as improbable and it was fully supported in its conclusion that accused was guilty of desertion as alleged (MCM, 1928, par. 130a; Winthrop's, reprint, p. 637, 638).

5. The prosecution improperly objected to the defense asking a leading question upon cross-examination and the law member erroneously sustained the objection (R. 35). It is elementary that leading questions may be asked witnesses upon cross-examination. However, the matter inquired about was of slight materiality and the erroneous ruling in no sense prejudiced accused (AW 37).

6. The defense sought to establish that accused stated to a witness that he intended to return to the Army about 1 January 1944. This testimony was admitted but in his ruling, the law member improperly announced that its admissibility was "extremely doubtful" and erroneously admonished the court to receive with caution testimony regarding accused's intentions. Since the question of whether accused intended permanently to separate himself from the service when he unauthorizedly absented himself from his command is of controlling importance, his declarations to third persons regarding this intent are material and admissible. The law member should not have questioned the propriety of this testimony. However, the substantial rights of accused were not prejudicially affected by the ruling (AW 37).

7. The charge sheet shows that accused is about 30 years old, that he was inducted into the Army 10 March 1942 and had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

~~CONFIDENTIAL~~

John D. Colquitt, Judge Advocate.

262313

O. G. Gde, Judge Advocate.

- 4 - Gordon Simpson, Judge Advocate.

**CONFIDENTIAL**

(219)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
20 April 1944.

Board of Review

NATO 1661

U N I T E D   S T A T E S	)	II CORPS
v.	)	Trial by G.C.M., convened at
Staff Sergeant SYLVAN E.	)	S. Maria a Versano and Ceppagna,
BERKOWITZ (33036624), Head-	)	Italy, 26 January 1944 and 8
quarters Battery, 71st Anti-	)	February 1944 respectively.
aircraft Artillery Brigade.	)	Dishonorable discharge, suspended,
	)	and confinement for five years.
	)	NATOUSA Disciplinary Training
	)	Center, Casablanca, French Morocco.

-----  
**OPINION by the BOARD OF REVIEW**

Holmgren, Ide and Simpson, Judge Advocates.  
-----

1. The record of trial in the case of the soldier named above having been examined in the Branch Office of The Judge Advocate General with the North African Theater of Operations and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General with the North African Theater of Operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Staff Sergeant Sylvan E. Berkowitz, Headquarters Battery, 71st Antiaircraft Artillery Brigade did at Vairano, Italy on or about 15 January 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with one Russo Giuseppe, by mouth.

He pleaded not guilty to and was found guilty of the Charge and Specification.

**CONFIDENTIAL**

FC2279

**CONFIDENTIAL**

No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence and ordered its execution but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated NATOUS A Disciplinary Training Center as the place of confinement. The proceedings were published in General Court-Martial Orders No. 15, Headquarters II Corps, 13 March 1944.

3. On 26 January 1944, at what may be designated a first hearing, the court received testimony, reached findings of guilty and adjudged a sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The findings and sentence were announced in open court, and the court adjourned to meet at the call of the president. On 8 February 1944, at what may be designated the second hearing, the court met again, six of the seven members and the personnel of the prosecution and defense who participated in the first hearing being present. The court and the personnel of the prosecution were resworn. At the second hearing testimony was received and the court, without expressly revoking its previous findings and sentence, reached findings of guilty anew and adjudged anew a sentence similar in all respects to that previously adjudged. All of the proceedings were recorded in a single record of trial. In his action on the record the reviewing authority approved "the sentence". The only question requiring consideration here is whether the action of the court, upon the second hearing, in receiving evidence, reaching findings and adjudging a sentence anew after it had previously, at the first hearing, reached findings of guilty and adjudged a sentence, amounted in legal contemplation to a revocation of the original findings and sentence and to an unauthorized rehearing. In determining this question it is proper to consider the record as a whole and the evidence adduced at both hearings.

4. The evidence received upon the first hearing was substantially as follows:

Russo Giuseppe, 15 years of age, testified that he had been employed "at a kitchen at the General's headquarters" (advance headquarters of the Commanding General, II Corps, at Vairano, Italy) (R. 5). On 15 January 1944, witness entered a room occupied by accused at the headquarters for the purpose of sweeping the floor and shining shoes, and saw accused lying on his cot (R. 5,6). "Another sergeant" was asleep in the room in which there were, all told, five cots (R. 6,8). Accused was heating water "in a receptacle and then started to make coffee". Witness did not see a hot water bottle. After witness had been in the room for about an hour he approached accused's cot for the purpose of shining his shoes. Accused told witness to hurry his work in order to be ready for inspection (R. 8). When the shoes had been shined (R. 8), accused gave witness a package of cigarettes (R. 7,8). While witness was near the cot accused opened witness' trousers (R. 6,8), took witness' "penis in his hands and then he put it in his mouth" for a period of about 15 minutes (R. 6). Witness' penis became erect (R. 7,9). A "soldier" or "sergeant" came into the room (R. 6,8) and witness "broke away" and sat down on another cot (R. 9). Afterward accused,

**CONFIDENTIAL**

# CONFIDENTIAL

(221)

without any request by witness (R. 9), gave witness a celluloid cigarette case (R. 7,9), and told him that if he should be questioned he should state that accused had been ill and had been "getting a hot water bottle" (R. 6). Later, on the same day, witness told one Bianco what accused had done (R. 9).

First Sergeant George L. Brewer, Headquarters Battery, 71st AAA Brigade, testified that accused was a member of witness' unit. At about 1030 hours on 15 January 1944 (R. 10) at Vairano, Italy (R. 12) witness, in the company of a Staff Sergeant Wausat (R. 13), entered the room occupied by accused at the brigade "forward CP" for the purpose of making an inspection. He observed a Sergeant Harlan asleep in the room (R. 11), and saw a boy whom he knew as "Russo" at the head of accused's cot. Russo's back was towards witness. Accused was lying on the cot, under blankets (R. 11,12) and was "up on" his left elbow and "bent around in front of the kid". The boy was very close to accused, but witness could not say that the two were touching each other. Witness made a noise and the boy turned about. The fly of his trousers was open (R. 11,12) and he had his "hands on his pants" (R. 11). He turned towards the wall and started to button up his fly. When the boy "stepped away" accused, who had a towel in his hand, put the towel over his face and "wiped his mouth off" (R. 12), and said something to the boy, in broken English or Italian, about a hot water bottle. The boy sat down and "crossed his hands over his pants" (R. 11) and accused laid down and acted as if going to sleep. Witness observed that accused's face was "very flushed" (R. 12). Witness awakened Sergeant Harlan for the purpose of verifying the fact that he had been asleep (R. 11).

Staff Sergeant Harold R. Wausat, Headquarters Battery, 71st AAA Brigade, testified that he entered the room in question with First Sergeant Brewer (R. 13). Looking over Brewer's shoulder he observed "Russo" and accused. Witness testified as to the postures and relative positions of the two in substantial conformity with the testimony of Brewer (R. 13,14). Witness testified that accused rubbed the towel over his face when the boy turned around, and that the boy made "another turn" (R. 13) and sat down on a bed with his hands "across in front of his pants" a few buttons of which were open. There was a hot water bottle on the floor. Water was boiling on a stove and accused told witness to get him some water or to turn off the stove. Witness extinguished the fire in the stove (R. 14). Accused was marked quarters on the day in question, being troubled with neuralgia (R. 15).

Accused testified that on the day of his alleged offense he was suffering from neuralgia about the left side of his face. The surgeon had marked him quarters and told him to stay in bed "with a hot water bottle". He went to bed and found that the water in the bottle was not hot enough, so put water on a stove to heat it. At about that time the Italian boy came into the room. While accused was bending over the stove the boy pinched him on the buttock and "sort or rubbed up against" him (R. 16). Accused was surprised and pushed the boy away (R. 17). He told the boy "to shine shoes" but did not speak loudly for "It was kind of quiet. The sergeant was sleeping" (R. 18). The boy "grabbed" his trousers and "through his trousers" appeared to have an erection. Accused testified:

"he said something about ficke-ficke. I have a little

CONFIDENTIAL

FF2279

(222)

# CONFIDENTIAL

knowledge of Italian. He was talking what seemed to me he had performed an act of sodomy with someone before. He said something about 2 dollars. Whether he got paid two dollars or gave two dollars I don't know" (R. 17).

A laundry woman and a little girl entered the room, and the girl asked accused to give her the cigarette case. The Italian boy then asked accused to give him the case instead. Inasmuch as the boy had done work for him, accused gave him the cigarette case and a package of cigarettes. Accused got back in bed and while waiting for the water to heat "got up on" his left elbow and started to read a magazine (R. 17), holding the hot water bottle to his face, with a towel about it (R. 18,19). The boy started acting "funny" again, "grabbed himself" through his trousers, apparently with an erection, and came towards accused. The boy's fly was partly open and as he approached he opened it completely. He came within "a foot or so" of accused's bed (R. 18). Accused "just stared" at the boy -- "I didn't know what was going on". At this point Sergeant Brewer entered the room, and the boy turned about buttoning up his trousers. Accused was "as embarrassed as hell" (R. 17). Accused "yelled" at the boy "to shut off the stove", but Sergeant Wausat did so (R. 17). Accused did not wipe his face with the towel but "may have taken it away from my face" when Sergeant Brewer entered. He held the towel up to his face again (R. 19). A short time after the occurrence the boy returned to the room, commenced to cry and accused understood him to ask that accused refrain from reporting the occurrence, for fear the boy would lose his job. Accused agreed to say nothing (R. 17,18).

Sergeant Brewer testified for the defense that the Italian boy had been at the bivouac area of the forward echelon for as much as a month, and had obtained his food there. He received cigarettes only when someone gave them to him (R. 19,20). Witness knew him only by sight and last name and was not intimately acquainted with him (R. 20). Corporal Irving Pessen, Headquarters Battery, 71st AAA Brigade, testified that he was well acquainted with accused and had found him a normal individual with a normal attitude towards women (R. 20,21).

5. After the foregoing testimony had been received and arguments had been made, the court, on 26 January 1944, through the usual procedure, found accused guilty and sentenced him as indicated above, and then adjourned. When the court convened on 8 February 1944, the prosecution announced that the accused wished to introduce further evidence in his own behalf, and added: "If this meets with the approval of the court we will proceed to hear such evidence as the accused presents at this time" (R. 23). The reporter, the court and the personnel of the prosecution were at this point again sworn.

6. At the second hearing evidence substantially as follows was introduced by the defense and by the court:

Russo Giuseppe testified for the defense that accused did not in fact place witness' penis in his mouth. Witness testified:

"At the time I was cleaning shoes for the sergeant he asked

# CONFIDENTIAL

~~CONFIDENTIAL~~

(223)

me if I had ever had anything to do with women. I told him no. He asked me the size of my penis and attempted to take it out and see. Instead I did it myself. Right at that time the other two sergeants came in and saw what was going on" (R. 24).

Witness testified to the contrary at the first hearing because the two sergeants (Brewer and Wausat) had threatened to turn witness over to the police if he did not so testify, although witness had at first declared that accused "didn't do anything" to him (R. 24,28). Witness did not, in fact, tell Bianco that accused had taken witness' penis in his mouth. He told one Esposito as well as Brewer and Wausat that accused had not done so (R. 26).

Two enlisted men testified for the defense that they had lived with accused in tents for considerable periods and had never observed any homo-sexual tendencies in him. Each testified that accused had appeared to be normal in his attitude towards women; and one testified that accused had with witness visited a house of prostitution and had later taken prophylactic treatment (R. 30,31).

Peter W. Princie, an agent of the Counter Intelligence Corps Detachment, II Corps, testified as a witness for the court that he investigated the case at the request of the Staff Judge Advocate, II Corps (R. 31). Witness questioned Russo who first related his story circumstantially and substantially as testified to by him at the first hearing. Later, after the boy had been told that he "was equally responsible", he changed his story, denied connection with accused and related the occurrences circumstantially and substantially as testified to by him at the second hearing. Russo also stated that he had been induced by Sergeants Brewer and Wausat to testify that the offense had been accomplished (R. 33). During the examination of the witness the defense interpolated a statement that the boy had been advised during the investigation that he was subject to military law and prosecution for the offense of sodomy as a principal (R. 33,34).

Private Ernest Bianco, Headquarters Battery, 71st AAA Brigade, testified for the court that at about 1215 hours on 15 January, Russo Guiseppe sat next to witness at the noon meal, "hung around" witness and without prompting told witness that Russo had had "illicit relations" with accused. When witness expostulated that he did not believe the story, Russo "showed me with motions" (R. 34). Russo also stated that accused proposed the act, offered the boy cigarettes and took the boy's penis in his mouth (R. 36).

Sergeant Brewer testified for the court that after the evening meal on 15 January he had Russo brought to his office. Sergeant Wausat, Private Esposito, and another soldier were present. Witness asked, through Esposito as interpreter, if he knew that "we" had caught him in the room (R. 37). Russo at first said accused and he had done "nothing", and then, after witness had told him if he did not "come clean I would throw him out", the boy said accused had committed the act as charged (R. 38). Witness testified that there had never been friction between him and accused (R. 37).

~~CONFIDENTIAL~~

262279

**CONFIDENTIAL**

Sergeant Wausat testified for the court in substantial corroboration of Brewer with respect to the interview with Russo. He also testified that Bianco was interviewed before the boy was questioned (R. 39). Witness and accused had been good friends and had not had any serious difficulties (R. 40).

Private Frank Esposito, Headquarters Battery, 71st AAA Brigade, testified for the court that he acted as interpreter at the interview on 15 January between Sergeant Brewer and Russo. In response to questions Russo stated that accused "put his hand on his fly and opened it up and played with it a while and put it in his mouth". Witness told Russo that he need not be afraid of anything and Russo talked freely and without threats. Russo did not at first tell a different story (R. 42).

It was after the foregoing testimony had been received at the second hearing that the court again reached findings of guilty and adjudged a sentence anew.

6. The evidence received at the second hearing was supplementary and in part contradictory to that received at the first hearing. The testimony for the court as to the statements made by Russo after the alleged offense was obviously produced as an aid to the court in determining which version of Russo's contradictory testimony at the trial was true. In view of other conclusions reached, the competency of this testimony as to the extrajudicial declarations of the witness need not be determined here.

From the nature of the testimony received and the procedure followed at the second hearing, there can be no doubt that the court intended at the second hearing to cancel or revoke its previous findings and sentence, to reopen the case and to weigh and consider the additional evidence, together with the old, and to determine anew the guilt or innocence of accused and the sentence to be adjudged. There was more than a mere correction of errors or a reconsideration of the findings and sentence for the purpose of correction or change such as might be accomplished by the court upon its own motion or on proceedings in revision (Winthrop's Mil. Law and Prec., reprint, pp. 377, 394; Dig. Op. JAG, 1912-40, sec. 395 (37)). The reception and consideration of material evidence after the court had reached and announced its determination of guilt and had adjudged a sentence gave to the second hearing, perforce, the character of a new trial or rehearing although the second hearing took the form of a continuation of the original hearing. From the standpoint of accused as well as the government there was in fact a complete rehearing of the case in the sense that the findings and sentence finally adjudged were arrived at upon consideration of matter for and against accused not considered at the first hearing, as well as upon reconsideration of the evidence received at the first hearing. The fact that the competent evidence received at the second hearing may not have been sufficient in itself to support findings of guilty did not affect the nature of the second hearing for the court had before it the evidence at the first hearing. There was, in legal effect, an implied revocation of the original findings and sentence followed by a new trial or rehearing.

7. Until the enactment of Article of War 50 $\frac{1}{2}$  in 1920, there was no

**CONFIDENTIAL**

**CONFIDENTIAL**

(225)

express provision in the statute law for new trials or rehearings in court-martial cases. Colonel Winthrop in his Military Law and Precedents, pointed out however that:

"It was held by Atty. Gen. Wirt, in the early case of Captain Hall, that a reviewing officer, in disapproving a sentence, is authorized further, in his discretion, (for the allowance is not a matter of right,) to order a new trial of the accused; provided he specifically applies therefor, thus waiving his privilege under the provision against second trials for the same offense now contained in Art. 102. But, beside the new trial granted under these circumstances in the case of Hall, the similar instances in our service have been very few and rare, and the subject of new trial is now one quite without material significance in our military law and need not therefore be dwelt upon. It is to be noted that it is only upon, and as an incident to, a disapproval of a sentence that the new trial can be allowed" (Winthrop's Mil. Law and Prec., 1920, p. 453).

Revision proceedings were authorized by the Manuals for Courts-Martial but it was provided, with respect to procedure on revision, that as the action "to be taken is entirely corrective, a case will not be reopened by the calling or recalling of witnesses or otherwise" (LCM, 1917, par. 352). This clause was incorporated in the Manual of 1921 but was not carried over into the present Manual for Courts-Martial. There is nothing in the present Manual inconsistent therewith and the principle is therefore still applicable (MCN, 1928, p. VII). In connection with proceedings in revision Winthrop has said:

"The object of the proceeding is not to reopen an investigation which has been closed, or rehear a case once tried and brought to judgment, but simply to revise what has been judicially completed. To permit the introduction of such additional testimony upon the merits would amount substantially to a new trial\*\*\*And although the evidence admitted were simply that of previous witnesses recalled to elucidate their former statements, there would still practically be a rehearing, and the proceedings would be liable to be protracted in the same manner as where the witnesses were new, only in a less degree. Interest reipublicae ut sit finis litium, and most of all that part of the republic embraced in the military state, where prompt and final action is of the very essence of government and discipline. That no evidence whatever shall be presented or heard at this stage is indeed a principle established by the great weight of authority, and this principle, upon a recent reconsideration of the subject, has been emphatically reaffirmed in General Orders, and incorporated in the Army Regulations" (Winthrop's Mil. Law and Prec., 1920, p. 456).

**CONFIDENTIAL**

262279

# CONFIDENTIAL

(226)

8. The present Manual for Courts-Martial stipulates that "a court may reconsider any finding at any time before the same has been announced or the court has opened to receive evidence of previous convictions" (I.C., 1928, par. 78d), and it has been held by the Board of Review that:

"Even though the findings and sentence in a case have been announced, a court has the legal right and power, up to the time that the record of trial has been authenticated and transmitted to the reviewing authority, to reconvene of its own motion for the purpose of correcting the record or its proceedings and may reconsider and vacate its findings or sentence or both and make new findings and adjudge a new sentence" (Dig. Op. JAG, 1912-40, sec. 395 (37)).

It has also been held that it was not fatal error for a court-martial to receive evidence offered by the defense after findings had been tentatively reached but before sentence had been adjudged and announced (Dig. Op. JAG, 1912-40, sec. 395 (37)). There is no authority for consideration by a court-martial of evidence after findings have been reached and a sentence has been adjudged and announced by the same court, and where, as in the instant case, the reception of the evidence and the consideration thereof are tantamount to a new trial or rehearing.

9. Rehearings are authorized by Article of War 50 $\frac{1}{2}$ , which provides, inter alia:

"When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing".

The article expressly requires that

"Such rehearing shall take place before a court composed of officers not members of the court which first heard the case".

Even were it assumed (the Board of Review does not so decide) that the approval by the reviewing authority of the sentence in the instant case carried an implication of his tacit authorization of the second hearing, the proceedings on the rehearing would fall short of the requirements of the Article of War in the vital particular that the second hearing or rehearing did not take place before a court composed of officers not members of the court which first heard the case.

10. The requirement of Article of War 50 $\frac{1}{2}$  that the rehearing be by an entirely new court is one which goes to the competency of the court to conduct the rehearing. It has been held:

"All members of a court which first hears a case are by

# CONFIDENTIAL

772279

**CONFIDENTIAL**

(227)

statute made legally ineligible to sit as members at a rehearing of the same case and where one of the members at the rehearing had sat as a member of the court that first heard the case it follows that the court at the rehearing, was not legally constituted and was without jurisdiction to try the accused and its proceedings, including the findings and sentence, are null and void ab initio (Dig. Op. JAG, 1912-40, sec. 408 (7)).

Inasmuch as the members of the court-martial which sat at the first hearing of the instant case were ineligible for appointment on a court for a rehearing regularly ordered pursuant to Article of War 50 $\frac{1}{2}$ , it follows that they were ineligible to sit as members of the court which actually but without express authority conducted the rehearing in the instant case. The competency of the members of the court was jurisdictional (MCM, 1928, par. 7). The circumstance that accused apparently consented to the second hearing did not validate the proceedings, for it is well established that jurisdictional defects in the legal constitution of a court-martial cannot be waived (Dig. Op. JAG, 1912-40, sec. 365 (8)).

11. As observed above the procedure followed not only invalidated the findings and sentence finally adjudged on rehearing but it involved also an implied revocation of the findings and sentence first adjudged. To ignore the implied revocation because there was not an express revocation of the original findings and sentence would be to ignore substance for the sake of form. Intention of the court to revoke its findings and sentence first adjudged is implicit in its reopening of the case for further evidence on the issue of guilt or innocence. This for the reason that the reception of further evidence would have been idle had the court intended to let its original findings and sentence stand. It cannot be assumed that the court in reopening the case contemplated only a meaningless and ineffective gesture. The intention to revoke is implied also in the court's action in adjudging findings and a sentence anew. This action of the court implied its purpose to reconsider what it had done before and its belief in its power to change its former findings and sentence if such change seemed advisable upon the entire proceedings, old and new. In the nature of things it could not reconsider its former action for possible change without revoking such action. Its reconsideration for the purpose of change was as effective as if it had finally changed its findings and sentence, in which latter case the purpose to reconsider or revoke its previous action would be manifest.

To adopt the view that the findings and sentence adjudged at the first hearing are still valid and unrevoked would impute to the court a purpose finally to adjudge guilt twice and finally to impose two sentences. The court could act finally but once and it would be illogical to impute to it a purpose to do otherwise. As noted, the intention to determine anew the guilt or innocence of accused and to adjudge a sentence anew as upon a rehearing, was beyond the legal power of the court, but since, by obvious implication, it did not in fact intend the original findings and sentence to stand, such findings and sentence cannot now be brought to life and given legal efficacy.

**CONFIDENTIAL**

PP2279

(228)

# CONFIDENTIAL

12. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence.

*James P. McGuire* Judge Advocate.  
O. T. D. C., Judge Advocate.

*Gordon Simpson*, Judge Advocate.

NATO 1661  
Branch Office of The Judge Advocate General, NATCUSA, APO 534, U. S. Army,  
20 April 1944.

1st Ind.

TO: Commanding General, NATCUSA, APO 534, U. S. Army.

1. There is transmitted herewith for your action under the fifth subparagraph of Article of War 50½ the record of trial by general court-martial in the case of Staff Sergeant Sylvan E. Berkowitz (33036624), Headquarters Battery, 71st Antiaircraft Artillery Brigade, together with the opinion of the Board of Review in this Branch Office that the record of trial is legally insufficient to support the findings and sentence. I concur in the opinion of the Board of Review and recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the findings and sentence so vacated be restored.

2. This is a case in which, following the trial, the principal witness for the prosecution repudiated his testimony. A rehearing was then had before the court which first heard the case. This was contrary to the provision of Article of War 50½ that no member of an original court-martial is eligible to sit as a member of a court upon a rehearing of the same case.

3. There is transmitted herewith a form of action designed to carry the foregoing recommendation into effect, should it meet with your approval.

*Hubert D. Hoover*

HUBERT D. HOOVER  
Colonel, J.A.G.D.  
Assistant Judge Advocate General

2 Incls.

- Incl. 1 - Record of trial
- Incl. 2 - Draft of action

(Findings and sentence vacated. GCMO 28, NATO 4 May 1944)

CONFIDENTIAL

762279

Branch Office of The Judge Advocate General  
 with the  
 North African Theater of Operations

APO 534, U. S. Army,  
 1 April 1944.

Board of Review

NATO 1672

U N I T E D   S T A T E S	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
Private CHARLES E. SPEARS	)	Naples, Italy, 27 January
(32337619), Company D, 387th	)	1944.
Engineer Battalion (Separate).	)	Death.

-----  
 REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Mackay, Judge Advocates.  
 -----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Charles E. Spears, Company D, Three Hundred Eighty-seventh Engineer Battalion (Separate), did, at Naples, Italy, on or about 17 December 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill one Private David Quick, Company A, Three Hundred Eighty-seventh Engineer Battalion (Separate), a human being, by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by special court-martial for absence without leave and drunk and disorderly in camp in violation of Articles of War 61 and 96, was introduced. He was sentenced to be hanged by the neck until dead, all of the members present at the time the vote was taken concurring. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War "50½". The confirming

267110

CONFIRMED

CONFIDENTIAL  
authority, the Commanding General, North African Theater of Operations, confirmed the sentence and forwarded the record pursuant to Article of War 50½.

3. The evidence shows that about 1900 hours on 17 December 1943, Private David Quick, Company A, 387th Engineer Battalion, went to a house in Naples, Italy, occupied by Mrs. Mattero Francesco and her husband, known as Rafael Di Orio, for the purpose of getting some laundry (R. 7,8,16,19). He sat at a table in the kitchen and talked to Di Orio, who could speak some English (R. 8,19). After they had been talking about ten minutes, accused, who had been to the Di Orio home two or three times previously, entered the house, looked through all the rooms and then came to the kitchen door. From the doorway he said to Quick "Where have you been, I've been looking all over for you". Accused had a pistol in his right hand, his hand at his side. It was stipulated that if Di Orio were present he would testify that the "two soldiers seemed to be having some sort of an argument and were talking very loud at one another"; that he "moved away a little bit" when he saw accused had a pistol and as he moved, accused raised the pistol, fired twice, then ran out of the door. Quick grasped himself near the heart, staggered to his feet and fell to the floor. At no time while the soldiers were arguing did Di Orio "see Pvt. Quick, with a gun in his hand, nor did he make an attempt to draw one" (R. 8,9,19). Di Orio's wife testified that preceding the shooting, Quick's voice had been "very, very calm", that he made no movement and that he had his arms folded across his chest when he was shot (R. 8,9). She also testified that Quick did not take a pistol from his pocket or reach for it (R. 9).

Following the shooting, military police went to the Di Orio house, searched Quick, and among his effects found a pistol in his right hand pocket. The weapon was described as a "small Italian Berretta" and was loaded. Quick was dead when they removed his body from the house (R. 8,17).

It was stipulated that a medical officer "would testify as to the cause of death of Private David Quick" in effect that a bullet entered the left chest above and to the right of the heart, fracturing the left first rib and perforating the windpipe and the principal vessel supplying blood from the heart to the body; that the bullet ranged downward and through the body, fracturing at the point of exit the right sixth rib about eight centimeters from the backbone (R. 18).

After the shooting, accused went to a place described as "Lina's house" where he stayed until he was apprehended by agents of the Criminal Investigation Division, Provost Marshal's Office, Headquarters, Peninsular Base Section, on 23 December 1943. He was hiding on the roof of the house when arrested (R. 11,12,13; Pros. Ex. 1).

After accused had been warned that he need not make a statement and that whatever he said might be used against him, accused made a written statement which was received in evidence without objection by the defense (R. 13,14; Pros. Ex. 1). Accused stated he had known Quick since June, 1942 and had been in the guardhouse with him at Fort George G. Meade. On one occasion there, accused, who was still confined, asked Quick, who had

CONFIDENTIAL

AC.110

~~CONFIDENTIAL~~

(231)

been released and was passing by, for some money Quick owed him but Quick refused to repay him. Accused stated that subsequently, in Oran, he lived in a pup tent with Quick while the two were in confinement and the latter told accused "about how many people he done shot and how much time he had done". He stated further that later in Italy, while he was in the guard-house he "gave" Quick \$5.00. He did not see Quick again until accused "broke out of confinement" about the middle of November and on that occasion they drank together and "were getting along all right together". About a week later, he asked Quick for some of the money he owed accused and "right away he gets mad". Accused stated that afterwards he saw Quick "off and on". About two or three days before the shooting, Quick "threatened" accused in connection with the money and said he was going "to get something to take care" of accused. Quick obtained a "small automatic" and after that, accused was "on the alert" for him. He stated further:

"On the day of the shooting I first saw him about noon. We were drinking together. We had a argument, drinking at the bar together. Every time we got together it was the same thing. We would get to drinking and get in a argument about the money. I said I would go my way and he would go his. About 2:00 o'clock in the afternoon I left him.

"Around 3:00 or 3:30, I met some Italian fellow and he motioned to me that David was looking for me. Thinking about it, I thought it was time for me to look for him and get things straightened out. I started looking for him. I fooled around some more, got some more drinks, some cognac. There was only one place I thought I could find him. I went to the house with a arch-way. I went upstairs six floors and I saw Miller and White. As far as I can remember I asked them if they had seen Quick. That was what was on my mind. I had my hand on my gun in my pocket. I looked around, passed thru, and said 'Where's Quick?' They said they hadn't seen him. Then I comes down the steps and went in the door of these people's house where I had been before. I went in the door, turned left, and saw Quick sitting at the table. I said 'Quick, I hear you have been looking for me and I am looking for you.' Quick said, 'What are you looking for me for?' I said, 'It was told to me that you were looking for me.' I told him, 'It is about time you and me come to a showdown. I have witnesses that say that you have been threatening to shoot me. I think it is about time for us to come to a showdown.' I had my gun in my righthand pants pocket; it was loaded with the safety on, and I had my right hand to my side. He said, 'If there is going to be any shooting, let's shoot.' When he said that he stuck his right hand inside his jacket and I reached for my gun, pulled it out, kicked the safety off, and shot twice. I knew he had a gun."

Accused stated that after the shooting he went to "Lina's house" and stayed

267110

~~CONFIDENTIAL~~

there until the agents "came looking" for him when he put on his clothes, took his "gun" and went up on the roof. He added, "I stayed on the roof until I saw it was useless and came out and gave up." He also stated he had bought the weapon on the day he "shot Quick or the day before" (Pros. Ex. 1).

For the defense a soldier who had known accused about a year testified that Quick carried a "gun" and was "pretty nasty" when he was drinking. This witness testified that he was present "in a place drinking" when accused

"asked Quick about his money and Quick said he wasn't going to give him his money and pulled out of his pocket a small pistol and said if he asked him about his money again something might happen to him" (R. 20).

Accused testified that Quick had shown him a "gun" he was carrying and had threatened his life; that he had known Quick had the weapon ever "since we have been over the hill in Naples", or about a week, and he was afraid Quick would shoot him with the "gun" because that was "what he said he got it for" (R. 21,23). He testified further that on one occasion Quick

"pulled this gun on me and I pulled mine but nothing happened from that incident because the room was too full of people so he ran out of the door, down the stairs and fired two shots back up the stairs" (R. 21).

He also testified that a "lot of Italian people" whose names he did not know had told him Quick "was looking" for him (R. 21). Accused testified concerning the shooting itself and the events immediately leading up to it, in substantial accord with his statement, except that he testified that he had the pistol about a week before the shooting occurred (R. 22,23; Pros. Ex. 1). He testified that he did not intend to shoot Quick when he went to the house where he found him (R. 22) and that he shot "because he made an attempt to get his gun which I knew he had. He started out to get his gun" (R. 23). He also testified that the only reason he fired was in protection of his own life (R. 23). He had not reported to his commanding officer that he was afraid of Quick for the reason that "we were over the hill in Naples", and "just figured" he would stay as far away from Quick as he could (R. 23).

4. It thus appears from the uncontradicted evidence that at the place and time alleged, accused shot Private David Quick, the person named in the Specification, with a pistol, killing him. Accused had armed himself with the pistol and pursuant to a plan upon which he had previously determined, sought out his victim with whom he testified he was expecting trouble and demanded "a showdown" or "some kind of agreement". Accused testified that Quick said "let's shoot" and reached inside his jacket, whereupon accused fired. Eyewitnesses testified that Quick had made no move to reach for his own weapon. One testified that Quick was sitting with his arms folded when the fatal shot was fired. The court was warranted in concluding that accused deliberately armed himself and with a homicidal intent sought out his victim.

and, upon finding him, fired upon him in consummation of a preconceived purpose. Although accused contended that he fired in self-defense, and the proof showed that Quick was armed and had made threats previously, there is no evidence that Quick drew his weapon or that, at the time of the shooting, accused was in imminent danger. There is no basis in the evidence for a conclusion that accused had reasonable grounds for believing that it was necessary for him to kill Quick, as he did, to save his own life. The proof shows indisputably that accused was the aggressor in the events immediately preceding the shooting, and, consequently, the right of self-defense would not have been available to him even had the court believed that the deceased started to draw his pistol just before accused fired the fatal shot (LCM, 1928, par. 148a).

Accused's actions were shown to have been willful and wanton. Although he stated he had been drinking, there is no indication that he was not in full possession of his faculties when he committed the homicide. His flight after the slaying and subsequent hiding are additional and significant indices of his guilt (Wharton's Crim. Ev., 11th Ed., pp. 137,140 et seq., 400,404 et seq; Underhill's Crim. Ev., 4th Ed., pp. 1136 et seq.). His conduct betokened a malevolent and lawless disposition, was characterized by personal hatred and ill-will toward the person he killed, and demonstrated that the homicide was malicious. He was properly found guilty as specified (LCM, 1928, par. 148a; Winthrop's, reprint, pp. 672,673; NATO 1070, Jones et al).

5. Mattero Francesco, wife of Rafael Di Orio was permitted without objection to testify that accused told deceased, when he entered the Di Orio house, that "he was looking for him for a long time and couldn't find him", but that accused was speaking in English at the time, a language which this witness did not understand. She testified that she learned what accused had said when her husband, who understood English, translated it to her (R. 8). This testimony was hearsay. However, accused himself stated he had been searching for Quick and that he had so stated to Quick when he found him (R. 22; Pros. Ex. 1). Consequently, this hearsay testimony was harmless and accused's substantial rights were not injuriously affected by its reception (AW 37).

6. An agent of the Criminal Investigation Division, Provost Marshal's Office, Headquarters Peninsular Base Section, was permitted to testify without objection to statements made by Rafael Di Orio and his wife, which purported to describe the fatal shooting. This agent also testified without objection to conversations with enlisted men and others which purported to identify accused as the person who did the shooting and to give information as to accused's whereabouts (R. 12,13). This testimony was hearsay and should have been excluded. However, the hearsay relation of the circumstances of the shooting by Di Orio and his wife was but cumulative of and consistent with their testimony at the trial (R. 8,19) and its reception could not have prejudicially affected any of accused's substantial rights. And the hearsay identification of accused as the slayer and the subsequent information as to his hiding place pertained to uncontradicted matters and were but cumulative of accused's own voluntary statement and his testimony (Pros. Ex. 1; R. 22). He could not have been injured in any sense by the

~~CONFIDENTIAL~~

267110

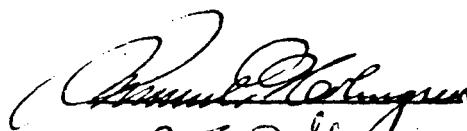
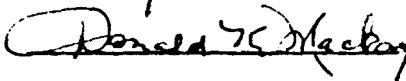
(234)

reception of this testimony (AW 37).

7. Evidence was received without objection that accused had been in the guardhouse both in the United States and in Italy and that at the time of the killing, he was in escape from confinement and was absent without leave (Pros. Ex. 1; R. 23). Ordinarily, such evidence would not be admissible. But not so here. It was a part of accused's own explanation of his relations with deceased and the events leading up to the shooting.

8. The charge sheet shows that accused is about 34 years old. He was inducted into the Army 16 May 1942. No prior service is shown.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92.

 Charles H. Koenig, Judge Advocate.  
O. G. J. M., Judge Advocate.  
 Donald T. Mackay, Judge Advocate.

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
1 April 1944.

Board of Review

NATO 1672

U N I T E D   S T A T E S	)	PENINSULAR BASE SECTION
v.	)	Trial by G.C.M., convened at
Private CHARLES E. SPEARS	)	Naples, Italy, 27 January
(32337619), Company D, 387th	)	1944.
Engineer Battalion (Separate).	)	Death.

-----

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Mackay, Judge Advocates.

-----

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

*Ronald W. Holmgren*, Judge Advocate.  
O. J. Ide, Judge Advocate.  
Ronald W. Holmgren, Judge Advocate.

NATO 1672                    1st Ind.  
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army,  
1 April 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Private Charles E. Spears (32337619), Company D, 387th Engineer Battalion (Separate), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

207110

NATO 1672

(236)

NATO 1672, 1st Ind.  
1 April 1944 (Continued).

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 1672).



HUBERT D. HOOVER  
Colonel, J.A.G.D.  
Assistant Judge Advocate General

---

(Sentence ordered executed. GCMO 25, NATO, 1 Apr 1944)

**CONFIDENTIAL**

(237)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
24 April 1944.

Board of Review

NATO 1702

U N I T E D   S T A T E S	)	XV AIR FORCE SERVICE COMMAND
v.	)	Trial by G.C.M., convened at
Private CLEMENTE D. REYNOLDS	)	Bari, Italy, 18 February
(38439979), 41st Depot Repair	)	1944.
Squadron, 41st Air Depot	)	Dishonorable discharge and
Group.	)	confinement for ten years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Private Clemente D. Reynolds, Forty First Depot Repair Squadron, Forty First Air Depot Group, did, at or near Gioia del Colle, Italy, on or about 7 January 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anum with Private Daniel M. McMahan, a male human being.

Specification 2: In that Private Clemente D. Reynolds, Forty First Depot Repair Squadron, Forty First Air Depot Group, did, at or near Gioia del Colle, Italy, on or about 7 January 1944, with intent to do him bodily harm, commit an assault upon Private Daniel M. McMahan, by willfully and feloniously striking said Private Daniel M. McMahan on the face with his fist.

**CONFIDENTIAL**

**CONFIDENTIAL**

(238)

Specification 3: In that Private Clemente D. Reynolds, Forty First Depot Repair Squadron, Forty First Air Depot Group, did, at or near Gioia del Colle, Italy, on or about 7 January 1944, with intent to commit the crime of sodomy, commit an assault upon Private Daniel M. McMahan, by willfully and feloniously striking said Private Daniel M. McMahan on the face with his fist.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, "U.S." Disciplinary Barracks, "Green Haven", New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 7 January 1944 accused and Private Daniel M. McMahan, both members of the 41st Depot Repair Squadron, 41st Air Depot Group, went to an Italian home in Gioia, Italy, about a mile from their camp, where they remained, except when they went out to get "something to eat and a drink of wine", until about 2100 hours (R. 3,4). During the afternoon and evening, accused and McMahan consumed about a quart of wine. McMahan testified that accused drank more than he but that neither was drunk (R. 6,9). When they left the Italian home, the two soldiers, at McMahan's suggestion, tried without success to get into a house of prostitution after which they started back to camp (R. 3,4,6,7). At accused's suggestion, they took "a short cut to camp" which led through an orchard. It was dark and there was not much traffic (R. 4). McMahan testified that when they reached the outskirts of the town (R. 7) accused

"said he was going to knock the shit out of me and fuck me in the ass" (R. 4).

McMahan started to run but accused "grabbed" him, knocked him down, leaped astride of him, hit him in the face, saying, "God damn you, I am going to kill you". McMahan was "scared terrible". Accused "rolled" him over, "ripped" his pants down and after seizing him in the groin, penetrated McMahan's rectum with his penis (R. 4,5,8). McMahan begged accused to stop "but he kept on". After completing the act, accused struck McMahan on the side of the head and left. The assaulted man "hollered for somebody to do something" for him and a soldier who was passing by in a "jeep" took him to his barracks (R. 4).

One of the Squadron noncommissioned officers testified he saw McMahan that night about 2315 hours; that he "seemed to be intoxicated", his face was "all bloody" and his clothing "looked muddy"; he had his trousers "hooked up at the top button and his belt hooked up"; his underwear "seemed to be at the bottom of his pants" (R. 10). This noncommissioned officer went with McMahan to the Squadron surgeon (R. 10,12). The surgeon testified that the injured man "presented a very bloody appearance". This officer found numerous abrasions around McMahan's forehead and nose, a large swelling

**CONFIDENTIAL**

**CONFIDENTIAL**

(239)

on his left jaw, a laceration on the left corner of his mouth, and some superficial abrasions on the front side of both thighs "high up" with some small welts, just over the groin (R. 12). He also testified that McMahan's rectum showed no evidence of trauma but that the rectum is a very "distensible structure" and he was "very definitely" of the opinion that it is possible for a man to have intercourse with another by rectum without causing trauma (R. 12,19). Another medical officer testified that the insertion of the penis into the rectum would not necessarily have "some tearing effect". This officer examined accused on the morning of 8 January 1944 and found an abrasion a half or three fourths of an inch behind the corona of his penis. He testified that the abrasion occurred within the twenty-four hours preceding the examination and that it is possible that an insertion of the penis into a rectum would cause an abrasion on the penis (R. 15). Before submitting to the physical examination, Article of War 24 had been read to accused and he voluntarily consented to be examined (R. 14). Late on the night of 7 January 1944, accused was observed at his barracks with a skinned fist and blood on his trousers and knuckles (R. 16).

Accused testified that he and McMahan went to an Italian house in Gicia on the afternoon of 7 January 1944; that they "left there in the afternoon and went back about six o'clock" when McMahan, who was drunk, got contentious with an Italian army officer and a "boy" whereupon accused told him they "were leaving for camp". McMahan wanted to "look for women" and they went to a house of prostitution but no one answered when accused knocked at the door (R. 18). From there they started back to camp, taking an unusual route because they "were at the whore house" (R. 18,19). Accused testified further that McMahan lagged "a little behind" and he told McMahan to hurry. The latter said "Why, you long legged son-of-a-bitch", or something to that effect, so accused hit him twice. McMahan "started running down the road and yelling for help" and said to "someone in a Jeep that Clemente was going to kill him". Accused did not see McMahan again that night. He did not scuffle with McMahan (R. 19), nor "have hold of him around the hips or groin" (R. 21). Accused did not know how McMahan's clothes became muddy (R. 20). He testified that the blood on his own trousers was from "some cut" on his finger which he rubbed off on his "pants" (R. 19,20). Accused did not know how to account for the cut on his penis, possibly his "shorts were rubbing" (R. 20).

4. It thus appears from substantial evidence that at the place and time alleged in Specification 1 of the Charge, accused had carnal connection per secum with Private Daniel M. McMahan, as alleged. There is evidence that he assaulted McMahan by striking him about the face with his fist both before and after engaging in the act of sodomy and that the assault which preceded the sodomy was committed with intent to commit that crime and the assault that followed the commission of that offense was accompanied by the intent to do McMahan bodily harm. Accused admitted he assaulted his victim but denied he committed sodomy upon him and impliedly denied that he assaulted McMahan with intent to commit the latter crime. The court was warranted in rejecting these denials and in finding accused guilty as alleged in the Specifications and the Charge.

5. In addition to dishonorable discharge and forfeiture of all pay

**CONFIDENTIAL**

**CONFIDENTIAL**

(240)

and allowances due or to become due, the Table of Maximum Punishments provides for confinement at hard labor not to exceed five years upon conviction of the crime of sodomy, not to exceed one year upon conviction of an assault with intent to do bodily harm and not to exceed ten years upon conviction of an assault with intent to commit any felony except murder and rape (MCM, 1928, par. 104c). Sodomy is a felony. Assault with intent to commit sodomy has been held to be an offense separate and distinct from the offense of sodomy where committed by force upon an unwilling pathic although both offenses were part of the same general transaction (CM 187564, Roberts et al). Accordingly, conviction of assault with intent to commit sodomy as alleged in Specification 3 of the Charge would alone support the imposition of the sentence adjudged.

6. The charge sheet shows that accused is about 20 years old. He was inducted into the Army 12 April 1943. He had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

Ronald E. Atkinson, Judge Advocate.  
O. J. S. de, Judge Advocate.  
James D. Johnson, Judge Advocate.

**CONFIDENTIAL**

**CONFIDENTIAL**

(241)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
8 April 1944.

Board of Review

NATO 1707

U N I T E D   S T A T E S	)	FIFTH ARMY
v.	)	Trial by G.C.M., convened at
Private JAMES (NM) FAIRCLOTH	)	APO 464, U. S. Army, 12 February
(34451639), Company A, 63d	)	1944.
Signal Battalion.	)	Dishonorable discharge and
	)	confinement for ten years.
	)	Federal Reformatory, Chillicothe,
	)	Ohio.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.  
-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private James Faircloth, Company A, 63rd Signal Battalion, did, at Caserta, Italy, on or about 27 October 1943, with intent to commit a felony, viz. murder, commit an assault upon Staff Sergeant Charles A. Mc Kelvey, Company C, 63rd Signal Battalion, by willfully and feloniously shooting him in the chest with a pistol.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

267177

**CONFIDENTIAL**

**CONFIDENTIAL**

(242)

3. The evidence shows that on 27 October 1943, the 63d Signal Battalion was stationed near Caserta, Italy (R. 4). A deposition of Sergeant Charles A. McKelvey of Company C of that organization, was received in evidence as Exhibit "A" without objection (R. 8). He testified that about 1830 hours on that date he left the company area with Technical Sergeant Sidney S. Burkhalter, of the same organization, and went to a small village near camp, about one and one-half miles from Caserta (R. 4; Ex. A, pp. 1,5). There they met accused and another soldier, who offered them a drink of rum which was refused. Witness had been drinking and wanted to obtain wine. It was finally agreed that accused would accompany witness to show him the place where the rum had been purchased, so that he could purchase "vino", while Sergeant Burkhalter remained with the other soldier. Witness was armed with a pistol, as was his custom when off duty, and accused was armed with an Italian Beretta pistol (Ex. A, pp. 2,5).

McKelvey testified that he and accused went to a house known as "94" where accused asked for rum or wine. He was told they had none. The door of the house was not opened though accused knocked several times. Witness testified he thought that the accused was partly to blame "for the Italian not selling" them wine or rum, but that it was "up to" the Italian whether or not he sold them wine if he had it. Accused continued to knock on the door and "then he pulled the gun out of his shirt and said he was going to shoot the door down". Witness then told accused to put the pistol away, but instead the latter cocked it. Witness drew his own pistol from his holster, pointed it at the ground, but did not cock it, and told accused "Not to do it, that that wasn't the right thing to do". Accused replied, saying that "we have given everything to the Italians and should have everything we want from them". Accused put his weapon away and witness returned his to his holster. Witness, who had a jug with him suggested they go to some other place for wine and they went to another house of which accused knew (Ex. A, pp. 2,6). Accused had a flashlight which he used to find the second house (Ex. A, p. 6). They entered this house and had the jug filled but witness had nothing to drink there. Witness asked the man at the house if he knew of any place where there was a whore. The man got angry, stood up and appeared insulted at the question. Witness tried to explain that he had not meant to insult him. Witness took his pistol out of the holster and held it "on" his leg (Ex. A, pp. 3,8), but he did not point it directly at the Italian. The Italian stated there were no whores in the place. Witness said something like he "did not have to take that kind of shit from anyone", and suggested that they leave (Ex. A, pp. 3,9). He said in substance "Let's go, soldier" and repeated the words (Ex. A, p. 10). Accused replied "Wait, let's have another drink before we go". When witness stated he was not drinking any more accused said that he was not drinking either. Accused left the room. Witness was standing in the room, with his pistol in his holster, which was fastened. The light in the room was dim (Ex. A, pp. 3,9).

McKelvey further testified that he did not hear accused say anything and followed ten feet behind him. It was too dark to see what, if anything, accused had in his hand. The doorway was not lighted and there was a "step up" to get outside but witness did not stumble. Witness' pistol was in his holster as he left the room (Ex. A, pp. 4,10). He testified:

267177

**CONFIDENTIAL<sup>2</sup>**

~~CONFIDENTIAL~~

(243)

"Faircloth stopped and I walked up near him. He said, 'Remember the argument we had in front of the other house'. I said, 'Yes'. He said, 'I am going to finish you right now'. He had his hand near his shirt front and suddenly pulled his gun and shot me in the left chest" (Ex. A, p. 4).

Witness was struck in the left chest by the bullet fired by accused. He went back to the house, asked to be taken back to camp, and "passed out". Asked

"What arguments, if any, had you had with Faircloth from the time you had met him on October 28th to the time you were shot?"

witness replied,

"We had no argument on the 28th of October. The Argument took place on the night of the 27th, which was in regard to Faircloth not shooting down the door of a house" (Ex. A, p. 4).

Witness' pistol, a ".45 cal. U. S. Army automatic" was taken from him while he was unconscious (Ex. A, p. 4). Witness had not known accused before. This night was the first time he remembered seeing him (Ex. A, p. 7).

Sergeant Burkhalter corroborated the testimony of McKelvey with respect to the events which happened prior to the latter's departure with accused. He further testified that McKelvey had been drinking but was not drunk and that McKelvey did not seem to be a belligerent sort of individual. He would say about five minutes elapsed before accused and McKelvey left the small village near the camp near Caserta. He himself waited approximately 45 minutes (R. 7).

A medical officer who examined Sergeant McKelvey on the night of 27 October 1943, testified that he had a perforating wound of the left chest apparently caused by a small caliber bullet. The bullet had entered anteriorly just off the left border of the heart and had emerged posteriorly just inside the shoulder blade (R. 8,9).

The accused made a written statement to the investigating officer. It was shown to have been made after accused had been advised that he need not make a statement and that what he said could be used against him. Defense objected to the statement because it contained matters of hearsay and a proper foundation for its admission in evidence had not been laid. The objections were overruled. In the statement accused said:

"It is true that I shot Staff Sgt. McKelvey. I shot him on the night of October 27, a little more than a month ago. I used an Italian pistol which was my property. I may have said before I shot him 'Well, I'm going to finish you. You pulled a gun on me back there', or I

~~CONFIDENTIAL~~

267177

**CONFIDENTIAL**

may not have used those words. I don't remember exactly what I said before I shot McKelvey.

"I shot McKelvey because I figured he was going to shoot me. He was reaching for his Colt .45 army pistol when I fired. He was about to draw when I pulled the trigger of my gun. Both of us had been drinking that night. Twice, on that same night, McKelvey pulled a gun on me and threatened me. The last time, he did not have the gun out of his holster when I shot" (Ex. B).

He recited events of his being with a Private Rushing, their meeting Sergeants McKelvey and Buckhalter and his going with Sergeant McKelvey to show him where he could buy some rum. He continued:

"We went to the place numbered '94' where I had purchased the bottle. The man at that place refused to sell us anything because it was past 7:30 at night and the(re) is a rule against that. I saw McKelvey then take out his .45 and 'cock it'-and he pointed it at the man's door and said 'I don't take that kind of stuff from anyone', and he then pointed the gun at me. I'd then taken my Italian pistol from my fatigue coat shirt pocket and fastened it on my belt. It was in a holster during this time.

"McKelvey then said 'Do you know any place where we can get a drink'. I told him that I did but that I did not know whether we could go to a place where we could also get his empty wine jug filled. We went to a house on a side street, some distance away. Here we found an old man who served us each two glasses of wine" (Ex. B).

After they had had the drinks accused went upstairs with the Italian to fill Sergeant McKelvey's empty jug, McKelvey remaining downstairs. They returned and the Italian poured two glasses of wine for accused and McKelvey. And,

"Then, McKelvey said to the old man: 'Have you anything to fuck?' The old man rose and said 'No' and Sgt McKelvey became angry and pushed the old man down in his chair and pointed the .45 gun at him saying, 'I don't have to take that kind of shit from anybody' and then, McKelvey added, 'Old man, you can drink a glass of that wine' and continuing to point his gun at the old man and then at me, McKelvey said, 'And you drink, too, soldier'.

"I then asked McKelvey if he was going to drink any more, and he said, 'No, I'm not drinking any more.' Then, I said, 'I'm not either', and he says, 'Oh yes you will drink it, too' and pointed the gun, and I drank it.

**CONFIDENTIAL**

267177

~~CONFIDENTIAL~~

(245)

Then, McKelvey turned to the old man, and said, 'Old Man, you can drink this other glass'. The old man drank it, after I handed the glass to him.

"McKelvey then said 'Let's go, soldier' twice. I rose after the second time and he followed. He had his gun on holster but his hand was still was still on the grip of the gun and the flap of his holster was opened as it was from the time he first pulled it out in the house.

"I went ahead of him in the darkness. I went through a small door cut inside of a large door to the courtyard area. To avoid tripping, I pulled out my flashlight, and as McKelvey came after me, I shone the light on his feet. When he saw the light this light shining and after he was through the doorway, he reached for his gun. Then, I shot him" (Ex. B).

Accused then went to a drinking fountain about 300 yards away, got some water and "headed back for camp". He was approached by some Italian youths who sold him an automatic pistol for 300 lire and two packages of cigarettes. He did not know what make of pistol it was. Upon his return to camp he put both weapons away. Shortly thereafter he surrendered the pistol with which he shot Sergeant McKelvey to a company officer and was confined in the guardhouse (Ex. B).

An officer of accused's company testified that about 2300 hours on 27 December 1943, he asked accused for a pistol and was given an Italian .32 caliber pistol. He "could only smell oil on the gun". Witness had seen accused carry the pistol "at times" while working. He had worked with accused nine months and had found the latter was a good soldier (R. 10,11).

Accused testified in substantial accord with his statement. When McKelvey said "Let's go, soldier", accused sat still for a minute and walked out in front of him. McKelvey's pistol was still in the holster with his hand on it. He testified that,

"When I stepped out I shined my light to keep from stumbling. I stepped back off behind the wall and shined my light to keep him from stumbling and as soon as he stepped out of the door he backed off about four steps and my light was shining on him and he reached for his gun and that is when I shot at him\*\*\*He reached for his gun and he stepped out and turned around to face me and backed up from me and my light was shining on him and that is when I shot him" (R. 14).

Accused reached for his weapon after McKelvey reached for his. Accused also testified that he had his pistol in a holster with a handkerchief tied around it. He did not remove the handkerchief until after he had shot

~~CONFIDENTIAL~~

267177

CONFIDENTIAL

McKelvey (R. 14). He was about six steps from McKelvey when he fired the shot. McKelvey was carrying the jug in his left hand. It was light enough so he could see people standing on their balconies. He saw McKelvey when he reached for his pistol. Accused's pistol was in his holster at the time. He could not say how far McKelvey had moved his weapon from its holster. He could not see McKelvey after he shot. McKelvey walked on in the same direction and "witness" went "after a drink of water". He did not remain to see if he had hit McKelvey. He did not take McKelvey's ".45 automatic", but he "got one that night off some Italian kids" (R. 15).

4. It thus appears from the evidence that at the time and place alleged, accused assaulted Staff Sergeant Charles A. McKelvey, the person named in the Specification, by shooting him in the chest with a pistol. There is evidence that a short time before the assault the principals, who were both armed with pistols, had had a verbal altercation over accused's avowed purpose of shooting open the door of an Italian's house, to which they had gone to procure wine. McKelvey remonstrated with accused and when the latter cocked his pistol to shoot at the door, McKelvey drew his own and, while pointing it at the ground, told accused to desist. Later at another place accused reminded McKelvey of their previous argument and, with the words "I am going to finish you right now", shot him. Accused claimed that he shot McKelvey in self-defense as the latter reached for his pistol and that McKelvey had a short time before pointed his pistol at him to force him to take a drink of wine. Upon all the evidence the court was justified in concluding that accused had no reasonable grounds for believing he was in imminent danger and that it was necessary to fire upon his victim, and in concluding, on the contrary, that accused aggressively fired the shot without any effort to retreat or otherwise to avoid the conflict. Both accused and McKelvey had been drinking prior to the shooting. It is clear that accused was in possession of his mental faculties.

The offense charged is an assault aggravated by the concurrence of a specific intent to murder. There is substantial basis for the view that the assault was committed without legal excuse or justification and under circumstances that, if death had ensued, the homicide would have constituted murder. That accused entertained the requisite specific intent to murder may be inferred from the use of a deadly weapon, the character of the injury inflicted and his resentment, though righteous, at McKelvey's allegedly overbearing conduct (Winthrop's, reprint, 1912-40, p. 688; MCM, 1928, par. 1491; NATO 1031, Howlett).

The court properly admitted in evidence the written statement of accused. Upon examination of the statement, it appears to fall short of a confession of guilt and to constitute merely an admission against interest. No showing that such a statement was voluntarily made is ordinarily necessary (MCM, 1928, par. 114b). In any case, however, there was adequate proof of voluntariness, and accused's testimony substantially corroborated the pertinent portions of the statement.

5. The charge sheet shows that accused is about 27 years old. He was inducted into the Army 28 September 1942. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting

CONFIDENTIAL

~~CONFIDENTIAL~~

(247)

the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. Penitentiary confinement is authorized for the offense of assault with intent to commit murder here involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 455, Title 18, United States Code.

Paul Rodriguez, Judge Advocate.  
O. G. Ide, Judge Advocate.  
Gordon Simpson, Judge Advocate.

~~CONFIDENTIAL~~

267177



Branch Office of The Judge Advocate General  
 with the  
 North African Theater of Operations

APO 534, U. S. Army,  
 11 April 1944.

Board of Review

NATO 1715

U N I T E D   S T A T E S	)	XV AIR FORCE SERVICE COMMAND
v.	)	Trial by G.C.M., convened at
Private JAMES (NMI) KINLOW	)	Bari, Italy, 18 February
(6286389), Company A, 450th	)	1944.
Signal Construction Battalion	)	Dishonorable discharge and
(Aviation).	)	confinement for life.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

-----  
 REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.  
 -----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private James Kinlow did at Company "A" 450th Signal Construction Battalion (Aviation), on or about 28 January, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one David Long, a human being by shooting him with a carbine.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the "rest" of his natural life, three fourths of the members of the court present concurring. The reviewing

authority approved the sentence, designated the Eastern Branch, "U. S." Disciplinary Barracks, "Green Haven", New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 1700 hours on 28 January 1944, accused and Private First Class Albert L. Hall, both of Company A, 450th Signal Construction Battalion (Aviation), were in Hall's tent in their company area at Cerignola, Italy (R. 5,6). About ten minutes earlier deceased, Private David Long, of the same battalion, had left the tent after having had a tussle with accused in the course of which accused had an open knife in his hand (R. 6,7,9,10). With nothing in his hands deceased entered the tent and asked accused "why he had drawn a knife on him". Accused replied he did not draw a knife on deceased (R. 7,11,12). There were no further remarks (R. 11). Accused then arose from the cot on which he had been sitting, picked up a carbine belonging to another soldier, pointed it at deceased and fired (R. 7,8,12,13). Accused did not take any steps in any direction before firing (R. 12). Deceased "was just standing in front of" accused, "asking a question", when accused shot him (R. 8). Deceased fell to the floor. Accused stood over him, with the carbine pointed toward him, less than three feet away. Deceased, lying on the ground, requested a doctor. Accused stood observing deceased for a few minutes and then left the tent saying he would get a doctor (R. 8,26). Shortly afterwards accused went to Second Lieutenant Harry I. Swiff, one of the company officers, handed him three rounds of live ammunition and a carbine, and told him deceased had been shot. Accused was not excited. When Lieutenant Swiff asked accused who had done the shooting accused replied "'I did.' 'I just couldn't help it.'" (R. 14,15).

Deceased was identified by a medical officer who attended him and who testified that he died at 0705 hours 29 January 1944, from "a gunshot wound in the abdomen with perforating wound to the stomach, liver". The bullet had also fractured the twelfth dorsal vertebra resulting in complete sensory and motor paralysis of the body from the liver down, including both extremities (R. 3). There were no evidences of powder marks on the body. The medical officer did not think the gun was fired "very close" to the body (R. 4).

Accused and deceased were tentmates (R. 5,6). They had entered Hall's tent together about 1645 hours and spent between five and ten minutes doing card tricks. Hall testified he did not know whether there was any actual drinking in the tent. Accused "pulled a bottle out of his pocket" and Hall thought both accused and deceased had been drinking. Hall, who was bathing in the rear of the tent, did not pay much attention to what was going on and did not know what conversation took place but did observe that the two started to tussle (R. 5,6,9,12). Private Frank Montgomery, of the same organization, was in the tent at the time and had watched the card tricks, but did not pay much attention to the tussle that followed when deceased sought to get the cards from accused (R. 16). "He was standing there looking at them" (R. 9). The tussle lasted about five minutes (R. 10): "It started on the bed and then they fell to the floor of the tent" (R. 19). Montgomery saw deceased push accused "back in the corner" but he was not

sure "whether it was a blow or shove" (R. 16). Accused was observed to have an open knife in his hand (R. 17,19), but deceased was holding him by the wrist (R. 9). The knife was "a regular service knife out of a tool kit" (R. 13). Hall did not see accused sprawled in the corner and did not see deceased try to hit accused (R. 9), but Hall asked accused to "let go of the knife" (R. 7). Montgomery and Hall stopped the tussle (R. 16) after which deceased slowly left Hall's tent and walked to his own. Montgomery also left. About five minutes later Hall saw deceased, armed with a carbine, but he testified he did not mention the fact to accused (R. 7,10). Montgomery testified he saw deceased with a carbine and told deceased "to go back to the tent and put the carbine back". Deceased did so (R. 17,18, 19). Ten minutes elapsed between the time deceased left Hall's tent and returned. The tents were about 20 feet apart (R. 7). During the period between deceased's departure and the shooting, accused did not say anything to Hall, who was bathing. When accused picked up the carbine, Hall did nothing; he testified he "didn't have time to do anything then" (R. 11).

Accused testified that he and deceased showed their card tricks in the tent and an argument ensued (R. 21). Accused returned the cards to Montgomery and started to leave the tent. Deceased said, "You think your smart, don't you?" to which accused replied, "No, I don't think I am smart." With that deceased shoved accused into a corner and accused fell down. He got up and deceased picked up a five-gallon can and started to hit accused with it. Accused said, "'What is the matter, Long?' 'I thought you were playing?'" Montgomery "grabbed" deceased and told him to put the can down that there would be no fighting in the tent. Then as accused started to leave the tent deceased grabbed his arm and shoved him back into the bed. Accused had a knife in his hand (R. 21,22) which he had previously gotten from deceased. He made no effort to use the knife and did not threaten deceased with it. Accused gave the knife to Hall and sat down in the corner. Deceased left the tent, running, and Montgomery went out. About five minutes later someone outside the tent said that deceased was coming with a rifle. Hall looked out and said that deceased did have a rifle. Accused reached and got a rifle near the bed. Hall told him it was his rifle and to put it down. Accused replied that he did not want to get killed (R. 23); that "I would be a fool if I let anyone in the tent to kill me." Accused sat down on the bed again and loaded the rifle. Then, his testimony continued,

"Hall told me that Long wasn't coming back in the tent. I said, 'Don't let anyone come into here bothering me because I don't want to hurt anyone.'"

Deceased then entered the tent. Accused was sitting on a double deck bed, five or six feet from the door, and the following conversation ensued:

Deceased: "You think you're smart, don't you?"  
 Accused: "No, I don't think I am smart."  
 Deceased: "You drew a knife on me."  
 Accused: "You know I didn't draw a knife on you."

When the conversation started deceased was about three feet from accused.

**CONFIDENTIAL**

CONFIDENTIAL

He walked "around the far side of the pole on the opposite side where I was" (R. 24) then "He began walking towards me with his hands in his pockets." Accused testified he told deceased not to come toward him with his hands in his pockets but that he continued to come; and that, "I then told him I was through with him, and if he wanted to talk to me not to come with his hands in his pockets." Deceased kept coming and accused got up from the bed and started toward the door. He testified that deceased "got pretty close to me and made a lunge, and I swung around with the rifle and shot him" (R. 25).

Accused further testified he had been living in the same tent with deceased about two months. They had been good friends and had had no trouble before (R. 25). The knife was on the bed while he was doing card tricks and he picked it up "Because I was trimming my nails and I wanted to continue". The knife did not belong to deceased and, as far as accused knew, deceased did not have another knife. Accused had four or five rounds of ammunition with him and loaded the carbine. He reloaded the carbine after shooting because "I was scared and nervous." Deceased was "lying on the ground, and I was on my way for a doctor." He saw a company officer and walked up and handed him the gun. The officer asked what had happened (R. 26). Accused testified he told the officer he had shot deceased, saying "'I did, sir, I couldn't help it.'" Accused, deceased, Hall and Montgomery were all friends (R. 27). He further testified that he shot deceased because "I was scared that he was going to kill me\*\*\*I don't know what he had. I was just scared of him when he made his lunge." Accused "didn't see anything in his hands because he had them in his pockets" (R. 27). When they were showing the card tricks accused and Montgomery drank out of a quart bottle (R. 28). Accused was not drunk. He knew he had shot deceased but "I didn't shoot him with the intention of killing him." He had never seen deceased with a pistol and did not know whether or not he owned one (R. 28).

Hall testified that when deceased returned to the tent he had nothing in his hands, which were at his sides (R. 29). He asked accused why he drew a knife and accused "said he didn't". He testified deceased did not jump towards accused and that the latter shot him without saying a word. He did not see deceased pick up the water can. When deceased returned to the tent witness did not look out and say "Here comes Long with a gun." He did not go to the door of the tent and said nothing about a gun (R. 30).

4. It thus appears from the evidence that at the time and place alleged accused shot and killed Donald Long, the person named in the Specification, with a carbine. A few minutes before the shooting accused and deceased had been doing card tricks in a tent and became involved in an argument. Deceased had pushed accused into a corner. Accused had a knife in his hand which he surrendered to another soldier who interrupted the tussle. Deceased then went to his own tent about 20 feet away and started back with his carbine. One of the soldiers told him to take his carbine back to his tent which deceased did. Accused picked up a carbine near the cot where he was sitting and loaded it. Shortly thereafter deceased re-entered the tent where accused was sitting. He had nothing in his hands.

CONFIDENTIAL

He asked accused why he had drawn a knife on him. Accused replied that he had not drawn a knife on deceased. With that accused arose from the cot, pointed the rifle at deceased and fired. Deceased died the next day from a gunshot wound in the abdomen. Accused admitted that he fired the fatal shot but claimed that he fired because his victim was coming toward him with his hands in his pockets and he did not know what deceased had. However, there is substantial evidence that deceased was unarmed and that accused was in no sense in any real or apparent danger when he raised his rifle. Accused did not claim that he retreated or in any way sought to avoid the fatal shooting. His conduct was obviously wanton, willful and without justification or excuse and the court was fully warranted in concluding that accused did not act in self-defense when he committed the homicide (MCM, 1928, par. 148a). Accused's testimony that he did not shoot deceased with the intention of killing him is negatived by evidence that the fatal shot was fired directly at the body of deceased at close range. It was the duty of the court to weigh the conflicting evidence and its conclusion that accused acted deliberately and intentionally when he shot and killed Long is supported by substantial evidence. That they had been friends and that he may have entertained no specific hatred or personal ill will toward Long does not exclude the existence of malice. Malice may properly be inferred from the use of a dangerous weapon and the attendant facts and circumstances surrounding the homicide. The court was fully justified in finding accused guilty of murder as charged (MCM, 1928, par. 148a; Winthrop's, reprint, pp. 672,673; Dig. Op. JAG, 1912-40, par. 451 (10); NATO 696 (Pokorney)).

5. The Specification alleges that accused "did at Company 'A' 450th Signal Construction Battalion (Aviation)" commit the said offense without setting forth the geographical location of such organization. The proofs show that the offense was committed in Cerignola, Italy (R. 14,25). The naming in the Specification of the place of the offense as the station of the soldier's command is proper pleading (Dig. Op. JAG, 1912-40, sec. 428 (12)) since jurisdiction of the court did not depend upon any consideration of geography and the precise place where the act occurred is not of the essence of the offense charged (Dig. Op. JAG, 1912-40, sec. 416 (10); Winthrop's, reprint, p. 138; NATO 419, Addison; NATO 544, Helton).

6. The charge sheet shows that accused is about 28 years old. He enlisted in the Army 7 November 1938. No previous service is shown.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. The death penalty or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

*James G. O'Donnell*, Judge Advocate.  
O. 3 900

*Gordon Dinsmore*, Judge Advocate.

CONFIDENTIAL



**CONFIDENTIAL**

(255)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
12 April 1944.

Board of Review

NATO 1723

U N I T E D   S T A T E S	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
Sergeant LEANDER (NMI) KNIGHT	)	Naples, Italy, 10 February
(12022645), 609th Ordnance	)	1944.
Company (Ammunition), 248th	)	Dishonorable discharge and
Ordnance Battalion.	)	confinement for life.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Sergeant Leander Knight, 609th Ordnance Company (AM), did at Dump 0-451, Aversa, Italy, on or about 3 December, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private John C. Ruffin, 10th Replacement Bn, a human being by shooting him with a service pistol (Caliber .45).

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg,

~~CONFIDENTIAL~~

(256)

Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 3 December 1943, near Aversa, Italy, Private John C. Ruffin, who had formerly been a member of the 609th Ordnance Company (Ammunition), returned to visit his old organization and went to the tent of one of the company noncommissioned officers where he visited briefly (R. 11,12,17,21,22). As he was leaving the tent, he "walked right into" accused who was at the time on duty as sergeant of the guard and was armed, as he was entitled to be, with an Army .45 caliber automatic service pistol (R. 12,13,18,22,28,29). Ruffin greeted accused who responded by asking "What did you cut me for, Ruffin?" The latter replied "I don't know. I was drunk. I don't know what happened" (R. 16,17,18). The two were within about a foot of each other (R. 19). An eyewitness testified that thereupon accused

"started to reach back for his holster. Ruffin turned and went up to the tent, and, at that time, Knight started shooting him. He was going in, and he fell across the bed with his head out of the tent. Knight shot him again. At that time, he took the magazine out, and went to the orderly room and put it on the table. At that time, Lieutenant Posey was coming across the area from the M.P.'s, and he walked up to Lieutenant Posey and gave himself up to Lieutenant Posey" (R. 17).

This witness testified further that accused fired three times and

"Ruffin was lying on the ground when he shot him the last time. Then, when they put him on the truck, I knew he had hit him\*\*\*there was a hole in his head" (R. 20).

The last shot was fired at the victim's head as he lay on the ground. Witness also testified that he was "quite sure" Ruffin was dead; that he was all covered with blood and was not breathing (R. 20).

The noncommissioned officer whom Ruffin had visited had admonished him and accused to "stop arguing" just before the shooting (R. 12), but he testified that the argument was not heated; that no one seemed to be excited, yet he could tell "it was a kind of friction like" (R. 14). Another witness testified that when accused was talking to Ruffin, the former employed his "usual tone" (R. 18).

When he went to Lieutenant Posey to surrender, accused told the latter, "I have just killed John Ruffin" (R. 20,21). It was then between 1600 and 1700 hours (R. 22). This officer testified that accused

"was very calm. In fact, he was so calm that when he said what he did, the statement and the way he reported to me, his whole inflection, I didn't catch what he meant. I mean he was very quiet" (R. 22).

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~

(257)

And further, he testified that accused

"wasn't just pretty quiet, he was deathly quiet" (R. 22).

After the shooting, Ruffin was taken to the 262d Station Hospital where a medical officer examined him and determined that he was dead. The medical officer testified that Ruffin died of gunshot wounds (R. 23).

Accused testified that he and Ruffin had had a difficulty in Sicily on 19 August 1943, which culminated in Ruffin's cutting him "behind the neck, in the chest, and on the arm" with a razor, inflicting wounds which required accused to spend 14 days in a hospital (R. 24,25,26). He testified further that when he returned to his company, Ruffin was not there; that the next time he saw Ruffin was on 3 December; that he was sergeant of the guard at the time and was armed with a pistol; that he did not know Ruffin was in the camp and had started in the tent where Ruffin had been visiting when the latter came out and said "Hello, Knight" (R. 26,27). Accused further testified that he was astonished at seeing Ruffin and

"The first thing I said to him was, 'Ruffin, what gave you the idea of cutting me up over in Sicily?' He replied, 'What about it?' He says to me, 'Well, I am just telling you about it.' Then I said to him, 'You know', just like that, I says, 'You know.' He broke and started for Valentine's tent. When he broke and started to Valentine's tent, he kind of turned sides-ways, he did, like a motion as though he was going for something in his pocket. The way he turned, both his hands shifted out this way, and he went toward his field-jacket. The jacket was open, his field jacket went up like that. Right there is when I just got scared and I got out the pistol and started shooting" (R. 27).

Accused testified he fired his weapon three times and that he shot because

"I was afraid that he was going to hurt me, because of the motions he made. As I said before, he and I had an argument before. Just in the instant when he ran from me, it got me all of a sudden when he ran" (R. 27).

He estimated he was about 20 feet from Ruffin when he opened fire (R. 29).

Accused's company commander testified that he had known accused 18 or 20 months and that the latter "was a type that didn't go out of his way to bother anybody"; that he was quiet and reserved and had "always been quite efficient" as a soldier (R. 29,30).

4. It thus appears from the uncontradicted evidence that at the place and time alleged, accused shot with a pistol and killed Private John C. Ruffin, the person named in the Specification. The undisputed evidence also shows that when accused unexpectedly met Ruffin at the time of the killing,

~~CONFIDENTIAL~~

**CONFIDENTIAL**

accused renewed a quarrel the two had had in Sicily some four months previously by asking Ruffin why he had cut accused on that occasion. Ruffin started to go back into the tent from which he had just emerged when accused drew his pistol and shot at his victim three times, firing the last time after Ruffin had fallen to the ground.

There is support for the view that accused had brooded over the assault Ruffin had made upon him and when he unexpectedly met his former adversary, he decided to avenge himself and accordingly fired upon Ruffin with fatal effect. The argument between the two men which preceded the killing was not heated. Ruffin said nothing to provoke accused nor did the latter appear excited or enraged. When he surrendered after the homicide, he was calm and self-possessed. There is ample support for the conclusion that accused's acts were willful and deliberate and that he was prompted by personal malice and ill will toward his victim when he committed the fatal assault.

Accused testified that Ruffin made a motion as if he were "going for something in his pocket" and that accused was afraid Ruffin would injure him "because of the motions he made". However, there is substantial evidence that Ruffin was retreating when he was shot and there is no evidence that Ruffin had drawn a weapon or had otherwise had in any sense menaced him. The court was fully warranted in rejecting as improbable this claim and in concluding that accused was in no real or apparent danger when he fired the fatal shots.

5. At the beginning of the trial, the defense interposed "the special plea" that accused was impelled to act by an "uncontrollable impulse" at the time of the shooting and "therefore, he is not guilty by reason of insanity". The prosecution announced that "a board of medical officers was appointed by the appointing authority, and they are present at this time with their report" (R. 6). The board of officers which had examined accused on 2 February 1944, found that

"There is no evidence to indicate that Sergeant Leander (NMI) Knight is insane at the present time, or that he was insane at the time of the alleged offense" (Pros. Ex. 1; R. 10).

One of the medical officers who comprised this board (Pros. Ex. 1) testified that he considered the actions of accused at the time of the shooting "more or less normal", that the board thought that the act of accused in shooting his victim was that "of a normal person rather than of an abnormal person" (R. 6,7). He also testified "The man is sane" (R. 10). He testified that the mental examination of accused was conducted at the 45th General Hospital and extended over "several days" (R. 8). There had been a report on the mental condition of accused from the 262d Station Hospital which was not introduced in evidence. The medical officer who expressed the view that the board of officers examining accused "disagreed with the report from the 262d Station Hospital, not so much in fact, as in terminology" (R. 7), stated that "there is very little difference between the 262d's report, and our report, except for the fact that we thought it was, if you want to

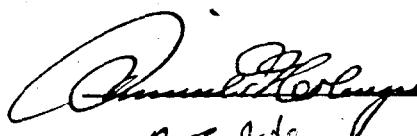
**CONFIDENTIAL<sup>4</sup>**

choose, a psychoneurosis reaction of an average normal individual, rather than a panic reaction, or a sick man's reaction" (R. 9).

After hearing the evidence on the insanity issue, the court overruled the defense plea. This it was justified in doing. There was no evidence of insanity or lack of mental responsibility.

6. The charge sheet shows that accused is about 23 years old. He enlisted in the Army 9 December 1940. No prior service is shown.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. The death penalty or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

 Paul D. Langley, Judge Advocate.  
O. T. J. de, Judge Advocate.  
Gordon Simpson, Judge Advocate.



~~CONFIDENTIAL~~

(261)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
6 April 1944.

Board of Review

NATO 1758

U N I T E D   S T A T E S	)	XII AIR FORCE SERVICE COMMAND
v.	)	Trial by G.C.M., convened at
Private First Class GEORGE H.	)	Naples, Italy, 21 March 1944.
DOSS (35425340), Headquarters	)	Dishonorable discharge and
and Headquarters Squadron,	)	confinement for ten years.
306th Service Group, Air Service	)	Eastern Branch, United States
Command.	)	Disciplinary Barracks, Green-
		haven, New York.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.  
-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private First Class George H. Doss, Headquarters and Headquarters Squadron, 306th Service Group, ASC, did, at Ponte Barrizzo, Italy, on or about 2 March 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Grover C. Isbell, a human being, by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of the Charge and Specification "as involve a finding of guilty of the lesser

222372

~~CONFIDENTIAL~~

**CONFIDENTIAL**

(262)

included offense of voluntary manslaughter of Private Grover C. Isbell, Headquarters and Headquarters Squadron, 306th Service Group, at the time and place, and in the manner alleged, in violation of Article of War 93<sup>a</sup>, approved only so much of the sentence as provides for dishonorable discharge, "total forfeitures" of all pay and allowances due or to become due and confinement at hard labor for ten years, designated the Eastern Branch, United States Disciplinary Barracks, "Green Haven", New York, as the place of confinement and forwarded the record of trial for action under Article of War 50<sup>b</sup>.

3. The evidence shows that on the evening of 2 March 1944, a card game was in progress in the day room of the Headquarters and Headquarters Squadron, 306th Service Group, located at Ponte Barrizzo, Italy (R. 6,9,15). At about 1930 hours (R. 11) the deal came to a Private Grover Isbell. He had been drinking and was "dealing very sloppy" and several players left, leaving only accused, Isbell and two other players in the game. Shortly thereafter an argument started between Isbell and accused (R. 6,9). There was a "scuffling" of feet and Isbell was seen following accused around the table (R. 6,8). Accused "backed through" the door leading into the orderly room (R. 9,11,15,18) and closed the door (R. 18). As accused entered the room he said something in a low voice that sounded like "don't come in the orderly room" (R. 11). He had a "gun", an Italian Beretta pistol, "90 calibre" (R. 13,14), in his right hand pointed toward the floor (R. 15,18), and was closely followed by Isbell (R. 7,9,11,15,18), who had nothing in his hands (R. 24). Accused kept backing away from Isbell (R. 11,16,17,18) and told Isbell "not to swing at him" (R. 11,12) and to stay back (R. 16). One witness testified:

"They hesitated once jointly and then came to a stop just about in front of the radio and just for a few seconds and then Isbell started after him again and he backed up a little further until he had his back then towards the only other exit which was the one which led towards downstairs" (R. 16).

A sergeant told accused to put the pistol down (R. 12,16,18) and repeated the order several times (R. 19). Isbell was getting closer to accused all the time, then, according to an eyewitness:

"First thing we knew Isbell made a lunge towards George Doss and took a swing and hit him on the face with his left hand and that kind of pushed George off balance and he kind of put his hand up before his face and kind of shook his head and at the same time raised the pistol which had been pointed down, he raised it and shot all of a sudden".

"About the time he shot was when Sgt. McGoun had reached out, I don't know whether he touched him or not, but he was making an attempt to reach the gun" (R. 16).

The blow struck by Isbell was "a pretty good wallop" (R. 17). It knocked accused's head to one side and knocked his hat off (R. 14). Other than

232572

**CONFIDENTIAL**

**CONFIDENTIAL**

(263)

involved in this blow, Isbell made no threatening gestures (R. 12,24).

Accused fired once (R. 9,12,18) and Isbell fell (R. 16) with a wound "on the lower part of the chin and to the left" (R. 13). He "became stiff all of a sudden" (R. 16). A medical officer to whom Isbell was well-known (R. 23) examined him "very shortly" thereafter. He was unconscious (R. 20) and in a state of shock (R. 21) with a wound on his chin and bleeding moderately from the mouth. He was dead when removed to the dispensary at about 2010 hours. A bullet was removed from the subcutaneous tissue at the back of the neck (R. 20). In the opinion of the medical officer the bullet was the cause of his death (R. 21).

The squadron commander heard the shot and entered the orderly room two or three minutes later. He saw Isbell on the floor and accused standing in the corner of the room. He said to accused "what is the matter?" and accused said "I shot him" (R. 22). The officer asked "are you drunk" and accused replied "No, sir, I have had a few drinks" (R. 23). Accused did not appear to be intoxicated (R. 19). A noncommissioned officer who witnessed the shooting testified that accused did not appear in any way to be drunk, but that after the shooting he stood "there sort of in a stupor for a minute" (R. 19).

A medical officer, a witness for the defense, examined accused on 8 March. He had a scratch over his right eye, a hemorrhage underneath the lining of the eyeball and "a black and blue surrounding area". In the opinion of the officer the injury was caused by a heavy blow (R. 25).

Accused made an unsworn statement. He told about the card game and the argument with Isbell who "seemed to be drinking". Isbell threw the cards down on the table and said, "I'll kill you, you cocksucker". Accused was standing up and backed toward the orderly room and said "don't do that", and as he backed through the door Isbell started "going for his back pocket" and said "I'll get you, you cocksucker". As the accused turned his head to get the knob to open the door and get out of the orderly room, "and out of his way, the witnesses all say he struck me, I don't know what happened". On previous occasions when Isbell was drinking he "would come in and kick guys around". The accused was "frankly scared of him". Isbell had not been drinking for quite a while and the accused did not know what he would do. Accused had no intention of harming Isbell and nothing would have happened if he could have gotten through the last door and down the hallway (R. 26).

4. The undisputed evidence shows that at the place and time alleged accused shot Private Grover C. Isbell, the person described in the Specification, with a pistol and that Isbell died shortly thereafter in consequence of the injury sustained. The difficulty which led to the fatal shooting had its inception in an argument over a card game. Deceased had been drinking. Accused, it appears, left the table where they had been playing and went into an adjoining room where he was immediately followed by the deceased. They faced each other, deceased unarmed and accused with a pistol pointed toward the floor. The latter told deceased to stay back and not "swing at him". But deceased, as he got close enough, struck accused a severe blow

**CONFIDENTIAL**

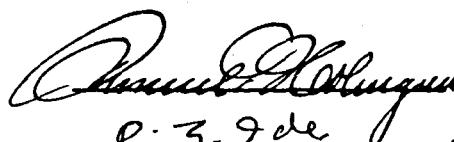
200-742

**CONFIDENTIAL**

in the face with his fist. It was then that accused raised the pistol and fired the shot that killed deceased. The homicide was unlawful and there is support for the view that the act of accused was committed in a heat of sudden passion caused by provocation, such as to render the killing voluntary manslaughter instead of murder as found by the court. An assault and battery inflicting actual bodily harm, as in this case, may constitute adequate legal provocation (Bull. JAG, May 1943, sec. 450 (1); MCM, 1928, par. 149a). The right of self-defense was not available to accused, for the circumstances did not admit of a reasonable basis for belief by accused that the killing was necessary to save his life or prevent great bodily harm to himself (MCM, 1928, par. 148a).

5. The charge sheet shows that accused is about 34 years old. He was inducted into the Army 1 April 1942. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority.

 Russell G. Slusher, Judge Advocate.  
E. J. G. de, Judge Advocate.  
Torow Simpson, Judge Advocate.

**CONFIDENTIAL**

**CONFIDENTIAL**

(265)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations.

APO 534, U. S. Army,  
1 May 1944.

Board of Review

NATO 1792

U N I T E D   S T A T E S	)	MEDITERRANEAN BASE SECTION
v.	)	Trial by G.C.M., convened at
Sergeant JOHN R. KASALONIS	)	Oran, Algeria, 28 February
(6 907 884), Detachment of	)	1944.
Patients, 2d Convalescent	)	Dishonorable discharge and
Hospital.	)	confinement for ten years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification: In that Sergeant John R. Kasalonis, Detachment of Patients, 2nd Convalescent Hospital, did, without proper leave, absent himself from his organization at Bouisseville, Algeria, from on or about 15 June 1943 to on or about 30 November 1943.

ADDITIONAL CHARGE

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Sergeant John R. Kasalonis, Detachment of Patients, 2nd Convalescent Hospital, did, at Oran, Algeria,

270576

**CONFIDENTIAL**

**CONFIDENTIAL**

(266)

on or about 29 November 1943, wrongfully and without proper authority use a motor vehicle of a value in excess of fifty dollars (\$50.00), the property of the United States.

Specification 2; In that Sergeant John R. Kasalonis, Detachment of Patients, 2nd Convalescent Hospital, did, at Oran, Algeria, on or about 29 November 1943, wrongfully obtain, carry away and dispose of one hundred twenty-two (122) pairs of woolen O.D. trousers, value about five hundred eighty-nine dollars and twenty-six cents (\$589.26), one hundred thirty-five (135) wool O.D. shirts, value about four hundred ninety-six dollars and eighty cents (\$496.80), one hundred twenty-five (125) wool undershirts, value about one hundred sixty-one dollars and twenty-five cents (\$161.25), one hundred twenty-five (125) pairs wool drawers, value about one hundred fifty-three dollars and seventy-five cents (\$153.75), one hundred twenty (120) cotton undershirts, value about twenty-five dollars and twenty cents (\$25.20), one hundred twenty (120) pairs cotton drawers, value about thirty-eight dollars and forty cents (\$38.40), one hundred sixty (160) pairs wool socks, value about forty dollars (\$40.00), and ten (10) O.D. field jackets, value about fifty-seven dollars and sixty cents (\$57.60), total value about one thousand five hundred sixty-two dollars and twenty-six cents (\$1,562.26), the property of the United States.

He pleaded guilty to the Charge and Specification but not guilty to the Additional Charge and the Specifications thereunder. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. As to the Charge and its Specification, the evidence shows that accused absented himself without leave from his organization at "2d Convalescent Hospital, APO #371" on 15 June 1943 (R. 14,15; Pros. Ex. A), and remained unauthorizedly absent until apprehended in Oran, Algeria, about 1 December 1943 (R. 15,42). After having been advised that "he need not make any statement, but that any statement that he did make could be used against him", accused made a written statement in which he stated he absented himself without leave from his organization about 15 June 1943 and described his activities which took him to Oran and other cities in French North Africa and to Sicily during the ensuing five months (R. 16,17,20; Pros. Ex. B).

As to Specification 1 of the Additional Charge, accused stated that he met one Robert Cohen about 12 November 1943, and later Cohen took him to a garage in Oran and showed him a "Command Car", telling accused that it had been stolen and was being used by "the boys". Cohen had introduced accused to J. D. Hunter who was masquerading as an American officer by the name of

270676

**CONFIDENTIAL**

## CONFIDENTIAL

Robert Cooper. Accused stated that subsequently he met "the rest of the boys", "Red" Burgoyne, "Bill" Quist and Jack Shippy. They suggested that since accused had a driver's license, he should drive them where they wanted to go in the "command car". Agreeably to that suggestion, accused stated he "drove them to their respective places" and brought the car back to the garage. He stated further that he and Cohen repainted the numbers on the vehicle, changing the one on the hood to 20257376 and that on the front bumper to 6696 T.C. After changing the numbers, accused drove the car to Algiers and upon returning to Oran, parked it in "M. P. Parking Lot #1, Blvd Clemenceau, Oran". Accused stated further that on 29 November 1943, he operated the car on trips to "160 Q.M." and to "Warehouse E" and subsequently to a place called Village Negra (Pros. Ex. B). One M. Aaron Cohen testified that accused was driving an "Officer's Car" on 29 November 1943 (R. 33,37).

A "command car" bearing the markings on the hood "USA 2025 7376" and "6696-TC" on the right rear bumper and "in several places a white star" was presented before the court and introduced in evidence. This vehicle was the same "recon car" which had been parked in the "M.P. auto park Number 1" in Oran. A witness testified that he could tell from the "way they were put on" that the numbers on the hood were not the original ones (R. 42,43,47,48). When this car was located in the parking lot, a trip ticket with the name Kasalonis appearing above the line for "driver's signature" was found in the glove compartment (R. 42,44; Pros. Ex. F). A handwriting expert who had had thirteen years experience as such with the United States Post Office Department and the Veteran's Administration, examined accused's proved signatures (R. 16) as they appeared on his statement (Pros. Ex. B) and the name "Kasalonis" on the trip ticket, and testified that in his opinion "the same person who wrote the signature, 'John R. Kasalonis', on Exhibit 'B' also wrote the signature, 'Kasalonis', on the driver's trip ticket" (R. 38,39,40). It was stipulated that the value of this vehicle on 29 November 1943, was in excess of \$50.00 (R. 49).

As to Specification 2 of the Additional Charge, accused stated that on 28 November 1943, he

"drew up a requisition on the 338th Engr, and signed the name of Major W.C. Gray. Jack Shippy signed as 1st Lt. J.C. Center, Supply Officer of the 338th Eng. I then took this requisition over to 160 Q.M., had it approved and then I took it down to Warehouse E, on Alsace Lorraine. On November 29th, which was the day after the requisition was submitted, I backed the Command car up to the warehouse, and Jack Shippy who was acting as Supply Officer, went in. The prisoners who were working in the warehouse loaded the Command Car\*\*\*Then we headed toward Village Negra where we sold the clothing. We received 27,000 francs, and were told to come back the next day and collect an additional 15,000" (Pros. Ex. B).

M. Aaron Cohen testified that he saw accused in Oran on 29 November

270676

CONFIDENTIAL

**CONFIDENTIAL**

1943 and that accused "was in the car when he brought me the goods" and that this merchandise consisted of American Army clothes, and included approximately 120 shirts, 122 trousers, 120 woolen undershirts, 120 woolen drawers, 120 cotton undershirts, 120 cotton trousers, 140 pairs of woolen socks and 10 field jackets (R. 33,34). Cohen bought this clothing for 44,100 francs. He testified that on 29 November 1943 he paid 27,000 francs to a "G.I." and the following day paid the balance to a soldier identified in court as Private Francis A. Fay. Accused was "outside in the car" when the first payment was made but was present on the occasion of the second payment (R. 35,36).

A requisition made out on War Department "Q.M.C. Form No. 400" was identified by the assistant to the officer in charge of the "Requisition and Editing Section of Depot 160", as having been "registered in the requisition register at the 160th QM". This document was dated 28 November 1943 (R. 22, 23). It bore the purported signature of Major W.C. Gray, Commanding Officer, "338 Engineers" as the requisitioning officer. The handwriting expert who testified respecting the signature on the "command car" trip ticket, testified that in his opinion the same person who wrote the signature "John R. Kasalonis" on accused's voluntary statement (Pros. Ex. B) also wrote "Major W.C. Gray" on the requisition, which was marked Prosecution's Exhibit "D" and introduced in evidence. It called for 122 woolen "O.D." trousers, 135 woolen "O.D." shirts, 125 woolen undershirts, 125 woolen drawers, 120 cotton undershirts, 120 cotton drawers, 160 woolen socks and 10 field jackets and had written across its face the word "completed" (R. 38,48; Pros. Ex. D). A "Tally-Out" sheet on War Department "Q.M.C. Form No. 490" dated 29 November 1943, showing "338 Engineers Co. 'B'" as consignee and bearing the same number as the requisition, was identified and introduced in evidence. This sheet listed the same clothing shown on the requisition and acknowledged receipt of the articles over the purported signature of "Lt J C Ganter" (R. 27,28,29,49; Pros. Ex. E).

One of the noncommissioned officers who searched the "recon car" found parked in "M.P. auto park Number 1" in Oran on 2 December 1943 (R. 42,45), testified he found "considerable clothing" in the rear compartment of the vehicle (R. 43). The clothing was identified as that taken from the car and introduced in evidence (R. 43,44; Pros. Ex. G). These garments which included woolen trousers, woolen "O.D." shirts, "shorts", cotton undershirts, woolen undershirts, woolen and cotton drawers and a raincoat, were, with the exception of the "shorts", shown to bear, among other identification marks, the words "Philadelphia QM Depot" (R. 47).

It was stipulated that the "value to the United States Government of the following articles consist of the prices given each article as of November 29, 1943, such prices being taken from AR 30-3000 dated 31 August 1943".

One pair woolen O.D. trousers	\$5.50
One woolen O.D. shirt	4.22
One woolen undershirt	1.42
One pair of woolen drawers	1.31

270676

- 4 -  
**CONFIDENTIAL**

**CONFIDENTIAL**

(269)

One cotton undershirt	.22
One pair cotton drawers	.34
One pair woolen socks	.28
One O.D. field jacket	6.10 (R. 46).

At the trial, accused elected to make an unsworn statement through defense counsel in which he stated in effect that he was 24 years old, married and the father of one child; that he enlisted in 1938, came overseas with the 1st Division, served as a rifleman in an infantry company in the North African invasion, was promoted to squad leader during the Tunisian Campaign, was wounded at El Guettar and subsequently hospitalized at 2d Convalescent Hospital (R. 50).

4. It thus appears from the uncontradicted evidence together with his pleas of guilty that at the place and time alleged in the Charge and its Specification, accused absented himself without proper authority from his organization and remained unauthorizedly absent until he was apprehended on or about 30 November 1943. He was properly found guilty of absence without leave as charged.

It further appears from the uncontradicted evidence that at the place and time alleged in Specification 1 of the Additional Charge, accused wrongfully and without proper authority used a motor vehicle, valued in excess of \$50.00, belonging to the United States Government. His guilt was established by the admissions in his voluntary statement which were corroborated by testimony that a trip ticket found in the vehicle bore his signature, that the car was found at the place and with changed numbers as detailed by accused in his statement and further by the circumstance that accused was seen by another witness driving an "Officer's Car" at the place and time here alleged. Government ownership was fairly to be implied from the markings on the vehicle including the words U.S.A. painted before the numbers on the hood of the car and the further circumstances that the "command car", a type of motor vehicle commonly used by the United States Army, was found in a military police parking lot where accused stated he had left it. Accused was properly found guilty as here specified.

It further appears from the uncontradicted evidence that at the place and time alleged in Specification 2 of the Additional Charge accused, with the aid and connivance of others, wrongfully and without proper authority, obtained, carried away and disposed of the items of property of the United States as specified and of the values alleged. The commission of the offense was established by the voluntary statement of accused, together with supplemental and corroborative proof, including evidence that a false requisition partly in the handwriting of accused was employed to draw from a Quartermaster Corps warehouse clothing of the identical kind and quantity and at the identical time alleged and also the testimony of the civilian to whom accused and his confederates sold the clothing they had thus wrongfully obtained. These wrongful acts were accomplished partly by accused and partly by his accomplices but all were shown to have been acting in concert and each was responsible for the acts of the others done in pursuance of the common design (NATO 1799, Quist; NATO 1800, Burgoyne). Accused was properly found guilty as here specified.

270676

**CONFIDENTIAL**

(270)

# CONFIDENTIAL

The values of the clothing described in this Specification as established by stipulation were slightly more than those originally alleged. When this difference appeared at the trial, the prosecution moved to amend the Specification to conform to the proof. The defense announced "no objection". Accused was in no sense surprised or prejudiced by this development and the court properly allowed the amendment.

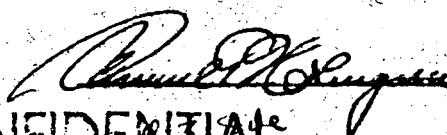
5. Accused challenged certain members of the court, including the law member, on the ground that they had sat as members of general courts-martial in the trials of two other accused, Private William P. Quist, NATO 1799, and Private Arthur G. Burgoyne, NATO 1800, in closely related cases wherein evidence was heard and considered which referred to and tended to establish the guilt of this accused and that consequently the challenged members had necessarily formed a positive and definite opinion as to his guilt or innocence. A poll was conducted and in each instance, with the exception of Colonel Bassich, the reply of the challenged member was substantially to the effect that he had no definite, positive opinion of the guilt or innocence of accused and that he could lay aside all of the testimony he heard and considered in the other cases. The court overruled the challenges except as to Colonel Bassich who was excused. What is said in NATO 1799, Quist, is applicable here. The challenged members were not ineligible, statutorily or otherwise, to sit as members of this court. The matter of their qualification to sit, when tested by the challenges for cause upon the grounds here urged, was for the court to determine. No abuse of discretion appears. Moreover, the guilt of accused was established by compelling evidence including the admissions he made in his pretrial statement. His substantial rights were not injuriously affected by the court's rulings on the challenges.

6. Defense counsel objected to the introduction of the requisition upon which the clothing described in Specification 2 of the Additional Charge was drawn (Pros. Ex. D), to the "tally-out" sheets showing this requisition was filled (Pros. Ex. E) and to the driver's trip ticket bearing the proven signature of accused (Pros. Ex. F), assigning as a reason for objection in each instance substantially that no proper foundation had been laid, that the documents had not been "connected" with accused. These objections went to the weight and not the admissibility of the evidence. There was proof that accused's handwriting appeared on Prosecution's Exhibits "D" and "F" and the "tally-out" sheet (Pros. Ex. E) was shown to bear the same number and list the same articles of clothing as did the requisition (Pros. Ex. D) accused and his confederates had employed to procure the merchandise they were charged with having wrongfully taken. The court properly overruled the objections to this testimony.

7. The charge sheet shows that accused is 24 years old. He enlisted in the Army 22 September 1938. He had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

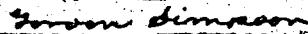
270676



Judge Advocate.

CONFIDENTIAL

Judge Advocate.

- 6 -  Judge Advocate.

**CONFIDENTIAL**

(271)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
10 May 1944.

Board of Review

NATO 1793

U N I T E D   S T A T E S	)	MEDITERRANEAN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private J. D. HUNTER	)	Oran, Algeria, 29 February
(6 295 076), Company A,	)	1944.
5th Replacement Depot.	)	Dishonorable discharge and
	)	confinement for 15 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private J. D. Hunter, 5th Replacement Depot, did, at Oran, Algeria, on or about 19 September 1943, wrongfully and without proper authority obtain, carry away and dispose of one hundred and two (102) pairs cotton khaki trousers, value about two hundred twenty-nine dollars and fifty cents (\$229.50), one hundred and two (102) shirts, value about two hundred twenty-one dollars and thirty-four cents (\$221.34), two hundred and forty-three (243) pairs cotton drawers, value about seventy seven dollars and seventy-six cents (\$77.76), two hundred and forty-three (243) undershirts, value about fifty-one dollars and three cents (\$51.03), two hundred and ninety-eight (298) pairs cotton tan socks, value

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(272)

about forty-one dollars and seventy-two cents (\$41.72), fourteen (14) raincoats, value about forty-four dollars and ninety-four cents (\$44.94), and twenty-one (21) O.D. field jackets, value about one hundred twenty dollars and ninety-six cents (\$120.96), total value about seven hundred eighty-seven dollars and twenty-five cents (\$787.25), the property of the United States.

Specification 2: In that Private J. D. Hunter, 5th Replacement Depot, did, at Oran, Algeria, on or about 29 October 1943, wrongfully and without proper authority obtain, carry away and dispose of two hundred (200) wool O.D. shirts, value about seven hundred and thirty-six dollars (\$736.00), and two hundred and sixty-four (264) undershirts, value about three hundred and forty dollars (\$340.00), total value about one thousand and seventy-six dollars and fifty-six cents (\$1,076.56), property of the United States.

Specification 3: In that Private J. D. Hunter, 5th Replacement Depot, did, at Oran, Algeria, on or about 3 November 1943, wrongfully and without proper authority take and drive away a motor vehicle of a value in excess of fifty dollars (\$50.00), the property of the United States.

Specification 4: In that Private J. D. Hunter, 5th Replacement Depot, did, at Oran, Algeria, on or about 1 December 1943, appear in a public place, to wit, Hotel Cavaignac, in the uniform of a commissioned officer of the United States Army.

Specification 5: In that Private J. D. Hunter, 5th Replacement Depot, did, at Oran, Algeria, on or about 26 November 1943, wrongfully obtain and carry away two (2) tires, value about ten dollars and eighteen cents (\$10.18), and two (2) headlamps, value about forty cents (\$.40), total value about ten dollars and fifty-eight cents, the property of the United States.

ADDITIONAL CHARGE:

CHARGE: Violation of the 69th Article of War.

Specification: In that Private J. D. Hunter, 5th Replacement Depot, having been duly placed in confinement in the Stockade, Mediterranean Base Section, on or about 6 December 1943, did, at Oran, Algeria, on or about 18 February 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to the Charges and Specifications. He was found guilty of the Charges and of all Specifications except Specification 4 of the Charge of which he was found guilty except the words "Hotel Cavaignac",

~~CONFIDENTIAL~~

# CONFIDENTIAL

(273)

substituting therefor the words "Gallieni Boulevard", of the excepted words, not guilty, of the substituted words, guilty. Evidence of one previous conviction by summary court-martial for failing to assume duty as a watchman to which he had been detailed, in violation of Article of War 96, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 15 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. As to Specification 1 of the Charge, the evidence shows that after having been told that "he need not make any statement but if he did make a statement, anything that he said would be used against him" (R. 16), accused made a voluntary written statement dated 3 December 1943, in which he stated that on 17 August 1943, one Burgoyne and one "Bill Quist" drew up "a requisition"; that on or about 29 September 1943, he, Burgoyne, Quist and a Robert Cohen, whom accused described as a deserter from the French Army, went to "Warehouse 'E'" to "pick up the clothing that had been requisitioned"; and that he signed the "Tally-out" sheet in the name of "S/Sgt Charles Bradley". Accused stated further that Cohen told him he had good connections and "could get rid of anything, at the same time getting a good price"; that the clothing was turned over to Cohen, who, on the following day, came to the hotel where accused and his companions were staying and gave each of them \$150.00 (R. 18; Pros. Ex. A).

Cohen testified that "about September" he, accused, Burgoyne, one Fay, and Quist went to an apartment in Oran where Quist told Cohen "about the clothes" and "to come back in the afternoon at two o'clock"; that accused, Burgoyne and Quist left in an American truck with a white star painted on it and came back later with about 100 uniforms, 100 pairs of pants, 100 shirts, about 250 or 300 "shorts", 250 "underwear", 250 pairs of socks, 20 field jackets and 20 raincoats, all "American" clothing (R. 20,21,22). Cohen testified further that he took the clothes to his home and sold them to "the Arab" for 42,000 francs which he gave to accused and his companions--he "split the money with the boys". Accused, Cohen and the others each received about \$160.00 (R. 22,23,32,33).

A requisition on War Department "Q.M.C. Form No. 400", dated 17 August 1943, bearing the purported signatures of W. A. Shires, Captain, Signal Corps, as the requisitioning officer and C. H. Nelson, First Lieutenant, Signal Corps, as supply officer, was identified by Cohen as having been on the truck when the "first deal" was made. The requisition was introduced in evidence (R. 27,29,54,55; Pros. Ex. C). This requisition, which called for the identical articles of clothing listed in Specification 1 of the Charge, was also identified by the assistant to the officer in charge of the editing and requisitions section of "Depot 160-Q", to which it was addressed, as having gone through his section (R. 35,36). It was also identified by a civilian employee and a noncommissioned officer in charge of the stock records section at "Warehouse E", a warehouse used by the "American Army" as having

-3-  
CONFIDENTIAL

# CONFIDENTIAL

(274)

come from the files of that section (R. 41,47,48).

A witness who had been handwriting expert for the Post Office Department and Veteran's Administration for 18 years, testified that in his opinion the same person who wrote the signature "Arthur G. Burgoyne, Jr" on Prosecution's Exhibit "B" (which writing another witness had testified was Burgoyne's genuine signature) also wrote the names of "W. A. Shires, Captain, Signal Corps" and "C. H. Nelson, 1st Lieutenant, Signal Corps" on the requisition dated 17 August 1943 (R. 19,39,40; Pros. Ex. C). "Tally-out" sheets bearing the same number as this requisition and listing the same clothing as was shown on it, were identified by the noncommissioned officer and the civilian employee, who had previously identified the requisition (R. 42,48). These sheets, which were admitted in evidence, bore the purported signature of "S/Sgt Charles Bradley" (R. 55; Pros. Ex. F).

The values of the articles of clothing listed in Specification 1 of the Charge were stipulated as follows:

- "One pair cotton khaki trousers, \$2.34
- One shirt, \$2.17
- One pair cotton drawers, 34¢
- One undershirt, 21¢
- One pair of cotton tan socks, 16¢
- One raincoat, \$4.30
- One field jacket, \$6.10" (R. 71).

As to Specification 2 of the Charge, in his statement dated 3 December 1943, accused stated that early in October, 1943, being in need of money, he asked Burgoyne to prepare a requisition which the latter consented to do; that when the requisition was drawn, accused signed it under the name of Captain A. F. McDowell. He stated further:

"The latter part of October a truck was backed up to the warehouse. We got this truck by asking a soldier if he would give us a hand in getting some clothes from the warehouse. We told him that our driver could not be located. He said he would give us a hand.

"While Cohen and Bergoyne were loading the truck, I signed the Tally-Out sheet under the name of 'Lt Cooper.'

"Somewhere along Rue Vienne, the clothing was unloaded and Cohen said that he would see that everything was taken care of.

"The following day, Cohen came to the hotel and gave Shippy, Bergoyne, and me \$140.00 each" (Pros. Ex. A).

Cohen testified that accused told him in October that "he was going to make another requisition between him and the boys" and they went to an

# CONFIDENTIAL

**CONFIDENTIAL**

(275)

apartment in Oran "where he makes the requisition", everyone present offering suggestions about how it should be drafted (R. 23,24). Cohen testified further that two days later, he, accused and four others went to "Warehouse 'E'" where they "got the clothes" (R. 24) which consisted of approximately 200 woolen "OD" shirts and about 260 "OD" undershirts (R. 25); that they transported the clothing to a prearranged place where accused "makes the price for 35,000 francs" which "the Arab" paid over to Cohen; that the next day the latter "split the money with the boys", each receiving "about 150 bucks" (R. 25,26,33,34). During this time, accused was masquerading as a second lieutenant, calling himself Robert M. Cooper (R. 31). Cohen identified Prosecution's Exhibit Number "D" as the requisition which accused and his associates prepared and used on the "second deal" (R. 28,29). The assistant to the officer in charge of the editing and requisitions section of "Depot 160-Q" also identified this requisition by means of the requisition registry number on the document, as having passed through his section (R. 36, 37,38).

A "tally-out" sheet bearing the same requisition number as Prosecution's Exhibit Number "D" and listing the same articles as are described in Specification 2 of the Charge, was identified as having come from the stock records section at "Warehouse E" by the noncommissioned officer in charge of the section (R. 41,45,46), by another noncommissioned officer who checked the "tally-out" sheet for "nomenclature and exactness in the figures" and who wrote the signature "Bryant" on the sheet (R. 49), and by a civilian employee who worked "for the Americans" and who wrote on the sheet "Posted, 2/11/43, Huguette Sabah" (R. 50). This tally-out sheet was introduced in evidence. It acknowledged receipt of the articles listed on it over the purported signature of "2nd Lt. Cooper" (R. 55,56; Pros. Ex. G).

The values of the articles of clothing listed in Specification 2 of the Charge were stipulated as follows:

"One wool OD shirt, \$4.22  
One undershirt, \$1.42" (R. 71).

As to Specification 3 of the Charge, the evidence shows that on or about 3 November 1943, the driver of a command car, the property of the United States, assigned to 2611 Engineer Map Depot Detachment, parked the vehicle on Avenue Loubet about 50 yards from the corner of Rue d'Arzew, in Oran, about 1900 hours, "told the watchman to watch it and went on inside and went to work". About 1950 hours he looked for the car and it was gone. He had given no one permission to take it (R. 51,54). Neither had the officer commanding the detachment given anyone permission to drive the vehicle away. The other driver assigned to the car did not "move" it that evening. The next time this officer saw the car, was when the "C.I.D. had it". He testified that the number originally on the vehicle "wasn't on it at the time I saw it when it was brought back" (R. 52,53).

Cohen testified that about 2, 3 or 4 November,

"One night we walked up Avenue Loubet from Rue d'Arzew,

**CONFIDENTIAL**

# CONFIDENTIAL

(276)

in the beginning of Avenue Loubet. I stopped right on the corner and Hunter and Burgoyne saw the command car and Burgoyne started, wanted to start it, and the motor froze. So Hunter went inside the command car and started the motor and went away with the command car" (R. 30).

He described the car further as "officer's transportation" for the "American Army" (R. 30). One day after the car was taken Cohen changed the number in the presence of accused (R. 31).

Accused stated in his statement of 3 December 1943, that

"On or about November 3rd 1943, at approximately 2100 hours, Bergoyne, Cohen and I, while walking down Avenue Loubet, Oran, noticed a command car which was parked unattended. I handed Bergoyne a key and told him to start it. He was having difficulty starting it, so I took over. I drove the command car which we had just stolen to a French garage at #6 Rue Pellisiere, Oran, where I paid the attended 20 francs and parked the command car there that night" (Pros. Ex. A).

It was stipulated that the value of the command car referred to in the testimony of the commanding officer of the 2611 Engineer Map Depot Detachment was in excess of \$50.00 on or about 3 November 1943 (R. 54).

As to Specification 4 of the Charge, the evidence shows that accused was posing as a second lieutenant before the command car was taken, calling himself "Robert M. Cooper" (R. 31), and when apprehended in Oran on or about 1 December, 1943, he was dressed as a second lieutenant and was "in the uniform of a commissioned officer of the United States Army" (R. 16). In his statement of 3 December 1943, accused stated he told his "girl friend" in Oran upon his arrival there sometime after 7 June 1943, that he had taken an examination to become an officer and should "have definite word within a couple of months"; that early in September, he asked Cohen to supply him with a set of "dog tags" and a few days later Cohen gave him a set marked "Robert N. Cooper, 0-661194"; that in the latter part of October, he signed "the Tally-Out sheet under the name of 'Lt Cooper'"; and that early in November, he travelled to Bizerte "impersonating a 2nd Lt," and assuming the name of "Lt Robert Cooper", and about the same time, he visited his "girl friend" in the uniform of a second lieutenant and told her his commission had "come through" (Pros. Ex. A).

As to Specification 5 of the Charge, accused stated in his statement of 3 December 1943, that in the latter part of November he drew up a requisition on "150-0 Ordnance and drew two (2) 600x16 tires, and two (2) bulbs head lamps", and signed the requisition in the name of "Lt Gray". These tires were drawn for use on a Plymouth automobile to which accused had access (Pros. Ex. A).

-6  
CONFIDENTIAL

**CONFIDENTIAL**

(277)

A requisition dated 26 November 1943, prepared on War Department "QMC Form 400" to "150 Ordnance" calling for two size 600x16 tires and two bulb head lamps, bearing the purported signature of "Lt Gray", was identified by the depot commander of Ordnance Depot 150-0 (R. 56,57) and by two noncommissioned officers at the depot who assisted in processing it, as being from the records of that depot (R. 59,60,61,62,63). This requisition was introduced in evidence (R. 72, Pros. Ex. H). Tally sheets listing the articles shown on the requisition were identified by three noncommissioned officers on duty at the depot, all of whom took part in processing the sheets (R. 60,62,64; Pros. Exs. I,J).

It was stipulated that "a 600x16 tire had a value to the Government on or about November 26, 1943 of \$5.09" and on or about the same date, the value of a headlamp bulb was 20 cents (R. 58,59).

As to the Additional Charge and its Specification, the evidence shows that accused was confined in the stockade, Mediterranean Base Section, about 6 December 1943, and was still in confinement on 17 February 1944 (R. 66). Just before ten o'clock on the night of 18 February, a sentry at the stockade saw a man going over the wall. The sentry cried "Halt" and shot at the fleeing man. A noncommissioned officer of the guard who heard the shot investigated, "checked on accused" and found he was missing (R. 68,69). Accused was not present at the stockade roll call on the morning of 19 February 1944 (R. 70).

A military policeman on duty in Oran on 19 February 1944, saw accused "behind a door in a latrine, which was just off the kitchen in this house, apartment house". Accused did not have a pass. He "sort of imitated a Frenchman" and said his name was Green. When the military policeman noticed he had "the DTC marking on his fatigue jacket underneath", accused said "All right. Let's go". At "MP" headquarters, he stated his identity (R. 70,71).

At the trial, accused elected to make an unsworn statement through counsel. He stated he was 20 years old, married, and had been in the service since he was 15 years old; that he qualified as a demolition specialist in 1940, landed with the invasion troops in North Africa on 8 November 1942, and afterwards participated in the Tunisian campaign until wounded and hospitalized on 5 May 1942; that he was returned to his organization a month later (R. 74,75).

4. It thus appears from uncontradicted evidence that at the places and times alleged in Specifications 1 and 2 of the Charge, accused, with the aid and connivance of others, wrongfully and without proper authority obtained, carried away and disposed of the items of property of the United States as specified and of the values substantially as alleged. The commission of these offenses was established by accused's pretrial statement, together with supplemental and corroborative proof including evidence that false requisitions were employed by accused and his accomplices to draw from a Quartermaster Corps warehouse clothing of the identical kind and quantity and at approximately the times alleged and also the testimony of the accomplice

**CONFIDENTIAL**

**CONFIDENTIAL**

who either disposed or assisted in disposing of the clothing accused and his confederates had thus wrongfully obtained. These wrongful acts were committed partly by accused and partly by his accomplices but all were shown to have been acting in concert and each was responsible for the acts of the others done in pursuance of the common design (NATO 1792, Kasalonis; NATO 1799, Quist; NATO 1800, Burgoyne; NATO 1801, Fay). The court was fully warranted in finding accused guilty as here specified.

It further appears from uncontradicted evidence that at the place and time alleged in Specification 3 of the Charge, accused wrongfully and without proper authority took and drove away a motor vehicle, the property of the United States, of a value in excess of \$50.00. His guilt was established by the admissions contained in his pretrial statement which were corroborated and supplemented by other evidence including the testimony of one witness who saw him drive the car away and other witnesses who testified the vehicle was taken without authority. Accused was properly found guilty as here alleged.

It further appears from uncontradicted evidence that on Gallieni Boulevard in Oran and at the time alleged in Specification 4 of the Charge, accused appeared in a public place in the uniform of a commissioned officer of the United States Army. In his pretrial statement he admitted that he had been impersonating an officer. When apprehended, he was attired in the uniform of a second lieutenant in the United States Army. It was alleged that accused appeared in the uniform of a United States Army officer at the Hotel Cavaignac in Oran. By exceptions and substitutions, the court found he appeared so attired on Gallieni Boulevard in Oran, the place where he was apprehended. Accused was not prejudiced by this exception and substitution which, under the circumstances, the court properly made. Findings of guilty here were fully warranted.

It further appears from uncontradicted evidence that at the time alleged in Specification 5 of the Charge, accused wrongfully obtained and carried away the items of property of the United States as specified and of the values alleged. The commission of this offense was established by the pretrial statement of accused together with supplemental and corroborative proof including evidence that a false requisition had been employed by a "Lt. Cooper", the name by which accused admitted he was then going, to obtain the tires and headlamps described in this Specification from a United States Ordnance warehouse. The place where the offense was committed was inferentially, though not directly, established by proof that accused was living in the city of Oran on or about the time of this wrongful taking. Moreover, the place of the commission is not of the essence of this offense and lack of formal evidence in this respect in no sense injured accused. He was properly found guilty as here specified.

It further appears from uncontradicted evidence that at the place and time alleged in the Additional Charge and its Specification, accused, having been duly placed in confinement, escaped before he was set at liberty by proper authority. His restraint in the Mediterranean Base Section Stockade and his escape by scaling a stockade wall were established by clear proof.

**CONFIDENTIAL**

# CONFIDENTIAL

(279)

The court's findings of guilty as here specified were fully warranted.

5. Accused challenged certain members of the court, including the law member, on the ground that they had sat as members of general courts-martial in the trials of three other accused, Sergeant John R. Kasalonis, NATO 1792, Private William P. Quist, NATO 1799, and Private Arthur G. Burgoyne, NATO 1800, in closely related cases wherein evidence was heard and considered which referred to and tended to establish the guilt of this accused and that consequently the challenged members had necessarily formed a positive and definite opinion as to his guilt or innocence. A poll was conducted and in each instance, the reply of the challenged member was substantially to the effect that he had no definite, positive opinion of the guilt or innocence of accused and that he could lay aside all of the testimony he heard and considered in the other cases. The court overruled the challenges. What is said in NATO 1799, Quist, is applicable here. The challenged members were not ineligible, statutorily or otherwise, to sit as members of this court. The matter of their qualification to sit, when tested by the challenges for cause upon the grounds here urged, was for the court to determine. No abuse of discretion appears. Moreover, the guilt of accused was established by compelling evidence including the admissions he made in his pretrial statement. His substantial rights were not injuriously affected by the court's rulings on the challenges.

6. Defense counsel objected to the introduction of each of the following instruments, substantially upon the ground that the documents had not been connected with accused and hence had no probative value:

- (1) Prosecution's Exhibit "C", the requisition calling for the articles listed in Specification 1 of the Charge (R. 54).
- (2) Prosecution's Exhibit "D", the requisition calling for the articles listed in Specification 2 of the Charge (R. 55).
- (3) Prosecution's Exhibit "E", a requisition register identified by the officer whose duty it was to edit and process requisitions (R. 35,72).
- (4) Prosecution's Exhibit "F", the "tally-out" sheets listing the articles shown on the requisition marked Prosecution's Exhibit "C" (R. 55).
- (5) Prosecution's Exhibit "G", the "tally-out" sheet listing the articles shown on the requisition marked Prosecution's Exhibit "D" (R. 55).
- (6) Prosecution's Exhibit "H", the requisition calling for the articles listed in Specification 5 of the Charge (R. 72).

These objections went to the weight and not to the admissibility of this evidence and were properly overruled. All the requisitions were connected directly with accused by competent proof, including the admissions contained in his pretrial statement. The requisition register was admissible for whatever the court might deem it worth in connection with the identification and wrongful use of the requisition employed to procure the clothing described in Specification 2 of the Charge. The "tally-out" sheets were shown to have listed the same articles as the requisition in connection with which they were respectively proffered. There was no error in these rulings.

# CONFIDENTIAL

**CONFIDENTIAL**

(280)

7. The charge sheets show that accused is 20 years old. He enlisted in the Army 26 April 1939, and had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

Kenneth Holley, Judge Advocate.

Gordon Simpson, Judge Advocate.

Donald W. Mackay, Judge Advocate.

**CONFIDENTIAL**

Branch Office of The Judge Advocate General  
 with the  
 North African Theater of Operations

APO 534, U. S. Army,  
 29 April 1944.

Board of Review

NATO 1799

U N I T E D   S T A T E S	)	MEDITERRANEAN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private WILLIAM P. QUIST	)	Oran, Algeria, 24 February
(36 195 724), Company C, 32d	)	1944.
Replacement Battalion, 1st	)	Dishonorable discharge and
Replacement Depot.	)	confinement for ten years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

-----  
 REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.  
 -----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private William P. Quist, Company "C", 32nd Replacement Battalion, 1st Replacement Depot, did, without proper leave absent himself from his organization at Canastel, Algeria, from on or about 31 August 1943 to on or about 30 November 1943.

ADDITIONAL CHARGE:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private William P. Quist, Company "C", 32nd Replacement Battalion, 1st Replacement Depot, did at Oran, Algeria, on or about 19 September 1943, wrongfully

**CONFIDENTIAL**

and without proper authority obtain, carry away and dispose of one hundred and two (102) pairs cotton khaki trousers, value about two hundred twenty-nine dollars and fifty cents (\$229.50), one hundred and two (102) shirts, value about two hundred twenty-one dollars and thirty-four cents (\$221.34), two hundred and forty-three (243) pairs of cotton drawers, value about seventy-seven dollars and seventy-six cents (\$77.76), two hundred and forty-three (243) undershirts, value about fifty-one dollars and three cents (\$51.03), two hundred and ninety-eight (298) pairs cotton tan socks, value about forty-one dollars and seventy-two cents (\$41.72), fourteen (14) raincoats, value about forty-four dollars and ninety-four cents (\$44.94), and twenty-one (21) O.D. field jackets, value about one hundred twenty dollars and ninety-six cents (\$120.96), total value about seven hundred eighty-seven dollars and twenty-five cents (\$787.25), the property of the United States.

He pleaded guilty to the Charge and Specification, not guilty to the Additional Charge and Specification. He was found guilty of the Charges and Specifications. Evidence of two previous convictions by special courts-martial for absence without leave in violation of Article of War 61 were introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. As to the Charge and its Specification, the evidence shows that accused absented himself from his organization at Canastel, Algeria, on 30 August 1943 (R. 17; Pros. Ex. A), and was apprehended in Oran, Algeria, on 30 November 1943 (R. 17,18,19). After having been advised "that he need not make any statement, that any statement that he made might be used against him", accused made a written statement to the investigating officer which was received in evidence without objection (R. 18,21; Pros. Ex. B). He stated that he left his organization on or about 5 July 1943 without permission and went to Oran where he remained about five weeks (Pros. Ex. B).

As to the Additional Charge and its Specification, the evidence shows that about the middle of September 1943, accused proposed to a Frenchman named Robert Cohen that the latter "sell for him the clothes" to which Cohen replied "yes" (R. 24,25; Pros. Ex. B). Cohen testified that accused "Quist, Fay, Hunter, Burgoyne and I" went to where a truck was waiting and accused told Cohen to remain there, "we are going to get the clothes, and Fay and me waited" while the others got in the truck and left. The truck was American; there was "an American soldier there and it had a big star in the front--an American star" (R. 25). Cohen also testified that a half an hour later

"he came back with the clothes. Hunter told me to get on the truck. He had a requisition in his hand, Burgoyne's hand, and Quist said, 'do you know if everything is here'. He said, 'yes'" (R. 26).

~~CONFIDENTIAL~~

He testified further that at accused's suggestion, Cohen was given the requisition which he identified as the same document which was later introduced as Prosecution's Exhibit "E" (R. 26,27,53). Cohen took the clothes to his home, counted them and ascertained that they totaled "exactly the number that was on the requisition". He sold the clothing to "some Arab" for 42,000 francs (R. 28) and the following morning went to the Hotel Cavaignac, in Oran, where he gave the proceeds of the sale to accused who, Cohen testified, "split the money with the boys". Accused and each of the others got \$160.00 (R. 29).

An officer who was assistant to the officer in charge of the Requisitions and Editing Section of "Depot 160-Q", also identified Prosecution's Exhibit "E" and testified that this requisition had been submitted to him at the depot and that it then bore the purported signatures of "W. A. Shires, Captain, Signal Corps" and "C. H. Nelson, 1st Lt., Supply Officer" (R. 33, 34,35; Pros. Ex. E). A handwriting expert to whose qualifications as such the defense offered no objection, testified that in his opinion the same person who signed the name Arthur G. Burgoyne, Jr. on Prosecution's Exhibit "C", proved to be the signature of that person (R. 22), also wrote the purported signatures of Captain Shires and Lieutenant Nelson on the requisition (R. 40,41,42). Another witness had previously testified that in his presence Burgoyne had signed Prosecution's Exhibit "C" (R. 21,22,52). The requisition was on "War Department Q.M.C. Form No. 400" and called for 102 khaki slacks, 102 khaki shirts, 243 cotton drawers, 243 undershirts, 298 tan socks, 14 raincoats and 21 field jackets (Pros. Ex. E). Tally sheets which were filled out from the requisition and identified by the American Army checker who signed them, showed the identical articles of clothing which appeared on the requisition (R. 46,47,48,53; Pros. Ex. F).

It was stipulated that the

"value of the following garments to the United States Government on or about September 19th, 1943, as shown by AR 30-3000 in effect the 31st of August 1943, are as follows: Trousers cotton khaki, \$2.34; Shirt cotton khaki, \$2.17; Drawers cotton, \$.34; Socks cotton, \$.16; Field Jacket, \$6.10; Undershirt cotton, \$.21; Raincoat, \$4.03" (R. 51).

On 2 December 1943, after having been warned that he need not make a statement and that anything he said might be used against him (R. 18), accused stated that about 17 August 1943, being in need of money, he aided Burgoyne in drafting a requisition which they took to "160 Q.M." where Burgoyne went in the office while accused waited outside. From there they went to Warehouse "E" and again Burgoyne went inside with the requisition. Accused stated further that about 19 September 1943, he, Burgoyne, Hunter and Cohen went "into the warehouse to get the clothing" for which Hunter signed and "the rest of us loaded the goods on our backs, and left"; that the clothing was turned over to Cohen to be sold and the following day, the latter came to the hotel where they were staying and "gave us each \$150.00 for our share" (Pros. Ex. B). It was shown that Warehouse "E" was in Oran (R. 36).

(284)

Accused elected to remain silent at the trial (R. 54).

4. It thus appears from the evidence together with his pleas of guilty, that at the place and time alleged in the Charge and Specification, accused absented himself without proper leave from his organization on 31 August 1943, and remained unauthorizedly absent until apprehended on 30 November 1943. He was properly found guilty as charged.

It further appears from the evidence that at the place and time alleged in the Additional Charge and Specification, accused, with the connivance and help of others, wrongfully and without proper authority obtained, carried away and disposed of the property of the United States described therein, of the values substantially as alleged. The commission of the offenses was established by the testimony of one of accused's accomplices and by the statement of accused, and was further corroborated, among other evidence, by the requisition which accused and his confederates wrongfully employed to get the clothing from a Quartermaster Corps warehouse. While the wrongful disposition of the clothing was not accomplished by accused himself but by an accomplice, the sale was a part of an unlawful transaction upon which accused and his confederates had previously agreed and each was responsible for the acts of the others done in pursuance of the common design (NATO 385, Speed; NATO 643, Moor; NATO 1800, Burgoyne). Accused was properly found guilty as here specified.

5. The accused challenged certain members of the court, including the law member, on the ground that they had sat as members of a general court-martial in the trial of an accused (Private Arthur G. Burgoyne, NATO 1800) who was charged with and found guilty of the same offense as that set forth in the Specification of the Additional Charge herein, the specific objection being that the challenged members had thereby formed a definite opinion as to the guilt of this accused. A poll was conducted and in each instance, with the exception of Colonel Bassich, the reply of the challenged member was substantially to the effect that he had no definite, positive opinion of the guilt or innocence of the accused and that he could lay aside all of the testimony he heard and considered in the other case. The defense counsel announced he was not challenging the members of the court for cause in connection with the offense laid under Article of War 61, but solely under Article of War 96, which involves an offense of wrongfully obtaining, carrying away and disposing of clothing, property of the United States. As such, the offense is essentially one of a military disorder, punishable by confinement at hard labor not in excess of five years (NATO 1800, Burgoyne).

The statutory disqualification of a member of a court-martial is established if he is an accuser, a witness for the prosecution, or (upon rehearing) was a member of the court which first heard the case (AW 8,9, 50 $\frac{1}{2}$ ). Ineligibility therefor is mandatory. Such disqualifications go to the eligibility of the officer. Paragraph 58e of the Manual for Courts-Martial lists as a ground of challenging a member for cause, but not as a basis of ineligibility, any

"facts indicating that he should not sit as a member in the

interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality.",

and sets forth as one of several examples of such facts:

"that he participated in the trial of a closely related case."

It is stated that a failure to sustain such a challenge where good ground is shown may be cause for a rehearing because of error injuriously affecting the substantial rights of an accused (CM, 1928, par. 58f).

The question raised by the court's action in overruling the challenges must be decided in the present instance upon the principle that it is the function of the court to determine the existence or nonexistence of prejudice (CM 152101; Dig. Op. JAG, 1912-40, sec. 375 (2)) and further that:

"The fact that a member had sat as a member of the court that tried an alleged co-wrongdoer for the same offense does not of itself render such member ineligible" (CM 139027; Dig. Op. JAG, 1912-40, sec. 375 (2)).

This, it may be noted, is not contrary to the view expressed in a case involving the offense of sodomy (CM 162001; Dig. Op. JAG, 1912-40, sec. 375 (2)) where the challenged members had already of necessity passed upon the question of the guilt or innocence of the person with whom accused was alleged to have committed the crime. It was held that:

"Notwithstanding the denial of the challenged members that they had formed or expressed an opinion, it was inevitable that they must, in the former trial, have formed and expressed an opinion upon the issues in the instant case and the court's action, in overruling the challenges, constituted error, which, under all the circumstances, injuriously affected the substantial rights of the accused."

It is manifest that, by reason of the very nature of the offense charged, the conviction of one accused implicated in the act of sodomy necessarily involved the guilt of the other, especially as stated where no question of compulsion, insanity or intoxication was presented. The facts are thus unlike those in the present instance where the guilt of one accused does not necessarily imply guilt of another. Consequently, in view of the adjudications above cited and the factual question involved, this Board of Review cannot say that the failure of the court to sustain the challenges in the present case was an abuse of discretion, notwithstanding the Board's belief that a challenge based upon the grounds here set forth should generally be accorded serious consideration because of the human factor that is so patently involved. In this case the evidence relating to the Specification and Charge concerned is compelling. The conviction under Article of War 61 alone supports the sentence imposed by the court. In view of all the circumstances

CONFIDENTIAL

the Board is of the opinion that the substantial rights of accused were not injuriously affected by the court's decision with respect to the challenges.

6. Defense counsel objected to the introduction of the identified signatures of Arthur G. Burgoyne, Jr., on the ground that they were incompetent, irrelevant and immaterial. He also objected upon the same grounds to the introduction of the requisition upon which accused and his confederates drew the clothing in question from the warehouse and to the introduction of the tally sheets which were made out by the warehouse clerk when the requisition was filled (R. 52,53). The prosecution sought to establish that the names of Captain Shires and Lieutenant Nelson were written on the requisition by Burgoyne, one of accused's accomplices, by a comparison of Burgoyne's proved signature with those appearing on the requisition. The prosecution also sought to corroborate the confession of accused and the testimony of accused's accomplice, Cohen, by introducing the documents which factored in withdrawing from a Government warehouse the clothing described in the Specification of the Additional Charge. These items of proof were unquestionably competent and relevant and were properly admitted.

7. The charge sheet shows that accused is 33 years old. He was inducted into the Army 25 March 1942 and had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

James P. O'Leary, Judge Advocate.  
O. J. T. de, Judge Advocate.  
John Simpson, Judge Advocate.

CONFIDENTIAL

~~CONFIDENTIAL~~

(257)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
19 April 1944.

Board of Review

NATO 1800

U N I T E D S T A T E S

v.

Private ARTHUR G. BURGOYNE, JR.  
(33268896), Detachment of  
Patients, 35th Station  
Hospital.

MEDITERRANEAN BASE SECTION

Trial by G.C.M., convened at  
Oran, Algeria, 22 February  
1944.  
Dishonorable discharge and  
confinement for 15 years.  
Eastern Branch, United States  
Disciplinary Barracks,  
Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Arthur G. Burgoyne, Jr.,  
Detachment of Patients, 35th Station Hospital, did, without proper leave, absent himself from his organization  
at A.P.O. No. 763, U. S. Army, from about 18 July 1943  
to about 30 November 1943.

ADDITIONAL CHARGE:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Arthur G. Burgoyne, Jr.,  
Detachment of Patients, 35th Station Hospital, did, at  
Oran, Algeria, on or about 19 September 1943, wrongfully and without proper authority obtain, carry away and

~~CONFIDENTIAL~~

**CONFIDENTIAL**

dispose of one hundred and two (102) pairs cotton khaki trousers, value about two hundred twenty-nine dollars and fifty cents (\$229.50), one hundred and two (102) shirts, value about two hundred twenty-one dollars and thirty-four cents (\$221.34), two hundred forty-three (243) pair cotton drawers, value about seventy-seven dollars and seventy-six cents (\$77.76), two hundred forty-three (243) undershirts, value about fifty-one dollars and three cents (\$51.03), two hundred and ninety-eight (298) pairs cotton tan socks, value about forty-one dollars and seventy-two cents (\$41.72), fourteen (14) raincoats, value about forty-four dollars and ninety-four cents (\$44.94), and twenty-one (21) O.D. field jackets, value about one hundred twenty dollars and ninety-six cents (\$120.96), total value about seven hundred eighty-seven dollars and twenty-five cents (\$787.25), the property of the United States.

Specification 2: In that Private Arthur G. Burgoyne, Jr., Detachment of Patients, 35th Station Hospital, did, at Oran, Algeria, on or about 29 October 1943, wrongfully and without proper authority obtain, carry away and dispose of two hundred (200) O.D. shirts, value about seven hundred thirty-six dollars (\$736.00), and two hundred sixty-four (264) undershirts, value about three hundred and forty dollars (\$340.00), total value about one thousand and seventy-six dollars and fifty-six cents (\$1,076.56), the property of the United States.

Specification 3: In that Private Arthur G. Burgoyne, Jr., Detachment of Patients, 35th Station Hospital, did, at Oran, Algeria, on or about 3 November 1943, wrongfully and without proper authority take and drive away a motor vehicle of a value in excess of fifty dollars (\$50.00), the property of the United States.

Specification 4: In that Private Arthur G. Burgoyne, Jr., Detachment of Patients, 35th Station Hospital, did, at Oran, Algeria, on or about 1 December 1943, wrongfully and without proper authority appear in a public place, to wit, Hotel Cavaignac, in the uniform of a commissioned officer of the United States Army.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of two previous convictions, one by special court-martial for absence without leave in violation of Article of War 61, and one by summary court-martial for being drunk in uniform in a public place in violation of Article of War 96, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 25 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence but remitted ten years of the confinement imposed, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New

**CONFIDENTIAL**

CONFIDENTIAL  
York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. As to the Charge and its Specification, the evidence shows that on 18 July 1943, accused absented himself without leave from his organization, Detachment of Patients, 35th Station Hospital, "APO #763, U. S. Army" (R. 6,7; Pros. Ex. A). On 30 November 1943, he was apprehended in Oran, Algeria (R. 7). After having been warned that he need not make any statement and that if he did, anything he stated could be used against him, accused made a statement to a noncommissioned officer who, in company with an officer, presented it to accused the following day. The officer "again warned him of his rights" and accused signed the statement on 3 December 1943. It was received in evidence without objection (R. 40,41,42,43; Pros. Ex. J). Accused stated he had been admitted to the 35th Station Hospital on 30 May 1943, and that he left the hospital without being properly discharged on 25 July 1943 (Pros. Ex. J).

As to Specification 1 of the Additional Charge, the evidence shows that accused met Private Robert Cohen of the French Army in Oran, Algeria, in August 1943 (R. 37,45,46,64), and in September accused asked Cohen if the latter "wanted to sell for him 100 uniforms", to which Cohen replied "yes" (R. 54). Afterwards, accused met Cohen at "the Madame Laval's place" in Oran (R. 48,54) and said he was "going to get the clothes" that afternoon. Shortly after 1600 hours accused "came back with the truck full of clothes" (R. 54). Cohen testified there were approximately "100 pairs of pants, 100 shirts, 250 underwear, 200 drawers, 200 pairs of socks, 21 field jackets" which he took to his house and sold to "the Arabs" for 42,000 francs (R. 46, 47,54). He "split" the money between accused, "Hunter, Quist, Fay and myself" (R. 47,54). Cohen testified further that when the truck loaded with these clothes arrived he saw a requisition which he identified as Prosecution's Exhibit "B" "on the truck" (R. 61,62). This requisition was also identified by an assistant supply officer for "160-Q Depot" in Oran (R. 8,9), and by the requisition clerk at "'E' Warehouse", who had initialed and marked on the requisition the word "Sunday" which signified, this soldier testified, "that we accepted the requisition and that we would have it ready Sunday to be picked up" (R. 23). Also appearing on the requisition were the purported signatures of Captain W. A. Shires, Signal Corps, "Capt. Sig. Co." and First Lieutenant C. H. Nelson, Signal Corps, "Supply Officer" (Pros. Ex. B). The requisition, which was on War Department Q.M.C. Form No. 400, called for 102 khaki slacks, 102 khaki shirts, 243 cotton drawers, 243 undershirts, 298 tan socks, 14 raincoats and 21 field jackets (Pros. Ex. B). The value of these articles prior to 31 August 1943 was established by the testimony of a Quartermaster Corps officer who gave the prices from the Army Regulations price list (R. 25,26), as follows:

Trousers, cotton khaki	\$2.25 each
Shirts, cotton khaki	.21 each
Drawers, cotton	.32
Undershirts, cotton	.21
Socks, cotton	.14
Raincoats	3.21
Jackets, field, olive drab	5.76 (R. 26).

CONFIDENTIAL

CONFIDENTIAL

In his statement of 3 December accused stated that after arriving at Oran about 15 August 1943, he met "Francis Fay, Bill Quist and J. D. Hunter" and also Robert Cohen, "a deserter from the French Army". He stated further that he and Quist drafted a requisition and accused signed thereon "the names of Captain W. A. Shires and 1st Lieut. C. H. Nelson". Accused went to "160 QM" where the requisition was approved and later he submitted it to "Whse 'E'" at "#48 Rue Alsace Lorraine" where he was told "it would be ready by the 19th of September 1943". Accordingly, on that day, he, Hunter and Cohen got the clothing and agreed that Cohen should dispose of it, which the latter did. On the following day Cohen brought the money to the Hotel Cavaignac where "it was split four ways", each receiving \$140.00 (Pros. Ex. J.).

As to Specification 2 of the Additional Charge, Cohen testified that he saw a requisition, identified and received in evidence as Prosecution's Exhibit "C", being prepared "in October" (R. 47,48); that accused, Fay, Hunter, Quist and the witness were at "Madame Laval's" and "everyone would give his idea about the requisition, about the size and about the clothes" (R. 48,49); that the requisition was typed and "they got it signed at the warehouse" after which accused came back and "said we would have to wait three or four days before we get the clothes" (R. 50). Cohen testified further that he, accused and four others went to "the warehouse" on Rue Alsace-Lorraine and "went inside and got the clothes"; that they got "200 OD shirts and 260 undershirts" which he took "some place and sold" for 35,000 francs; that he "split the money with the boys" (R. 52,55).

This requisition, likewise made out on War Department Q.M.C. Form No. 400, called for 200 "shirts OD" and 264 "Under shirts woolen". It was signed by Susette Ennouhy, a French civilian who was voucher clerk at Warehouse "E", 48 Alsace-Lorraine, Oran, and also by a Sergeant Becker who was chief warehouseman at the time (R. 11,13; Pros. Ex. C,J). The officer who had testified concerning the values of the goods listed on Prosecution's Exhibit B, testified that "shirts, wool O.D." were valued at \$4.22 each since 31 August 1943 (previously \$3.68 each) and "Under shirts, wool" were valued at \$1.42 each since that date (previously \$1.29 each) (R. 26,27).

In his statement of 3 December accused stated that about 1 October 1943 Hunter told him if he would draw up a requisition, the former would get it approved; that the requisition was accordingly prepared, and taken by Shipply to "160 QM" where it was given a number; that accused and Shipply went to the warehouse where

"the Sgt. asked me why Major Conklin's stamp of approval wasn't on the requisition. \*\*\*I figured that if I took the requisition back to 160 QM it would arise suspicion, so I asked the Sgt in charge if it was possible since it was raining and since I had no transportation to please call 160 QM and have it approved by phone. He agreed, and so I had the requisition approved. On or about October 29th I asked a soldier who was driving a truck if it was possible to drive me somewhere with

CONFIDENTIAL

some clothing that I had intentions of drawing from the Warehouse. I told this soldier that my driver had left me and without a truck it would be practically impossible to draw the clothing. This soldier said O.K. He backed the truck up to the warehouse. Cohen and I loaded the truck while Hunter signed for the clothing.

"Somewhere along Rue Vienne, Oran, the clothing was unloaded. Cohen told us to leave and that he would take care of it. Hunter and I went back to the hotel, together with Shippoly. The following day Cohen came to the hotel and gave us each \$140.00" (Pros. Ex. J).

As to Specification 3 of the Additional Charge, the evidence shows that about 1700 hours on 3 November 1943, an enlisted man, the driver of a "command car" belonging to the United States government parked the vehicle on Avenue Loubet in Oran, "took out the key, told the watchman to watch it, and went in the inside and went to work". About 1930 hours, he "went out there and discovered" the car was gone. He had not given anyone permission to drive the car away (R. 28,29). The officer commanding the organization to which the car had been assigned (R. 30) testified he had given no one except the two regularly assigned drivers permission to drive the vehicle on 3 November (R. 31); that the car was parked in front of "the depot" at about 1900 hours on that day and when he returned from eating, the car was not there (R. 32). He next saw the car on 17 January 1944 (R. 33,36). He knew it was the same car by the "same characteristics and the same markings" except it had a different number (R. 33,34,35). It was stipulated that the value of the car on 3 November 1943 was in excess of \$50.00 (R. 29). Cohen testified that in "the beginning of November", he, accused and Hunter went to Avenue Loubet and accused told him

"to watch if somebody come along. The command car was sitting there and he went inside to start the motor. He couldn't. So he called Hunter. So the both of them jumped in the command car and took off with the command car. Then I saw him again in the garage. The next morning, we was together again in the room and Hunter said, 'We got to change the number.' (R. 55).

In his statement of 3 December accused stated that as he, Cohen and Hunter were walking down Avenue Loubet in Oran, about 3 November 1943, Hunter "spotted" an unattended "command car" and handed accused a key, telling him to start it. When accused had trouble starting the car, Hunter "took over" and drove to a French garage in Oran where they parked the vehicle for the night (Pros. Ex. J).

As to Specification 4 of the Additional Charge, the evidence shows that on or about 1 December 1943, accused was attired in the uniform of a major of Infantry in the United States Army (R. 56,57). The noncommissioned officer who apprehended accused about that date at the Hotel Cavaignac in Oran, testified that accused "was in the uniform of a commissioned officer of the United States Army"; that his uniform included "O.D. trousers, O.D. shirt

(292)

with major's leaf on the collar, officer's hat with major's insignia on the hat" (R. 7,8). In his statement of 3 December accused stated that a few days after 3 November 1943, Hunter had told him to start raising a moustache, that accused was going to be "a major of the outfit" and Hunter was going to get him the leaves; that accused went along on a trip to Bizerte early in November "impersonating a major" (Pros. Ex. J).

4. It thus appears from the evidence that at the place and time alleged in the Charge and its Specification, accused absented himself from his organization without leave and remained unauthorizedly absent for 135 days. The original unauthorized absence was established by the morning report of accused's organization and his subsequent apprehension by the testimony of the noncommissioned officer who arrested him. Accused admitted in his statement that he had absented himself without leave but fixed the inception of the unauthorized absence at 25 July 1943, instead of 18 July 1943, the date alleged, a variance which is immaterial here. He was properly found guilty of absence without leave as alleged (MCM, 1928, par. 132).

It further appears from the uncontradicted evidence that at the places and times alleged in Specifications 1 and 2 of the Additional Charge, accused wrongfully and without proper authority, obtained, carried away and disposed of the items of property of the United States as specified and of the values as alleged. The commission of the offenses was established by the testimony of one of accused's accomplices and by the statement of accused, and was further corroborated by the requisitions which accused and his confederates wrongfully employed to get the clothing from a Quartermaster Corps warehouse. While the wrongful disposition of the clothing was not accomplished by accused himself but by an accomplice, the sale was a part of an unlawful transaction upon which accused and his confederates had previously agreed and each was responsible for the acts of the others done in pursuance of the common design (NATO 385, Speed; NATO 643, Moor). Accused was properly found guilty as here specified.

It further appears from the uncontradicted evidence that at the place and time alleged in Specification 3 of the Additional Charge, accused wrongfully and without proper authority took and drove away a motor vehicle belonging to the United States of a value of more than \$50.00. The commission of this offense was established by the testimony of one of accused's accomplices and by the statement of accused and was further corroborated by evidence of the unauthorized taking of the vehicle. Accused was properly found guilty as here specified.

It further appears from the uncontradicted evidence that at the place and time alleged in Specification 4 of the Additional Charge, accused wrongfully and without proper authority appeared in a public place in the uniform of a commissioned officer of the United States Army. Accused had attired himself as a major of Infantry in the United States Army, had been masquerading as an officer, and was so attired when apprehended. He was properly found guilty as here specified.

5. At the conclusion of the evidence, the defense moved for a finding

CONFIDENTIAL .  
6

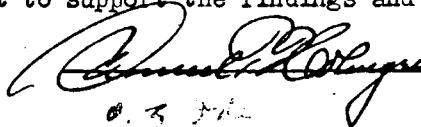
of not guilty of Specifications 1 and 2 of the Additional Charge upon the ground that there was no evidence of the corpus delicti other than accused's confession (R. 66). This motion was properly overruled (R. 68). The wrongful taking of the items of clothing as alleged in these Specifications was established by the evidence of Cohen which amply corroborated the admissions of guilt contained in accused's confession. Further elements of corroboration are implicit in the false requisitions which accused and his confederates presented to the Quartermaster warehouse. Even the uncorroborated testimony of his accomplice Cohen would have been sufficient to support the conviction. The testimony of an accomplice respecting acts and statements made by each confederate in furtherance of the common design is admissible against all persons who join in the commission of an offense and corroboration of the accomplice need not be required in trials by courts-martial (MCM, 1928, par. 114c, 120d; Dig. Op. JAG, 1912-40, sec. 395 (57)). The evidence adequately supported the court's action in overruling the motion for findings of not guilty of these two Specifications.

6. Specifications 1 and 2 of the Additional Charge allege that accused did "wrongfully and without proper authority obtain, carry away and dispose of" certain described property of the United States. The conventional language used in allegations of larceny is not employed, nor do the facts pleaded comprise offenses under Article of War 94, it not having been alleged that the property was furnished and intended for the military service of the United States (AW 94; MCM, 1928, pp. 250, 252 and par. 150j; Dig. Op. JAG, 1912-40, sec. 452 (8)). Consequently, there is no duplicity in the pleading since separate and distinct complete substantive offenses are not joined here in the same count. The acts alleged rather describe different stages in the same transaction (31 C.J. 758, 759). These offenses are laid under Article of War 96. The acts described are certainly disorders to the prejudice of good order and military discipline.

7. The defense objected to the interrogation of the witness Cohen through an interpreter "when the witness has testified before without an interpreter" (R. 45). The evidence shows that Cohen did testify without an interpreter at an earlier stage in the trial (R. 37, 38). This objection was overruled. The power to appoint an interpreter is vested by statute in the president of a court-martial (AW 115). The employment of an interpreter when the witness is unable to speak or understand the English language and the manner in which the examination, through the interpreter, shall be conducted rest in the discretion of the court (Underhill's Crim. Ev., 4<sup>th</sup> Ed., sec. 406). In overruling this objection of defense, the court did not abuse this discretion. There was no error in the ruling.

8. The charge sheets show that accused is 28 years old. He was inducted into the Army 3 June 1942 and had no prior service.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

 Judge Advocate.  
O. T. F. M., Judge Advocate.  
Gordon Simpson, Judge Advocate.



**CONFIDENTIAL**

(295)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
5 May 1944.

Board of Review

NATO 1801

U N I T E D   S T A T E S	)	MEDITERRANEAN BASE SECTION
x.	)	Trial by G.C.M., convened at
Private FRANCIS A. FAY	)	Oran, Algeria, 29 February
(12 010 317), Company B,	)	1944.
32d Replacement Battalion,	)	Dishonorable discharge and
1st Replacement Depot.	)	confinement for ten years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

-----  
**REVIEW by the BOARD OF REVIEW**

Holmgren, Simpson and Mackay, Judge Advocates.  
-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Francis A. Fay, Company "B", 32nd Replacement Battalion, 1st Replacement Depot, did, without proper leave, absent himself from his organization at Canastel, Algeria, from on or about 23 July 1943 to on or about 30 November 1943.

**ADDITIONAL CHARGE**

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Francis A. Fay, Company "B", 32nd Replacement Battalion, 1st Replacement Depot, did, at Oran, Algeria, on or about 29 November 1943, wrongfully

**CONFIDENTIAL**

~~CONFIDENTIAL~~

and without proper authority, use a motor vehicle of a value in excess of fifty dollars (\$50.00), the property of the United States.

Specification 2: In that Private Francis A. Fay, Company "B", 32nd Replacement Battalion, 1st Replacement Depot, did, at Oran, Algeria, on or about 29 November 1943, wrongfully obtain, carry away and dispose of one hundred twenty-two (122) pairs of woolen O.D. trousers, value about five hundred eighty-nine dollars and twenty-six cents (\$589.26), one hundred thirty-five (135) wool O.D. shirts, value about four hundred ninety-six dollars and eighty cents (\$496.80), one hundred twenty-five (125) wool undershirts, value about one hundred sixty-one dollars and twenty-five cents (\$161.25), one hundred twenty-five (125) pairs wool drawers, value about one hundred fifty-three dollars and seventy-five cents (\$153.75), one hundred twenty (120) cotton undershirts, value about twenty-five dollars and twenty cents (\$25.20), one hundred twenty (120) pairs cotton drawers, value about thirty-eight dollars and forty cents (\$38.40), one hundred sixty (160) pairs wool socks, value about forty dollars (\$40.00), and ten (10) O.D. field jackets, value about fifty-seven dollars and sixty cents (\$57.60), total value about one thousand five hundred sixty-two dollars and twenty-six cents (\$1,562.26), the property of the United States.

He pleaded guilty to the Charge and its Specification and not guilty to the Additional Charge and its Specifications. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. As to the Charge and its Specification, the evidence shows that accused absented himself without leave from Company B, 32d Replacement Battalion, 1st Replacement Depot, on 23 July 1943, and was apprehended in Oran, Algeria, on or about 1 December 1943 (R. 11,12; Pros. Ex. A). After having been advised "that he need not make any statement but that any statement that he did make could be used against him", accused made a statement in writing dated 3 December 1943, in which was included the admission that "on or about 15 July 1943, I went A.W.O.L. from the 32nd Bn, Co. B, 1st Replacement Depot" (R. 13; Pros. Ex. B).

As to Specification 1 of the Additional Charge, in his statement of 3 December 1943 accused stated that "some time in November" John Kasalonis drove "the command car" to a warehouse while accused waited two blocks away; that after "the clothing was drawn, the fellows picked me up" and drove to a house in Village Negra where they sold the clothing. He stated

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~

(297)

further that the following day, he and Kasalonis again drove to Village Negra, "using the stolen command car" (Pros. Ex. B). Aaron Cohen, an Oran perfume dealer, testified that he first saw accused on 29 November 1943, in company with another soldier, and that they "took me over behind the Rex Theater where a car was parked", an officer's car, "American make" which was being used to transport clothing (R. 25,27).

As to Specification 2 of the Additional Charge, in his statement of 3 December 1943, accused stated that while staying at a hotel in Oran with one Quist and one Burgoine, he met "Chuck" Hunter; that during the months of August, September, October and November, he knew "the boys were getting their money by requisitioning clothing"; that "sometime in November", "Jack Shippoly" and "John Kasalonis" drew up a requisition for some clothing which the latter took to the "160 Q.M." where he had it approved, after which he submitted the requisition to "Warehouse E". Accused stated further that on the following day Kasalonis drove "the command car" to the warehouse and he and Shippoly, who acted as the "Supply Officer", drew the clothing while accused, apprehensive of being recognized, waited two blocks away. After the clothing was drawn, "the fellows" stopped for accused and all drove in the "command car" to Village Negra where they sold the clothing. They then received 27,000 francs and were told to return the following day for the rest of the money. Accordingly, accused and Kasalonis returned to Village Negra the next day and collected "the additional 15000 francs". Accused stated that "we each received 14000 francs for our share" (Pros. Ex. B).

Cohen testified that accused and another soldier "approached" him on 29 November 1943 and "offered" him some American goods, "shirts, pants and everything". The offer was made by accused's companion who conducted the negotiations in Spanish (R. 25,26,27). The group proceeded "over behind the Rex Theater where a car was parked". Cohen testified further that there were 122 pairs of trousers, 120 woolen shirts, 120 woolen drawers, 120 woolen undershirts, an unspecified number of woolen socks and ten field jackets in the car (R. 27,28). Cohen bought the clothing for 44,100 francs, paying the soldier who spoke Spanish 27,000 francs upon its delivery (R. 29). This soldier, accompanied by accused, collected the remaining 17,100 francs the next day (R. 30,31).

A requisition made out on War Department "Q.M.C. Form No. 400" addressed to "160 Q.M." dated 28 November 1943, and calling for the identical articles of clothing alleged in Specification 2 of the Additional Charge, was identified by the assistant to the officer in charge of the "requisitions and editing section" and introduced in evidence. This requisition bore the purported signatures of Major W. C. Gray, Commanding Officer, 338th Engineers, as the requisitioning officer and First Lieutenant J. C. Ganter, Supply Officer, and was marked "completed" over the signature of Suzette Ennouchy (R. 16,17,40; Pros. Ex. E). An assistant voucher clerk at Warehouse "E", 48 Alsace-Lorraine, Oran, signed, as she was authorized to do, Suzette Ennouchy's name on the requisition (R. 18,19). Tally-out sheets on War Department "Form Q.M.C. No. 490" bearing the same number and listing the same articles as were shown on the requisition were identified by the noncommissioned officer in

~~CONFIDENTIAL<sup>3</sup>~~

~~CONFIDENTIAL~~

(298)

charge of the stock records section at "Warehouse E" and by a civilian employee of the Quartermaster Corps at that warehouse, and introduced in evidence. These sheets showed a receipt of the articles listed over the purported signature of Lieutenant Ganter (R. 18,19,21,22,23,24,41; Pros. Ex. F).

The genuine signatures of J. D. Hunter and John R. Kasalonis were identified and marked as Prosecution's Exhibits "C" and "D" respectively (R. 13,14,15; Pros. Exs. C,D). A handwriting expert, who had had 18 years experience with the Post Office Department and Veteran's Administration, testified that in his opinion the same person who signed the name J. D. Hunter on Prosecution's Exhibit "C" wrote the signatures of "Lt. J. C. Ganter" on the requisition (Pros. Ex. E) and on the "tally-out" sheets (Pros. Ex. F) and that the same person who signed the name John R. Kasalonis on Prosecution's Exhibit "D" also wrote the signatures of Major W. C. Gray on the requisition (R. 31,32).

It was stipulated that

"the values of the articles referred to in Specification 2 of the additional charge to the United States Government on or about November 29, 1943 were as follows:

One pair of woolen OD trousers, \$5.50.  
One woolen OD shirt, \$4.22.  
One woolen undershirt, \$1.42.  
One pair of woolen drawers, \$1.31.  
One cotton undershirt, 2½.  
One pair of cotton drawers, 3¼.  
One pair of woolen socks, 28¢.  
One field jacket, OD, \$6.10" (R. 40).

Accused elected to make an unsworn statement at the trial in which he stated in effect that he was 25 years old, unmarried and enlisted in 1940; that he landed with the invasion forces in North Africa 8 November 1942, "fought through the entire campaign" in Tunisia, became ill in May, 1943, and was evacuated to Canastel; was later returned to his organization and, having developed an infection, was again hospitalized and sent to Canastel from where he went absent without leave (R. 44).

4. It thus appears from the uncontradicted evidence together with his pleas of guilty that at the place and time alleged in the Charge and its Specification, accused absented himself without proper authority from his organization and remained unauthorizedly absent until he was apprehended on or about 30 November 1943. He was properly found guilty of absence without leave as charged.

It further appears from the evidence that at the place and time alleged in Specification 1 of the Additional Charge, accused wrongfully and without proper authority used a motor vehicle of a value in excess of \$50.00, belonging to the United States Government. His guilt was established by the

-4-  
~~CONFIDENTIAL~~

**CONFIDENTIAL**

(299)

admissions in his statement dated 3 December 1943, together with testimony that he and his confederates used "the stolen command car", as accused described the vehicle in his statement, in the execution of their conspiracy wrongfully to obtain, transport and sell Government clothing. The vehicle was described by one witness as an "officer's car" of "American make". It is a matter of common knowledge that a "command car" is a type of motor vehicle in general use in the United States Army. The court was warranted in concluding that accused was guilty as here specified.

It further appears from uncontradicted evidence that at the place and time alleged in Specification 2 of the Additional Charge accused, with the aid and connivance of others, wrongfully and without proper authority obtained, carried away and disposed of the items of property of the United States as specified and of the values alleged. The commission of the offense was established by the voluntary statement of accused, together with supplemental and corroborative proof including evidence that a false requisition partly in the handwriting of two of accused's confederates was employed to draw from a Quartermaster Corps warehouse clothing of the identical kind and quantity and at approximately the time alleged and also the testimony of the civilian to whom accused and his accomplices sold the clothing they had thus wrongfully obtained. These wrongful acts were committed partly by accused and partly by his accomplices but all were shown to have been acting in concert and each was responsible for the acts of the others done in pursuance of the common design (NATO 1792, Kasalonis; NATO 1799, Quist; NATO 1800, Burgoyne).

The values of the clothing described in this Specification as established by stipulation were slightly more than those originally alleged. When this difference appeared at the trial, the prosecution moved to amend the Specification to conform to the proof. The defense announced "no objection" (R. 40). Accused was in no sense surprised or prejudiced by this development and the court properly allowed the amendment.

5. Accused challenged certain members of the court, including the law member, on the ground that they had sat as members of general courts-martial in the trials of three other accused, Private John R. Kasalonis, NATO 1792, Private William P. Quist, NATO 1799, and Private Arthur G. Burgoyne, NATO 1800, in closely related cases wherein evidence was heard and considered which referred to and tended to establish the guilt of this accused and that consequently the challenged members had necessarily formed a positive and definite opinion as to his guilt or innocence. A poll was conducted and in each instance, with the exception of Colonel Bassich, the reply of the challenged member was substantially to the effect that he had no definite, positive opinion of the guilt or innocence of accused and that he could lay aside all of the testimony he heard and considered in the other cases. The court overruled the challenges except as to Colonel Bassich who was excused. What is said in NATO 1799, Quist, is applicable here. The challenged members were not ineligible, statutorily or otherwise, to sit as members of this court. The matter of their qualification to sit, when tested by the challenges for cause upon the grounds here urged, was for the court to determine. No abuse of discretion appears. Moreover, the guilt

**CONFIDENTIAL**

(300)

CONFIDENTIAL

of accused was established by compelling evidence including the admissions he made in his pretrial statement. His substantial rights were not injuriously affected by the court's rulings on the challenges.

6. Defense counsel objected to the introduction of the requisition upon which the clothing described in Specification 2 of the Additional Charge was drawn (R. 40; Pros. Ex. E) and to the "tally-out" sheets showing this requisition had been filled (R. 41; Pros. Ex. F), assigning as the reason for the objection in each instance substantially that the document had not been "connected" with accused. These objections went to the weight and not the admissibility of the evidence. Accused admitted that a requisition such as that introduced had been prepared and was used in the execution of the conspiracy to procure and dispose of Government clothing and there was proof that both the requisition and the "tally-out" sheets were partly in the handwriting of accused's confederates. The court properly overruled the objection to this testimony (NATO 1792, Kasalonis).

7. The charge sheet shows that accused is 25 years old. He enlisted in the Army 19 October 1940. He had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

Kenneth K. Kolengus, Judge Advocate.

Howard Simpson, Judge Advocate.

Donald T. Mackay, Judge Advocate.

CONFIDENTIAL

# CONFIDENTIAL

(301)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army.  
18 April 1944.

Board of Review

NATO 1840

U N I T E D   S T A T E S	)	MEDITERRANEAN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private JOHNIE J. BILLINGS	)	Algiers, Algeria, 13 March
(38248980), 2622d Ordnance	)	1944.
Transport Company, attached	)	Dishonorable discharge and
Company C, 9th Battalion,	)	confinement for 20 years.
1st Replacement Depot.	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification 1: In that Private JOHNIE J. BILLINGS (2622 Ordnance Transport) atched Casual Company "A", Special Service Command, did, without proper leave, absent himself from his organization at Algiers, Algeria, from about 21 May 1943, to about 15 June 1943.

Specification 2: In that Private JOHNIE J. BILLINGS (2622 Ordnance Transport) atched Casual Company "A", Special Service Command, did, without proper leave, absent himself from his organization at Algiers, Algeria from about 18 June 1943, to about 28 June 1943.

CHARGE II: Violation of the 69th Article of War.

# CONFIDENTIAL

(302)

# CONFIDENTIAL

Specification 1: In that Private JOHNIE J. BILLINGS (2622 Ordnance Transport) atched Casual Company "A", Special Service Command, having been duly placed in confinement in guardhouse at Algiers, Algeria, on or about 20 May 1943, did, at Algiers, Algeria, on or about 21 May 1943, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private JOHNIE J. BILLINGS (2622 Ordnance Transport) atched Casual Company "A", Special Service Command, having been duly placed in confinement in guardhouse at Algiers, Algeria, on or about 15 June 1943, did, at Algiers, Algeria, on or about 18 June 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 93d Article of War.  
(Finding of guilty disapproved).

Specification: (Finding of guilty disapproved).

CHARGE IV: Violation of the 96th Article of War.  
(Nolle prosequi).

Specification: (Nolle prosequi).

## ADDITIONAL CHARGES:

CHARGE I: Violation of the 69th Article of War.

Specification: In that Private JOHNIE J. BILLINGS (2622nd Ordnance Depot Company,) then attached to Company "C", 9th Battalion, First Replacement Depot, having been duly placed in confinement in Stockade, Mediterranean Base Section, on or about 1 December 1943, did, at Oran, Algeria, on or about 20 December 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Private JOHNIE J. BILLINGS, Company "C", 9th Battalion, First Replacement Depot, then of the 2622nd Ordnance Depot Company, did, at Mostaganem, Algeria, on or about 31 October 1943, wrongfully and without proper authority take and drive away a motor vehicle, to wit, a 1/4 ton truck, of a value in excess of fifty dollars (\$50.00), the property of the United States.

Specification 2: In that Private JOHNIE J. BILLINGS, Company "C", 9th Battalion, First Replacement Depot, then of the 2622nd Ordnance Depot Company, did, at or near Algiers, Algeria, on or about 20 January 1944, wrongfully and without proper

# CONFIDENTIAL

**CONFIDENTIAL**

(303)

authority take, drive away, and use a motor vehicle, to wit, a 1/4 ton truck, of a value in excess of fifty dollars (\$50.00), the property of the United States.

CHARGE III: Violation of the 58th Article of War.  
(Motion by the defense for a finding of not guilty sustained by the court).

Specification: (Motion by the defense for a finding of not guilty sustained by the court).

The accused pleaded not guilty to Charges II, III, Additional Charges I, III, and the Specifications thereunder. He pleaded guilty to Charge I and Specification 1 thereunder but not guilty to Specification 2; and guilty to Additional Charge II and Specification 2 thereunder but not guilty to Specification 1. The prosecution entered a nolle prosequi as to Charge IV and its Specification. Accused was found guilty of Charges I, II, Additional Charge I, and Additional Charge II, and the Specifications thereunder; guilty of Charge III and its Specification, except the words and figures "papers and" and "value about five (\$5.00) dollars, containing about 850 francs, value about seventeen (\$17.00) dollars, total value about twenty-two dollars (\$22.00)", substituting therefor the words and figures "and 800 francs, of a value of about sixteen (\$16.00) dollars"; of the excepted words and figures not guilty; of the substituted words and figures guilty. At the close of the case for the prosecution a motion by the accused for findings of not guilty of Additional Charge III and its Specification was sustained by the court. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 20 years, three fourths of the members of the court present concurring. The reviewing authority disapproved the findings of guilty of Charge III and its Specification, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 2 May 1943, accused was attached to Casual Company A, Special Service Command, in Algiers, Algeria (R. 8,13; Pros. Exs. A,B) and that on 20 May 1943, was confined in the guardhouse of Headquarters, Special Service Command, Allied Force. On 21 May 1943, accused could not be found. A rope was seen hanging from a balcony outside the kitchen, on the floor below the guardhouse (R. 13). The morning report of accused's company was admitted showing accused absent without leave at 2200 hours 21 May 1943 (R. 9; Pros. Ex. C). On the evening of 13 June 1943, a military police officer found him in the city police station at El Biar. He was confined there for the night (R. 11,12) and thereafter, on or about 14 June 1943, was remanded to the guardhouse of the Special Service Command (R. 13; Pros. Ex. D, R. 10). At about midnight on 18 June 1943, he was found missing. A rope was seen hanging from a second story window outside the building (R. 13). The morning report shows accused as "AWOL 2230 hrs" on that date (R. 9; Pros. Ex. C). He was apprehended by military police on 26 June 1943 (R. 14; Pros. Ex. D, R. 10). He was dressed at the

**CONFIDENTIAL**

**CONFIDENTIAL**

time in cotton khaki uniform and wearing "sort of a cowboy hat" (R. 14).

On 21 October 1943, accused was transferred by the 1st Replacement Depot to the "2622nd Ordnance" (R. 35; Pros. Ex. H).

It is further shown that on 31 October 1943, an officer of the military police left a "jeep" unattended, without a key, in front of the Grand Cafe in the public square of Mostaganem and when he returned about 35 minutes afterwards the vehicle was gone. No one had been given permission to take it away. Painted below the windshield of the vehicle were the words "Military Police" and stenciled on the hood was the "U. S. number", 2018628 (R. 21). On 12 November 1943, at Rivoli, the provost marshal of Mostaganem apprehended accused driving this vehicle. It was identified by the markings and the serial number (R. 22). Accused told the officer he had taken the vehicle in front of the Grand Cafe in Mostaganem "about eleven o'clock on Sunday". He did not remember the date (R. 24).

On or about 1 December 1943, accused was attached for confinement and duty to the 2615th Mediterranean Base Section Stockade. On 20 December 1943, accused was absent from his detail and following a search could not be found. He was not present at roll call that night (R. 19). The morning report of the stockade, admitted in evidence, shows accused as "atchd for conft, fr dy to AWOL (Escaped fr conft)" as of 20 December 1943 (R. 19; Pros. Ex. F).

At about 1730 hours (R. 30) on 19 January 1944, a one-quarter ton truck, serial number 20413857, assigned to the 1081st Signal Company, Service Group (R. 29), was parked, locked, on a street in Algiers (R. 30). The vehicle had been received on a shipping ticket from the Army Air Force Depot Number 4, Ordnance Section (R. 31), and had markings of the 12th Air Force as well as the "1081st Signal" on the front and rear bumpers (R. 29). When the assigned driver returned about 30 minutes later the vehicle was gone. He had not given accused or anyone permission to take it (R. 30). On 20 January, two military policemen patrolling a highway near Algiers saw accused (R. 31) speeding in a "jeep". They pursued and caught him in Algiers. Accused was dressed as a first lieutenant, wore an "MP" brassard and Coast Artillery insignia. He gave his name as "First Lieutenant Jack Duncan" (R. 28,32) and had no identification card or tags (R. 27,32). Accused was arrested and the car impounded. It was a "peep" (R. 32) and found to have the serial number 20413857 (R. 29). The markings on the front and rear bumper had been painted over with white paint. It was not "too good a job" and the markings were discernible (R. 30).

It was stipulated that the vehicles taken by accused at Mostaganem on 31 October 1943, and at Algiers on 19 January 1944, respectively, were property of the United States and that each had a value in excess of \$50.00 (R. 31).

Accused made a voluntary statement which was received in evidence without objection (R. 35). In the statement he said that he escaped from the guardhouse on or about 20 May 1943, by unlocking the door with a key which

**CONFIDENTIAL**

**CONFIDENTIAL**

(305)

he had and "walked out". He went to Algiers, then to Oran and from there to a replacement depot to inquire where his "outfit" was. In the middle of June he was picked up by military police, returned to Algiers, and put in the stockade. He again escaped. He stayed in Algiers and was picked up about the beginning of July. Accused further stated that he stole a "weapons carrier" and was picked up in Mostaganem on or about the 11th or 12th of November and from there he was sent to Canastel. In November he was shipped to Oran. He stayed there until five days before Christmas. He escaped from there and came back to Algiers on a train to Blida and from Blida to Algiers. He lived in the Casbah where he bought first lieutenant bars from Arab "kids". On 19 January 1944, he stole a "jeep" and the next day was arrested when caught speeding with it (Pros. Ex. G).

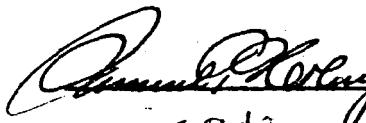
Accused elected to remain silent (R. 40).

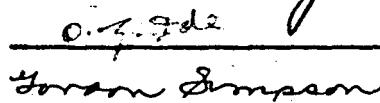
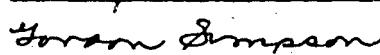
4. It thus appears from the evidence that accused was absent without authority during the periods of time alleged in Specifications 1 and 2 of Charge I, and that he escaped from confinement in each of the instances set forth in Specifications 1 and 2 of Charge II and the Specification of Additional Charge I. All elements of these offenses are amply supported by the evidence, including accused's confession.

It is also shown that at the places and times alleged in Specifications 1 and 2 of Additional Charge II, accused wrongfully and without proper authority took and drove away the two motor vehicles described therein, respectively. The vehicles were the property of the United States, and each had a value in excess of \$50.00. Accused confessed to the unlawful taking and use, substantially as alleged, and other evidence clearly establishes all elements of the offenses charged.

5. The charge sheets show that accused is about 23 years old. He was inducted into the Army 11 September 1942 and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The sentence is authorized upon conviction of absence without proper leave in violation of Article of War 61. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

  
Charles P. Langen, Judge Advocate.

  
O. J. F. d. Z., Judge Advocate.  
  
Gordon Simpson, Judge Advocate.

**CONFIDENTIAL**



**CONFIDENTIAL**

(307)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations.

APO 534, U. S. Army.  
21 April 1944.

Board of Review

NATO 1856

UNITED STATES

v.  
Private CHARLIE (NMI) YOUNGE  
(34224538), 93d Quartermaster  
Company (Railhead).

FIFTH ARMY

Trial by G.C.M., convened at  
APO 464, U. S. Army, 4 March  
1944.  
Dishonorable discharge and  
confinement for ten years.  
Federal Reformatory, Chilli-  
cothe, Ohio.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Charlie Younge, 93rd Quartermaster Company (Rhd), did at Caserta, Italy, on or about 8 January 1944, by force and violence, and by putting them in fear, feloniously take, steal and carry away from the presence of Private Eddie Smith, 212th Military Police Company, Private first class Freeman Oliver, 212th Military Police Company, and Private Robert Hives, Company D, 242nd Quartermaster Battalion, sentinels in the execution of their office, two cases of tobacco component, 200 rations each, the property of the United States, value about \$30.00.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by summary court-martial for wrongfully introducing wine into camp in violation of Article of War 96 was introduced. He was sentenced to dishonorable discharge, forfeiture of all

**CONFIDENTIAL**

266468

CONFIDENTIAL

pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on or about 8 January 1944, the 93d Quartermaster Company (Railhead), operated a ration dump, property of the United States, in Caserta, Italy. The dump included cases of tobacco components, 200 rations each, consisting of cigarettes, pipe tobacco and related items (R. 27,28). The value of each component was approximately \$11.69 (R. 28). The components were stacked in the open and guarded by the three soldiers named in the Specification (R. 5,7,13,17). At about 0130 hours on that date, as these soldiers were seated about a fire accused, armed with a "tommy gun", approached with the warning "Don't move". He stated he was there for the purpose of getting some cigarettes and also to kill "a Lieutenant Davis" (R. 6,17,18). Simultaneously, an Italian civilian, who appeared with accused, went to the stack and took and ran away with two or four cases of the tobacco components (R. 6,18). One of the soldiers started to get up but was told by accused not to move. They all remained seated, afraid accused would shoot (R. 15,26). Accused also stated "You know who I am. I don't want to kill you because you are colored too. If you move I will be forced to kill you", and further, "You all know me because this is Charlie Younge and I works in the ration dump" (R. 18). He held his gun over his arm, "swinging it around for us to stay back" (R. 13). Accused, after the Italian had gone, backed away and warned the soldiers not to follow him or he would shoot (R. 6). He went in the same direction as the Italian had gone (R. 12).

Accused was identified in court by two of the soldiers who were on guard (R. 6,17,18). Both had seen accused before that night around the ration dump (R. 10,14,18). The moon was shining (R. 7,22,24) and the fire made rather a large flame" (R. 7). Accused had a tape on the little finger of his left hand (R. 7) and a cut lip (R. 12), a "chap scar" (R. 14). The tape on his finger was seen that night, according to one witness, as accused held his hand over the fire (R. 7,13). Another witness testified accused did not get closer than five yards to the fire (R. 21,22). Immediately after accused had left one of the guards went to Maddaloni, Italy, where he reported the incident to the sergeant of the guard (R. 18). He returned to the ration dump at approximately 0200 hours (R. 19) then went to the bivouac area of accused's company and searched for accused but could not find him in his barracks (R. 19,20). The following morning accused was arrested in his company area (R. 10), at which time he still had the wrapping on his finger (R. 7).

The investigating officer, called as a defense witness, testified that during his investigation of the case he had questioned both of the guards who had testified as prosecution witnesses. Neither of them knew the name of the accused, but "When they identified the man the next morning, one said that he had a bandage on his finger that night he held them up". All three of the guards said they had seen accused around the area and knew he had worked there before (R. 35).

CONFIDENTIAL

**CONFIDENTIAL**

(309)

A soldier in accused's organization testified for the defense that between 2100 and 2400 hours on the night of 8-9 January 1944 accused was with a group of soldiers who were "singing, drinking and having a good time" in a room close by and in the same building as where they lived. Accused was drinking with them but was not drunk. The last time witness saw accused was about 2400 hours when witness went to bed. Another defense witness testified he was with accused at 2300 hours (R. 36). Another defense witness was on sentry duty from midnight to 0400 hours "on the main gate". He testified that he saw accused in the area in the evening but not in the vicinity of witness' post between midnight and 0400 hours (R. 37). He heard some shooting at the ration dump between 0200 and 0300 hours (R. 38). Shortly thereafter Sergeant Boyd Wright of his organization came to see witness on his post and said "not to let anyone in to arrest them or stop them from going in there". He was followed in about 15 minutes by a Private Albert Jones, of the same organization, with some military policemen. They went to the bivouac area then to the ration dump (R. 37,38).

Private Andrew Williams, 93d Quartermaster Company (Railhead) (R. 38) testified for the defense he was on guard from 2000 to 2400 hours that night on a post near the "P X". He saw accused about 2030 hours near his post. After 2400 hours accused came to witness' room, awakened him and said "if the M.P.'s came looking for him I was to tell them where he was". Accused then retired in the same room in the bed of a soldier who was not in that night (R. 39). Witness got up between 0600 and 0620 hours and accused was still in the room. This witness had seen accused early in the evening leaving the area for Caserta (R. 40).

Accused testified that he left the area about 2000 hours, went to a near-by village and returned at 2130 hours. He went to his room, then joined the soldiers who were drinking and singing in another room down the hall. He drank and sang with them until 0030 hours when he returned to his room and

"I picks up a pistol and went down to Andrew Williams' room and told him if any M. P.'s came up looking for me to let me know as an M. P. asked me for the pistol, sir" (R. 41).

He then went to bed in that room and did not leave the room until he got up in the morning. There was another soldier by the name of Charlie Younge in his organization (R. 42). He testified further that he went into the village at 2000 hours to buy some cognac from an Italian. He stayed about "1½ hours" (R. 42). The room where he slept was in the same building and about a half block from his own room. At the request of a military policeman, he had gotten a pistol from "a boy in the 62d Medics". The "M.P." got off duty at 2400 hours and had told accused he would come for the pistol. Accused told Williams about it because "I knew that he was pulling guard". He "never gave it a thought" that Williams had just come off guard. He had a small tape on the little finger of his left hand (R. 43).

Staff Sergeant Boyd A. Wright, 93d Quartermaster Company (Railhead), testified for the defense there were two "Charlie Younges" in the company.

**CONFIDENTIAL**

**CONFIDENTIAL**

(310)

Wright was on duty in the headquarters tent of the ration dump the night of 8-9 January 1944. About 0130 hours two jeeps passed the tent. He heard something that "might have been a shot", then the "jeeps went by" and "I then heard some more shooting". Some military police were doing the shooting. Shortly after the shooting he received a report that some (R. 44) cigarettes had been taken and he sent a soldier with two military police to the barracks to check up as to who was gone. He was to check on "Private Charlie Younge" (R. 45).

One of the guards was recalled as a prosecution witness and testified that he heard the shots after he had been held up, at about 0200 hours. The shots were not fired at the time of the alleged robbery but when the guards came back and searched the area (R. 46).

4. It thus appears from the evidence that at the time and place alleged accused with a "tommy gun" threatened and held in restraint three soldiers guarding an Army ration dump while an Italian civilian took therefrom and carried away two cases of tobacco components, of ownership and value substantially as alleged in the Specification. The taking of the property was accomplished by accused's act in intimidating the guards who, in view of the menaced violence, were under a well founded apprehension of present danger. The circumstances sufficiently show that accused and the Italian acted in concert. All elements of the offense are clearly established. The crime of robbery may be committed if property is taken from a person's presence and even though the property is merely in the possession or custody of such person. It is not necessary that he be the actual owner (MCM, 1928, par. 149f).

The accused attempted to establish an alibi. It was the function of the court to weigh all the evidence and it is clear that the identity of accused as the perpetrator of the offense was amply supported by the testimony and the facts and circumstances. Witnesses who had seen accused on previous occasions unequivocally identified him in court. They had an opportunity to observe his physical features at the time of the robbery and the tape on his finger proved to be of considerable significance in the identification.

The Specification alleges the value of the property taken to be \$30.00. The proofs show its value as \$23.38. Since the offense of robbery does not depend upon the value of the property taken, the variance between the alleged and proved value is immaterial (CM 153475, Blalock; CM 154280, Hunter).

5. The charge sheet shows that accused is 24 years old. He was inducted into the Army 27 June 1942. He had no prior service.

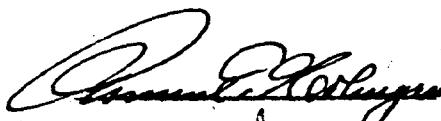
6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. Penitentiary confinement is authorized for the offense of robbery here involved, recognized as an

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(311)

offense of a civil nature and so punishable by penitentiary confinement  
for more than one year by Section 463, Title 18, United States Code.

 R. E. Shugrue, Judge Advocate.

O. J. Jobe, Judge Advocate.

Foram Simpson, Judge Advocate.

- 5 -

266468

~~CONFIDENTIAL~~



**CONFIDENTIAL**

(313)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
29 April 1944.

Board of Review

NATO 1925

U N I T E D S T A T E S )

v. )

Sergeant HARRIS COFIELD )

(6 973 244), Corporals GOLDEN )

S. JACKSON (20 284 523) and )

WILLIAM H. JAMES (33 323 714). )

Private First Class LEE R. )

SHEPARD (34 310 917) and Private )

JAMES E. GORHAM (34 066 697), all )

of Company A, 910th Air Base )

Security Battalion. )

EASTERN BASE SECTION

Trial by G.C.M., convened at  
Souk Ahras, Algeria, 28  
February 1944.

As to each: Dishonorable  
discharge and confinement for  
life.

U. S. Penitentiary, Lewisburg,  
Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

1. The record of trial in the case of the soldiers named above has  
been examined by the Board of Review.

2. Accused were jointly tried upon the following Charges and  
Specifications:

CHARGE I: Violation of the 92d Article of War.

Specification: In that Sgt. Harris Cofield, Cpl. Golden S.  
Jackson, Cpl. William H. James, PFC Lee R. Shepard and  
Pvt. James E. Gorham, all of Co. A 910th ABS Bn., acting  
jointly, and in pursuance of a common intent, did, near  
Monesqueu, French Algeria, on or about May 5, 1943  
forcibly and feloniously, against her will, have carnal  
knowledge of Djebbari Embarka bent Mohamed.

CHARGE II: Violation of the 93d Article of War.

**CONFIDENTIAL**

**CONFIDENTIAL**

Specification: In that Sgt. Harris Cofield, Cpl. Golden S. Jackson, Cpl William H. James, PFC Lee R. Shepard and PVT. James E. Gorham, all of Co. A 910th ABS B., acting jointly and in pursuance of a common intent, did, at or near Monesquieu, French Algeria, on or about May 5, 1943 unlawfully enter the dwelling of Djebbari Mahieddine ben Nekki, with intent to commit a criminal offense, to wit, to commit rape therein.

Each accused pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. Each of the accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved the sentence as to each accused, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The evidence shows that on 5 May 1943, the 910th Air Base Security Battalion, to which accused belonged, was stationed at an airport near Monesquieu, Algeria (R. 4,7). On that day, five colored American soldiers approached an Arab who was watching sheep at a place about five kilometers from the camp. The Arab testified that one of the group of soldiers "appeared to be a little whiter than" the others. Four were armed with rifles and one had something "on his hip" which looked like a revolver (R. 9,10,11, 12). The soldiers asked the Arab for "Fatma", meaning woman, and when he told them "there is no Fatma here", they went to the house of Djebbari Mahieddine ben Nekki, about a quarter of a kilometer away. The Arab testified he saw the soldiers enter the courtyard to Djebbari's house and that they stayed there "about an hour or a half an hour" (R. 10,11). When they came out they shot at some dogs that were barking at them and then proceeded toward the house of another Arab named Messahi-Messahi who, upon seeing them coming, told them to stay away. The soldiers kept on going and thereupon the Arab "shot at them twice and then they started shooting at him". Witness then left the scene (R. 10,11).

Djebbari testified that at about 1030 or 1100 hours he saw the five colored soldiers coming down the road and that after he had entered the courtyard and his house "suddenly they came in after me" (R. 13). The door to the house was open and they entered without permission (R. 14,17). The house was made of stone (R. 25) and consisted of two rooms and a kitchen. It was surrounded by a stone or brick wall about six feet high (R. 10,13,26). When the soldiers entered the courtyard Djebbari's wife, Embarka bent Mohamed, was outside milking a cow. Upon seeing them she ran into the house, and picked up her baby. She was nursing it when the soldiers entered (R. 14,17, 24). Three other women who were with Embarka went into the kitchen and locked the door (R. 14,23,25,49). Four of the soldiers had rifles and one a revolver, and that one was "a little lighter than the rest" (R. 14,19,25). One of the soldiers with a rifle "stood guard on" Djebbari in the courtyard and another kept going in and out while three were in the room with Embarka.

**CONFIDENTIAL**

263556

# CONFIDENTIAL

(315)

(R. 14,19,24). Djebbari heard his wife crying in the room (R. 14) and calling for him to "come in, come in" (R. 15,16). He testified she was crying "because she needed my help and wasn't feeling good" and "I told her I couldn't come in". The soldier on guard pointed his rifle at him and while standing "by my side shot his rifle in the air". Djebbari testified he was "in very bad shape, very scared" and thought he was "going to die" (R. 15). He could not definitely identify the accused (R. 11).

Embarka testified that three of the soldiers entered the room, seized her by the arms, took the baby away and thereupon "laid me down and held me by my arms and legs and attacked me" (R. 19,20). She was "hollering and crying. I was fighting to run away from them" (R. 19,22). While one held her down another "got on top" of her (R. 20,22). The "lighter" colored soldier attacked her first and she testified "He told me, Fatma, zig, zig and screwed me". He had intercourse with her. Each of the three soldiers penetrated her with his penis (R. 20,21). When one completed the act "he got up and the other one held my arms and another soldier got on top of me" (R. 20). She testified she did not consent to the act, and that they forced themselves upon her (R. 20,22). She pleaded and cried hysterically. One of the soldiers had something in his hand which "he threatened to hit me with" (R. 22). They "ripped open my clothing up to my breasts" and each in turn "took off his pants" (R. 23). She identified accused James as one of the soldiers (R. 21) he "looked different than the other ones. He was lighter than the other ones" (R. 23). Witness testified that one soldier stood guard over her husband "with his rifle pointed at him and one of them was coming in and outside, inside and outside back and forth" (R. 19).

Messahi-Messahi, a close neighbor, testified he saw the five soldiers enter Djebbari's house on 5 May 1943. One was lighter colored than the others. They remained in the house for a period of "about half an hour to an hour" (R. 29). Witness "heard crying of women and also a couple of shots". After leaving Djebbari's house, the soldiers proceeded toward Messahi's house. He waved for them to go away but when they persisted in their approach, he went after his shotgun to show them he was also armed. When the soldiers saw the weapon they fired at witness who returned the fire. The soldiers were finally driven away. Witness found blood where they had been (R. 30).

At about noon on 5 May 1943, Captain Lowry, of the 910th Air Base Security Battalion, investigated a report that a member of the Battalion had been wounded by Arabs. Captain Lowry testified that he found it was accused Gorham (R. 5), who told him that while he and the other four accused were out on patrol from about 0800 hours to 1200 hours on 5 May and when two or three miles from the airport, they were fired upon as they passed an Arab house. Gorham told witness the five of them were together and, as a group, the other four gave an account of how Gorham was shot in their presence. Jackson later made a statement of the same tenor (R. 6).

It was stipulated that witness Djebbari "in an unsworn statement testified before the judge advocate section of the Twelfth Air Force Service Command through William Toboul, interpreter, that the soldiers remained in the room about five minutes, whereas, during the trial today this same

CONFIDENTIAL

263556

# CONFIDENTIAL

witness testified that he was in the room one hour" (R. 34).

Defense counsel announced that accused James and Jackson wished to testify under oath and that

"The other three are content that Sergeant Jackson and Corporal James will be able to give the court the story in completion, that is a complete story, and they can add anything to it because they have gone over the matter, and they know what took place, and they feel that Corporal James and Sergeant Jackson can explain it a little better, they are a little better educated" (R. 34).

Accused James testified that on the morning of 5 May 1943, he and the other four accused went on "a little reconnaissance". There had been an alert the previous night and they heard planes and suspected that possibly parachutists had landed in the vicinity. As they were going along a road, a man came running out of a house waving his hands and pointed "down that way". They went to a house that looked deserted. It was "the house that the court was at", and the door was open. They walked in and found some dogs chained up, some sheep and chickens. They left and started back to their emplacement when they were fired on and Gorham was wounded. They returned the fire and crawled along a depression and got away. They saw no woman at the house (R. 36) or in the vicinity (R. 37) and did not stop at any other house (R. 36). Upon cross-examination, he testified that all five of the accused entered the house. There was a wall around the house between six and seven feet high. "It looked like it was made out of clay". They entered the courtyard (R. 39) for no particular reason (R. 42), but did not go into the house. They smoked cigarettes but did not touch anything (R. 42). They were there from ten to twelve minutes (R. 39). He never saw the woman "that testified here today" until after that occasion (R. 44).

Accused Jackson testified that the patrol was "not directly ordered out" but they had been told that they could reconnoiter of their own initiative (R. 45). They went along the road past the house with the stone wall "six and a half to seven feet high", then, noticing that it was getting late, they turned back and went into the courtyard, the door of which was open. They saw nothing but chickens and sheep.

"I didn't stay in there no longer than two or three minutes and came on out, told the other fellows to come on. My conception of the thing is they've got a very poor idea about time. I'd say they stayed in there about ten or fifteen minutes. I hollered at them to come out. They came out slowly one at a time" (R. 46).

They then proceeded along the road toward their company position. They saw an Arab at a house with a gun. The "Arabs scattered" and fired. The five accused "hit the ground" and the Arab fired again, with a shotgun wounding Gorham. Accused fired back at the Arabs and the Arabs fired at them with rifles. They gave Gorham first aid and returned to camp. Accused returned

# CONFIDENTIAL

**CONFIDENTIAL**

(317)

to the house with some officers, soldiers and an "Arab Sheik". There was some shooting back and forth and about ten Arabs ran out of the house and went away on horses. They did not see any women while on the patrol nor did they see any in any of the houses when they returned (R. 47). He saw no Arab women in the courtyard which he entered. He saw one of the Arab men and one of the women, who were in court as witnesses, on the following day when they came to camp "looking at our line up". He thought that they told the story about the attack on the woman because they "were not supposed to have any weapons" and were "trying to cover up in some manner or form" (R. 48). He testified that he noticed one door at the right as he entered the courtyard, which was shut (R. 48). He did not know what the other men did inside the house while he was outside. He did not believe they did any more than to walk in, look around and come out. They came right out. He came out first and the others came out "spasmodically" (R. 49).

Djebbari was recalled as a court witness and testified that he had a cow, chickens and sheep. The animals, except the cow, were in the field. The cow was in the courtyard. He did not know whether or not the chickens were inside or outside the courtyard. There were holes in the wall of the house which served as windows. Sometimes they left the door open, sometimes closed, but never locked. The soldiers saw the three women leaving the kitchen but the soldiers "went in my room" (R. 50). The three women were "old women in their fifties" (R. 51).

Accused James made the following unsworn statement:

"Sir, I wish to state to the court that I am a man, and I'm not a man that would stand up and see rape committed upon a woman. I don't care who she would be. Here is Captain Lowry sitting here. He knows that in Casablanca I was in a fight with a man, and it wasn't rape, it was a prostitute in the vicinity of our bivouac area that this man did have intercourse with and was going to refuse to pay her price, and I did have a fight with him due to that fact. I wouldn't stand to see any man rape a woman. I thank you, sir" (R. 51).

4. It thus appears from the evidence that at the place and time alleged the five accused unlawfully entered the dwelling of Djebbari Mahieddine ben Nekki, the person named in the Specification of Charge II and as one accused held Djebbari in restraint at the point of a rifle, three of accused forcibly and without her consent, had sexual intercourse with his wife, Djebbari Embarka bent Mohamed, the person named in the Specification of Charge I. The other accused was meanwhile passing in and out of the house where the assaults occurred. That all of the accused acted jointly and in pursuance of a common intent, is amply shown by the facts and circumstances. They were shown to have been looking for a woman, they intruded Djebbari's home obviously with that intent and thereupon concertedly either aided or actually participated in the perpetration of the offense of rape upon the woman. That rape was committed is clearly established (MCM, 1928, par. 148b). Each accused was charged as a principal. While outside of accused James no one of the accused was separately identified with any specific act or part, it is manifest that

263556

**CONFIDENTIAL**

(318)

# CONFIDENTIAL

at least as an aider and abettor each was properly charged as a principal (52 C.J. 1049; NATO 1121, Bray et al; NATO 1069, Scott et al). The offense of housebreaking was also committed (MCM, 1928, par. 149e). The victim of the rapes identified only one of the accused, James, as her assailant but the admissions of Cofield, Jackson and Shepard as to his presence at the closely related incident involving the shooting of Gorham, together with the testimony of James and Jackson, provided ample basis for a conclusion that all of accused were members of the party which made the unlawful entry and the attacks upon the woman.

5. The charge sheet shows that accused Gorham is 24 years old. He was inducted in the Army 5 February 1942, and had no prior service. Accused Jackson is about 25 years old. He enlisted in the Army 9 September 1940, and had no prior service. Accused Shepard is about 24 years old. He was inducted into the Army 15 July 1942, and had no prior service. Accused James is about 27 years old. He was inducted into the Army 22 July 1942, and had no prior service. Accused Cofield is about 24 years old. He enlisted in the Army 28 September 1939, and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentences. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

James O'Halloran, Judge Advocate.

O. J. Ode, Judge Advocate.

John D. Johnson, Judge Advocate.

CONFIDENTIAL

263556

Branch Office of The Judge Advocate General  
 with the  
 North African Theater of Operations

APO 534, U. S. Army,  
 29 May 1944.

Board of Review

NATO 1975

U N I T E D   S T A T E S	)	MEDITERRANEAN BASE SECTION
v.	)	
Private WILL LASTER (34 024 928) and JOSEPH MOORE (14 057 829), both of Company B, 240th Quartermaster Battalion.	)	Trial by G.C.M., convened at Oran, Algeria, 18 March 1944. As to each: Dishonorable discharge and confinement for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

---

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

---

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were jointly tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93d Article of War.

Specification: In that Private Will Lester, Company B, 240th Quartermaster Battalion and Private Joseph Moore, Company B, 240th Quartermaster Battalion, acting jointly and in pursuance of a common intent, did, at Oran, Algeria, on or about 10 February 1944, feloniously take, steal, and carry away one (1) traveling clock, value about \$10.00, one (1) Argus camera, value about \$25.00, one (1) box of assorted toilet articles, value about \$2.50, the property of 1st Lt. George L. Kursava; one (1) pair of eye glasses and case, value about \$17.00, one (1) field bag and straps, value about \$2.56; the property of 2nd Lt. Lewis Koppang; one (1) Fly spray, value about \$0.50, two (2) Red Triangle wicks, value about \$0.20 each, one (1) pajama top, value

**CONFIDENTIAL**

263381

**CONFIDENTIAL**

(320)

about \$2.00, one (1) khaki tie, value about \$0.16, one (1) pair bedroom slippers, value about \$4.00, one (1) soap dish, value about \$0.10, one (1) bar of soap, value about \$0.08, one (1) field bag and straps, value about \$2.56, and one (1) celluloid flashlight, value about \$1.98, the property of Captain Charles W. Brown; total value about (\$68.84), sixty-eight dollars and eighty-four cents.

**CHARGE II: Violation of the 96th Article of War.**

**Specification:** In that Private Will Lester, Company B, 240th Quartermaster Battalion and Private Joseph Moore, Company B, 240th Quartermaster Battalion, acting jointly and in pursuance of a common intent, did, at Perregaux, Algeria, on or about 12 January 1944 wrongfully and without proper authority take and drive away one (1) one-quarter ( $\frac{1}{4}$ ) ton truck, of a value in excess of (\$50.00) fifty dollars, the property of the United States.

**ADDITIONAL CHARGES**

**MOORE**

**CHARGE I: Violation of the 61st Article of War.**

**Specification 1:** In that Private Joseph Moore, Company B, 240th Quartermaster Battalion, did, without proper leave, absent himself from his organization at Arcole, Algeria, from about 8 November 1943 to about 16 November 1943.

**Specification 2:** In that Private Joseph Moore, Company B, 240th Quartermaster Battalion, then attached to Headquarters and Headquarters Detachment 28th Quartermaster Battalion (mobile), did, without proper leave absent himself from his organization at A.P.O. 763, U. S. Army, from about 18 November 1943 to about 27 November 1943.

**Specification 3:** In that Private Joseph Moore, Company B, 240th Quartermaster Battalion, did, without proper leave, absent himself from his organization at Arcole, Algeria, from about 7 December 1943 to about 10 February 1944.

**CHARGE II: Violation of the 69th Article of War.**

**Specification:** In that Private Joseph Moore, Company B, 240th Quartermaster Battalion, having been duly placed in confinement in the Battalion Stockade at Arcole, Algeria, on or about 28 November 1943, did, at Arcole, Algeria, on or about 7 December 1943, escape from said confinement before he was set at liberty by proper authority.

268381  
**CONFIDENTIAL**

# CONFIDENTIAL

CHARGE III: Violation of the 96th Article of War.

(321)

Specification: In that Private Joseph Moore, Company B, 240th Quartermaster Battalion, did, at Arzew, Algeria, on or about 10 February 1944 wrongfully appear with the insignia of rank of a staff sergeant of the United States Army on his overcoat.

LASTER

CHARGE I: Violation of the 61st Article of War.

Specification: In that Private Will Laster, Company B, 240th Quartermaster Battalion, did, without proper leave, absent himself from his organization at Arcole, Algeria, from about 7 December 1943 to about 10 February 1944.

CHARGE II: Violation of the 69th Article of War.

Specification: In that Private Will Laster, Company B, 240th Quartermaster Battalion, having been duly placed in confinement in the Battalion Stockade at Arcole, Algeria, on or about 12 November 1943, did at Arcole, Algeria, on or about 7 December 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 96th Article of War.

Specification: In that Private Will Laster, Company B, 240th Quartermaster Battalion, did, at Arzew, Algeria, on or about 10 February 1944 wrongfully appear with the insignia of rank of a technician fourth grade in the United States Army on his overcoat.

Each accused consented to a common trial with respect to the Additional Charges preferred against him. Each pleaded not guilty to Charge I and its Specification. Each was found guilty of the Specification, Charge I, except the words and figures "\$10.00", "\$2.50", "\$2.56", "\$0.50", "\$0.20 each", "\$2.00", "\$0.16", "\$4.00", "\$2.56", "\$1.98", "(\$68.84), sixty-eight dollars and eighty-four cents", substituting therefor the words and figures, "\$1.00", "\$2.00", "\$4.90", "\$0.15", "\$0.70", "\$0.20", "\$0.24", "\$1.50", "\$4.90", "\$0.50", "\$58.27 (fifty-eight dollars and twenty-seven cents)", of the excepted words and figures, not guilty, of the substituted words and figures, guilty, and guilty of the Charge. Each pleaded guilty to and was found guilty of Charge II and its Specification. Each pleaded guilty to and was found guilty of the Additional Charges and Specifications pertaining to him. Evidence of two previous convictions, one by a summary court-martial for unlawfully carrying a concealed weapon in violation of Article of War 96, and one by special court-martial for absence without leave in violation of Article of War 61, was introduced as to accused Moore. Evidence of three previous convictions, one by summary court-martial for absence without leave in violation of Article of War 61, and two by special court-martial for breaking restrictions and failing to obey a standing order in

# CONFIDENTIAL

CONFIDENTIAL

violation of Article of War 96, and for escape from confinement in violation of Article of War 69, was introduced as to accused Lester. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved each sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement for each accused and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on the evening of 10 February 1944, both accused, wearing staff sergeant chevrons, were in the day room of the 3426th Quartermaster Truck Company in Oran, Algeria, visiting Sergeant Elroy Mays of that organization. They stayed about ten minutes and left, saying they were going to visit another soldier. Sergeant Mays testified he saw them pass the orderly room after leaving (R. 29,30). That orderly room was located about 100 feet from the tent which was occupied by First Lieutenant George L. Kurzava and Second Lieutenant Lewis E. Koppang, both of that organization, and also by Captain Charles H. Brown, of the 28th Quartermaster Regiment (R. 20,23,27,30,31).

At about 2300 hours that night both accused were apprehended in a "jeep" at Arzew by two members of the "shore patrol" who testified that accused had a "trip ticket" purporting to be issued that day at 1900 hours, but that it did not correspond with the number on the "jeep" and that accused stated they had driven an officer from Algiers to Oran and were returning. The witnesses testified that Moore was "dressed as a Staff Sergeant", that Lester wore "T/4" chevrons and that the latter gave his name as "William Anderson". Accused were taken to the shore patrol office (R. 31,32,34). Two musette bags found in the "jeep" were also taken into the office where their contents were emptied out and inventoried. A clock was taken from the pocket of one accused. Both accused stated that the articles belonged to them but later "one said one bag was his and the other said the other was his" (R. 33,35). Accused Lester, when asked to sign the inventory, signed "Sgt. William Anderson" (R. 36,37; Pros. Ex. K). The inventory did not include musette bags, pajama top or tie (Pros. Ex. K).

The two bags and contents were turned over that night by the shore patrol to a Warrant Officer (Junior Grade) Jesse Coleman who testified he "received them as property of the accused" in the presence of "either" accused. He also testified after examining them in court that the articles then contained in the bags were the same as were in the bags when he received them (R. 18,35). In court, Captain Brown and Lieutenants Kurzava and Koppang identified as their property articles taken from the bags, which corresponded with those set forth in the Specification of Charge I (R. 22, 23,27,28). Each of these officers further testified that substantially all of his articles as specified were in his possession on 10 February 1944 (R. 21,22,23,24,27,28). Lieutenant Kurzava testified the only person authorized to take anything from his tent was a Private Smith who had permission to use the clock (R. 23). Lieutenant Koppang testified no one had authority or permission to take any of his identified articles from his tent (R. 26). Captain Brown testified he had not given either accused

26388 CONFIDENTIAL

~~CONFIDENTIAL~~

(323)

authority to remove his identified articles (R. 28).

It was stipulated that the articles referred to in the Specification of original Charge I had the following market values on or about 10 February 1944:

"one pajama top \$.20; two wicks \$.70, not each but \$.35 for each wick; one pair of bedroom slippers \$1.50; one flit gum \$.15; one soap dish \$.10; one flashlight, GI, \$.55; soap \$.08; one flashlight, black and white\*\*\* \$.50; one pair of spectacles \$17.00; one camera \$25.00; one clock \$1.00; the group of toilet articles approximately \$2.00\*\*\*One bag, canvas field, that is each bag, value \$2.56\*\*\*Identical straps, or suspenders \$1.34; one necktie, cotton, \$.24\*\*\*Compass, watch, compass \$2.31; flashlight \$.55" (R. 41).

Statements made by each accused after having been warned that he might remain silent and that whatever he said might be used against him, and having been advised of the contents of Article of War 24 (R. 10), were received in evidence without objection (R. 12; Pros. Exs. A,B). In the statements each accused said that they purchased the musette bags in Oran. Moore stated that he paid 350 francs for one of the bags and that when he bought it he saw only cigarettes therein but that they stopped when they got on the road and looked in the bags and then he saw glasses, a clock and flashlights. Lester stated he did not know what was in his bag until it was emptied in the police station (Pros. Exs. A,B).

With respect to Charge II and its Specification, Second Lieutenant Kenneth L. Ullery, 3250th Quartermaster Service Company, testified that on 12 January 1944, a "quarter-ton, four-wheel drive" "jeep" was assigned to his platoon, that at 2130 hours on that date, it was parked in the motor pool at Perregaux, Algeria, and that, though he had given no one permission to drive or operate it, at about 2150 hours that night, it was missing (R. 38,39). Another witness testified he saw the two accused in the 3250th Quartermaster Service Company area between 2100 and 2200 hours that night (R. 40,41). It was stipulated that the quarter-ton truck referred to in the Specification was the property of the United States on or about 12 January 1944, and had a value in excess of \$50.00 (R. 42). In their statements each accused states they had taken and driven away a "jeep" from in front of a hotel in Algiers, but said it was done on 9 February 1944 (Pros. Exs. A,B).

With respect to Specifications 1, 2 and 3 of Additional Charge I against Moore and the Specification of Additional Charge I against Lester, Moore, in his statement, said, "I don't remember but two AWOL's. I don't think I was AWOL from 7 Dec 1943 to 10 Feb 1944" (Pros. Ex. A), and Lester, in his statement, said "I was AWOL from 7 Dec 1943 to 10 Feb 1943" (Pros. Ex. B). Morning report entries showing absences without leave by both accused substantially as alleged were introduced (Pros. Exs. C,D,E,F).

263381 - 5 -

~~CONFIDENTIAL~~

**CONFIDENTIAL**

(324)

As to Additional Charge II in each case, the officer of the day of accused's organization testified that at 0300 hours on 7 December 1943, both accused were in confinement in the battalion stockade and that they were absent at 0730 hours that day although neither the witness nor anyone he knew of had released them (R. 15,16,17). The Stockade Guard Book for 7 December 1943, introduced in evidence, showed "Pvts Laster, Moore and Thornton escaped from Stockade" (R. 15; Pros. Ex. G.). In his statement, accused Moore said:

"On 7 Dec 1943 I didn't escape from confinement because there wasn't any guard at the stockade gate. I just walked out of the stockade and no one interfered. This was at the Stockade of the 240th QM Bn at Arcole Algeria" (Pros. Ex. A).

Laster's statement with respect to the escape was practically the same as Moore's (Pros. Ex. B).

As to Additional Charge III in each case, each accused, in his statement, said that the noncommissioned officer's chevrons were on his overcoat when it was issued to him. Moore said his coat was issued to him about 1 December 1943, and that he never removed the chevrons. Laster said his coat was issued to him about 15 minutes before he entered the battalion stockade (Pros. Exs. A,B). There was testimony that accused were seen wearing "Staff Sergeant" chevrons on the evening of 10 February 1944, in the day room of the 3426th Quartermaster Truck Company (R. 29,30) and when apprehended in Arzew at about 2300 hours Moore "was dressed as a Staff Sergeant" and Laster "had T/4 chevrons on" (R. 32). When they signed the list of articles which was taken from them by the shore patrol, Moore signed "Sgt. Moore" (R. 37) and Laster signed "Sgt William Anderson" (R. 37; Pros. Ex. K).

Each accused elected to remain silent (R. 44).

4. It thus appears from the evidence that at the place and time alleged in the Specification of Charge I the two accused took and carried away the articles described in the Specification, of values approximately as found by the court, and belonging to the persons therein named. They were seen in the vicinity of the officers' tent on the date that it was alleged that the property was stolen and were apprehended with the property in their possession in a car later the same night. Unexplained possession of recently stolen property is legally sufficient to support a conviction of larceny (MCM, 1928, par. 112a; Dig. Op. JAG, 1912-40, sec. 451 (37)). Other circumstances are corroborative of guilt. While accused in their statements said they had bought the property in Oran without knowing what articles were in the bags, it was within the province of the court to reject such evidence. The circumstances sufficiently establish intent to steal. All the elements of the offense of larceny are clearly established by the evidence. The fact that accused were acting jointly and in pursuance of a common intent is inferable from the facts and attendant circumstances.

It further appears from the pleas of guilty and the evidence that at

263381

**CONFIDENTIAL**

**CONFIDENTIAL**

(325)

the place and time alleged in the Specification of Charge II accused, acting jointly and in pursuance of a common intent wrongfully and without proper authority took and drove away a quarter-ton truck of the value alleged, property of the United States. While it was not conclusively shown that the truck in which accused were apprehended bore the same serial number as the truck which the testimony showed had been taken, the accused's pleas of guilty coupled with their admission of having wrongfully taken a similar type of vehicle, together with the other proofs adduced, amply support the findings of guilty of this Charge and Specification.

The evidence is clear that each accused absented himself without proper leave from his organization at the places and times alleged under Additional Charge I in each case, for the periods respectively alleged therein. The pleas of guilty as well as the evidence amply support the findings of guilty.

The escape from confinement of the two accused as alleged in the Specification of the Additional Charge II in each case is established by the evidence. Each accused in his statement admitted that he walked out of the stockade, but stated that he was not interfered with in making his departure. Some physical restraint is fairly inferable from the affirmative showing that accused were confined in the stockade at the time of their escapes. The respective confinements were presumed to be legal and a lack of effectiveness of the physical restraint imposed is immaterial to the issue of guilt (MCM, 1928, par. 139b; Dig. Op. JAG, 1912-40, par. 427 (4)).

The evidence further shows that at the place and time and in the manner alleged in the respective Specifications of Additional Charge III in each case, each accused wrongfully appeared with the insignia of a noncommissioned officer on his overcoat. They were seen wearing the insignia by two witnesses and admitted so doing in their statements. Their pleas of guilty together with their admissions and other evidence support the findings of guilty of these Charges and Specifications.

5. The charge sheet shows that accused Lester is 21 years old. He was inducted into the Army 18 April 1941, and had no prior service. Accused Moore is likewise shown to be 21 years old. He enlisted in the Army 10 July 1941, and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence as to each accused.

Russell P. Thompson, Judge Advocate.

Sorenson Simpson, Judge Advocate.

Daniel R. McRae, Judge Advocate.

268381

**CONFIDENTIAL**



**CONFIDENTIAL**

(327)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
8 May 1944.

Board of Review

NATO 1978

U N I T E D   S T A T E S	)	EASTERN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private ADRIAN MERCIER	)	Bizerte, Tunisia, 30 March
(38 262 991), WILLIE GRIFFIN	)	1944.
(38 263 020), and DAVID	)	As to each: Dishonorable dis-
JOHNSON (38 262 035), all of	)	charge and confinement for
Company B, 209th Quartermaster	)	life.
Battalion (General Service).	)	U. S. Penitentiary, Lewisburg,
		Pennsylvania.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were jointly tried upon separate Charges and Specifications as follows:

GRIFFIN

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Willie Griffin, then of Company B, 209th Quartermaster Battalion (GS), now 3894th Gas Supply Company, did, near Bizerte, Tunisia, on or about 12 September 1943, forcibly and feloniously, against her will, have carnal knowledge of Mabrouka.

JOHNSON

CHARGE: Violation of the 92d Article of War.

Specification: In that Private David Johnson, then of Company

**CONFIDENTIAL**

(328)

B, 209th Quartermaster Battalion (GS), now 3894th Gas Supply Company, did, near Bizerte, Tunisia, on or about 12 September 1943, forcibly and feloniously, against her will, have carnal knowledge of Mabrouka.

MERCIER

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Adrian Mercier, then Company B, 209th Quartermaster Battalion (GS), now 3894th Gas Supply Company, did, near Bizerte, Tunisia, on or about 12 September 1943, forcibly and feloniously, against her will, have carnal knowledge of Mabrouka.

Each accused consented to a common trial. Each pleaded not guilty to and was found guilty of the Charge and Specification pertaining to him. No evidence of previous convictions was introduced. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved each sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for each accused and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that an Arab named Abderrahaman lived with his wife Mabrouka near Bizerte, Tunisia, adjacent to an American gasoline dump (R. 9,10,35). His house consisted of five "rooms" or "huts" so located that they formed a "U" (R. 21,41; Def. Exs. 1,3,4). About 1330 hours, 12 September 1943, 12 or 13 colored American soldiers came to the Arab's home, all of them armed, most having rifles (R. 10,11).

Mabrouka testified that seven of the colored soldiers entered the room in which she was, and that two or three of them threw her to the ground and removed her clothes without her consent, throwing them on the ground beside her (R. 36,37,38,44,91). She was near the door, about in the middle of the room, her feet being nearer the door than her head (R. 46,47). It was not dark in the room, it was light (R. 47). Four of the soldiers then had intercourse with her "with great force". She resisted all of them, crying and pushing with both hands, except when they held her hand (R. 36,43). Though she crossed her legs every time a soldier got off her, the soldiers "opened them up again". She denied putting her arms around any of the soldiers and testified she did not have any emotions during the acts of intercourse and did not feel and enjoy any of the act. One soldier held her and another put his hand over her mouth (R. 44). She "was always crying", "very much afraid" and scared (R. 36,38,91). She called to her husband, whom she saw by the door of the room, asking for help, telling him the soldiers were attacking her and that they were having intercourse with her. She did this many times but did not know how many (R. 39,40,45). She testified that each of the four had "a discharge" during his intercourse with her (R. 38).

267108

**CONFIDENTIAL**

(329)

She also testified she did not ask for any money from the soldiers and that she had tried to run away when the soldiers first came in but that they grabbed her and held her back (R. 39). The only other person in the room was her boy one and one-half years old who was taken from her by the soldiers and put on the ground (R. 38). When at last they let her go she ran away (R. 39).

Abderrahaman identified the three accused, pointing them out from among eleven colored soldiers present at the trial (R. 4,5,12,13,14). He testified that accused Griffin, armed with a pistol, and later Mercier, guarded him, "holding" him and preventing him from going in the house, and that he could hear his wife inside the room "crying and hollering" (R. 12,21,23). Griffin or Mercier struck witness with a rifle (R. 13,14). The room was about 15 feet wide and seven feet long (R. 22). Witness was about ten or twelve feet from the door and saw the soldiers having intercourse with his wife (R. 18,20). They had laid his wife "right by the door" and "it could bee seen to the outside" (R. 26). "A stranger" was the first to have intercourse, accused Johnson was second and accused Griffin was the third. Mercier "held her down" and was the fourth to have intercourse (R. 89;90). Witness left the scene when he was struck on the chest with a rifle by Mercier and went to a searchlight battery, which was located a kilometer or a kilometer and a half away, where he told a white American soldier that "Soldiers are Zig-Zigging my wife" (R. 24,25,27). Witness returned to his house with four or five white soldiers (R. 25,88). It was when he returned he saw Mercier having intercourse with his wife (R. 88). Witness testified he was absent an hour or an hour and a half but he could not tell exactly (R. 22, 27). The white soldiers stopped near the house and talked with some colored soldiers. Witness testified they did not come close enough to see in the doorway (R. 88). Witness had worked in the gasoline dump for a week before the incident occurred and had seen accused working there (R. 15).

An old Arab woman testified she was in the house with Mabrouka on 12 September. She saw "American colored soldiers" "grab a hold of her" (R. 48). She also testified:

"I saw this with my own eyes. They grabbed hold of her, and took her baby and threw it by, put it by the door and she was hollering and crying."

Witness "then ran away" (R. 49).

A soldier from the same organization as accused testified that during September they "had orders to go and search for parachutists", that a group including accused and witness drove about a mile and stopped near a native hut which accused entered, witness remaining in the truck about 50 feet away. Accused came out of the hut and to the trucks "just as the Search Light Battery men came" (R. 50,51,52). Witness was permitted to testify, over objection by defense, that either Mercier or Griffin, in the presence of the other, said to witness "that he got screwed and two others". Witness asked him "Ain't you afraid" and he answered "No". When witness told him it was wrong he replied "Everything you do in the Army is wrong"

267108

**CONFIDENTIAL**

# CONFIDENTIAL

(330)

(R. 53,54). The witness testified the stop at the hut lasted 20 or 30 minutes (R. 55).

Another member of accused's organization testified that on 12 September 1943, accused Griffin said to him "we pitched the bitch at the Dump", and "that he got some Zig-Zig from some Arab woman" (R. 56,57,58).

A Criminal Investigation Department agent identified a written statement he had prepared for Griffin's signature. He testified that after he warned Griffin of his rights, Griffin made an oral statement which he wrote down "word for word", but that Griffin refused to sign it (R. 60,61,62). Witness "wrote it to make good English" (R. 64). The statement was "admitted in evidence as an admission against interest", but only as against accused Griffin. In the statement Griffin said he stayed with the truck and did not go in the hut (R. 64,65,66; Pros. Ex. 1).

Three white soldiers, members of an Engineer Regiment, who were on paratroop reconnaissance on 12 September 1943, testified for the defense (R. 97,98,110,113).

On that date they stopped by an Arab village located near the "POL" (Petroleum, Oil and Lubricant) dump between 1300 and 1400 hours (R. 97,100, 110,114). One of them, Sergeant William P. Dyrssen, testified that his attention was directed to a commotion and since he could not see from the outside what was going on, entered an Arab hut where he saw a colored soldier "having intercourse with an Arab woman" who was "flat on her back, had her legs clamped around the colored boy's legs" (R. 97,98,99). He testified she was not crying or screaming and apparently was offering no resistance (R. 99,107). Witness saw that "when one dismounted another one, she had her legs open and another one crawled on" (R. 99). He did not see a man standing outside holding a pistol. There were approximately three soldiers in the room at the time, "one was on top of her, one was standing against the wall, another was standing ready to get on" (R. 100). Later witness testified that "one was on her, one was in a kind of kneeling position, one was standing" (R. 102). The one who was kneeling near woman's feet had his trousers open (R. 108). The woman "was saying something with one hand motioning towards the door. I don't know what it was she was saying" (R. 100,108). Asked if any of the colored soldiers said anything, witness replied "I don't remember that". When reminded of a statement he had made on or about 20 September 1943, witness testified that he remembered one of the soldiers had said "I don't know what your saying sister, but you're sure going to get screwed" (R. 101). By way of impeachment witness' statement was introduced and read in evidence, without objection by defense (R. 103), in which it is stated that "Kneeling down along-side the Arab woman were two other colored soldiers. The Arab woman was talking and waving one of her arms. One of the colored soldiers said 'I don't know what you are saying sister but sho nuff you're goin to git screwed' \*\*\*There was no money in evidence. 5. I then left the hut and outside I met three white soldiers from an anti aircraft unit\*\*\*The white soldier told the negro that this stuff has got to stop. The negro told him that no one was being fucked and that furthermore he the negro had a tommy gun to prove it. I then walked away

267108

# CONFIDENTIAL

with my men. I was not going to stand between any gun fire" (R. 104; Pros. Ex. 4). Witness further testified he did not see an Arab man at the hut, but observed colored soldiers "coming in and out" (R. 106), and that "If they didn't have their arms on their shoulder, they had them against the wall" (R. 109). The men from the antiaircraft unit, located about a quarter of a mile away, arrived after the lapse of about 15 minutes and with them came an Arab (R. 106,107,108). Witness, with the two white soldiers with him, watched about 20 minutes; he did not see a child in the hut. Witness saw three of the colored soldiers get on and off the woman (R. 107,108,109). When asked what prompted him to go into the hut, witness replied "well, sir, we walked up to the door, and when we heard the Arab woman in there talking, we went in" (R. 109). Witness could not identify the accused as having been in the hut on that occasion (R. 100).

Private Preston B. Swain was with Sergeant Dryssen and a Corporal Zimmerman when they entered an Arab hut on 12 September 1943 (R. 110,111). This witness testified he saw "some colored boys in there. They were fucking an Arab girl". There were "three or four or five"; "two boys down by the side of the girl and one of them on top of her". She "wasn't doing anything"; "she was saying something, I don't know what it was"---in a low tone of voice". She "was making kind of motions with her hands". Witness saw an Arab man but "didn't know as he was there when we first came up or not, but he come up pretty soon after we got there" (R. 111), and that when "he started into the building one of the colored boys walked up in front of him with a pistol in his hand and struck at him, and he stopped". Witness testified that he and Corporal Zimmerman were in the hut "a few minutes before Sergeant Dryssen did". Except when he started to come inside the Arab could not have seen what was going on. Witness further testified that he did not see the soldier with the pistol get on the woman and that "there was one on her when we went in. He got off, and another one got on, and we come back outside". He did not see anyone guard the Arab man with the rifle (R. 112). Asked what the Arab woman was doing, witness testified "she had her legs one of them locked around the soldier that was on her" and did not see her resist when one got off and another on (R. 113).

Corporal Will H. Zimmerman was unable to identify accused (R. 113) and testified that on 12 September 1943, he entered an Arab hut because "there seemed to be trouble there, and we just stopped in to see what was going on"; "there was an Arab standing out there trying to get back to his house". Asked as to who was keeping the Arab from getting into the house, witness testified, "Well, one colored boy was standing out in front", armed with a pistol. Inside an Arab woman was "laying on the floor" and "this one colored boy was on her and he got off, and the other one got on". Witness testified she was not offering any resistance but "was laying there saying something, but I couldn't understand what she was saying". But he testified that the "colored boys" said "she said she wanted more air" (R. 114,115). When witness entered the Arab woman was "laying on her back with her legs up". Witness saw only two have intercourse with the woman, that before it was over "we left, went outside" (R. 115). A boy, "he could have been sixteen or\*\*\*elder", was seen outside "crying, hollering". There were about 12 colored soldiers (R. 116) and witness saw "three to four" in the hut. He

**CONFIDENTIAL**

(332)

testified he entered with Sergeant Dryssen and Private Swain and that they stayed only a "few minutes" inside. Witness testified "we asked what was going on. They said they were searching the house, said they had permission to" and that "there was a tommy gun and quite a few other guns around, and there was only three of us" (R. 117). Witness reported the incident to "the Top Sergeant" (R. 118).

Accused remained silent.

4. It thus appears from substantial evidence that at the place and time alleged each of the accused forcibly and without her consent had unlawful carnal knowledge of Mabrouka, the woman named in the Specification. The woman's husband was restrained from interference by one or more of accused while under arms. After she was forced to the ground and her clothing removed, each accused had sexual intercourse with her. She cried out and sought help, crossed her legs and tried to push each accused away. They "opened" her legs by force and for at least part of the time she was held by one accused while another soldier had intercourse with her. The accused were identified at the trial under circumstances which lent special verity to the identification. The court was warranted in finding each accused guilty of rape. All elements of the offense are amply established by the evidence with respect to each accused (MCM, 1928, par. 148b; Winthrop's, reprint, pp. 677,678).

5. Over the objection of the defense a witness was permitted to testify that when Mercier and Griffin returned to the trucks, one said in the presence of the other, that he and two others had got screwed. Such an admission would be properly admitted against the speaker alone but should not have been admitted where witness could not tell which of the two made the remark. Even if it be assumed that satisfactory evidence existed that the accused were acting jointly or as conspirators the admission of the statement was objectionable in that it involved others than the speaker and admissions made after the transaction is completed are inadmissible against an accomplice (Dig. Op. JAG, 1912-40, sec. 395 (4); MCM, 1928, par. 114c). However, the substance of the admission had been fully covered by other competent and uncontradicted evidence and it is clear that this improper admission of evidence did not injuriously affect the substantial rights of any of the accused (AW 37).

The same observations may be made to the admission Griffin made to the company clerk that "we pitched the bitch at the Dump". Here there is the added fact that the testimony was not objected to. This added consideration compels the same conclusion that no prejudicial harm was done any substantial right of any accused.

The testimony of the three white soldiers contained numerous objectionable matters but as it was adduced by the defense in the hope of proving the victim consented to the acts of intercourse it cannot be said to have been injurious to their rights in any material way. It was within the province of the court to evaluate their testimony.

**CONFIDENTIAL**

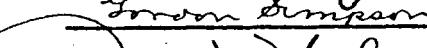
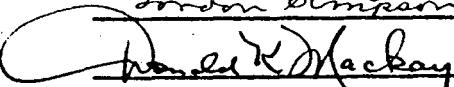
267108

**CONFIDENTIAL**

(333)

6. The charge sheets show that accused Mercier is about 21 years old, was inducted into the Army 7 November 1942, with no prior service; that accused Griffin is about 21 years old, was inducted into the Army 7 November 1942, with no prior service; and that accused Johnson is about 23 years old, was inducted into the Army 24 October 1942, with no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentences. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

  
Daniel E. O'Loghlen, Judge Advocate.  
  
Vernon Simpson, Judge Advocate.  
  
Charles K. Mackay, Judge Advocate.

267108

**CONFIDENTIAL**



**CONFIDENTIAL**

(335)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army.  
6 May 1944.

Board of Review

NATO 2012

U N I T E D   S T A T E S	)	VI CORPS
v.	)	Trial by G.C.M., convened at
Private WILLIAM F. FRAIN	)	APO 306, U. S. Army. 29 March
(31 006 272), Headquarters	)	1944.
Battery, Second Battalion,	)	Dishonorable discharge and
68th Coast Artillery (Anti-	)	confinement for life.
aircraft).	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private William F. Frain, Headquarters Battery Second Battalion Sixty Eighth Coast Artillery (AA), did, at Caivano, Italy, on or about 22 January 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Amphibious Operations, and did remain absent in desertion until he was apprehended at Miano, Italy on or about 26 February 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life.

**CONFIDENTIAL**

268915

~~CONFIDENTIAL~~

three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The undisputed evidence shows that accused absented himself from his organization at Naples, Italy, on or about 21 January 1944. On that date he was a member of a detail selected to accompany 12 trucks from Caivano, Italy, a staging area where his battery was then stationed, to Naples, where the vehicles were to be waterproofed. Accused's battery commander had the members of the detail assembled before they left for Naples and warned them that the organization was preparing for a hazardous overseas movement, that departure was imminent, and that "they were to stick around". Accused was present (R. 7,13,15,16,19). He had been with the battery during amphibious operations at Casablanca and Sicily (R. 13,14). Accused accompanied the detail to Naples but was not present when the detail was ready to return to Caivano that afternoon. A search for him was made but he could not be found (R. 7,15,16). The battery left Caivano on the 23d and moved to "the Naples area" where it stayed overnight. On the 24th, the battery boarded an "LST" and proceeded to Anzio, Italy, where it remained over two months (R. 19).

Accused spent the night of the 21st in Naples with some soldiers to whom he "said he had missed the truck and he wanted to spend the night there". He did so, and the following morning, after having a late breakfast, he stated he was "going back to the area". He left his equipment with the soldiers "because he couldn't carry it" (R. 21,22). Accused was apprehended in Naples 26 February 1944 (R. 12).

When accused rejoined his organization on 6 March 1944, his company commander warned him that anything he said might be held against him and also told accused that for his own curiosity he wanted to know what had happened. That officer testified:

"He had a story that he was present with the detail and then he wandered off and got to drinking and that he had returned and he stayed overnight at the palace grounds in Naples. The following morning he wandered off again and got drinking and then he told me he was unable to return because he had received a head injury by getting hit over the head with a bottle. I asked him if he went to a hospital and he said no he hadn't. He said an Italian had taken him in and fixed him up and I asked him if he had returned to our organization area but he said he hadn't, he had gone to Caivano and Santa Maria and the organization wasn't there. I asked him if he had gone back to the palace grounds and he said he wanted to but he couldn't find his way there and he said that when he came back in he said he turned himself in to the Military Police and when I asked him if he was sure that he turned himself in he said no, the Military Police picked him up because he had no pass and I found out in my conversation that he had stated

~~CONFIDENTIAL~~

**CONFIDENTIAL**

(337)

to them that he was a member of the 54th Medical Battalion" (R. 11,12).

That officer also testified, under examination by the defense:

"The time I took over the battery he was in the guard-house for being AWOL and when he came out he seemed to try for a while to straighten out. Then he started wandering off whenever he felt that he could get away with it. Then he did straighten out again for a little while. As far as duty overseas, the principle difficulties there has been drinking and going over the hill for a period of six to twelve hours" (R. 24)

and that accused "was in the habit of going out and getting a drink whenever he could" (R. 13).

According to a psychiatric report, accused is a chronic alcoholic, and his separation from the service was recommended (R. 34,35).

Accused elected to remain silent.

4. It thus appears from the evidence that accused absented himself from his organization without proper leave and that it was done at a time when an amphibious operation was impending. The nature of the operations involved and accused's knowledge of what was imminent were clearly established by competent evidence. The facts and circumstances here present warrant the inference that accused had in fact the requisite intent and that it co-existed with the absence from his organization as alleged, constituting the offense charged (NATO 867, McCullough; NATO 1183, Garner; NATO 1259, Orance; NATO 1283, Guest).

5. The allegation is that accused absented himself at Caivano on 22 January while the evidence indicates the absence began the prior day at Naples. Neither variance is substantial as accused was fully apprised of the nature of the offense with which he was charged and there is no evidence he was in any way misled. These discrepancies were minor and did no harm to any substantial right of accused (MCM, 1928, par. 130a; CM 199270, CM 186501, Dig. Op. JAG, 1912-40, sec. 416 (10)).

The evidence indicates Naples was the place where accused was apprehended and not Miano, as alleged in the Specification. However, that is of no controlling importance here where the gravamen of the offense charged is the intent to avoid the hazardous duty of amphibious operations (Dig. Op. JAG, 1912-40, sec. 416 (14)).

Though substantial evidence of previous wrongdoings of accused were admitted in evidence, that testimony was adduced by the defense apparently in an attempt to show accused to be a weak and irresponsible individual whose absence could be better attributed to straggling or drunkenness than to the

**CONFIDENTIAL**

**CONFIDENTIAL**

(338)

alleged intent to avoid hazardous duty. The introduction of the evidence under the circumstances was in fact more apt to benefit accused than to harm him and it cannot be said any substantial right of accused was invaded or harmed by permitting defense to offer this testimony.

6. The charge sheet shows that accused is about 26 years old, was inducted into the Army 11 January 1941, and had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

Ronald Holmgren, Judge Advocate.  
Lawson Simason, Judge Advocate.  
Daniel T. Mackay, Judge Advocate.

**CONFIDENTIAL**

**CONFIDENTIAL**

(339)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
3 May 1944.

Board of Review

NATO 2013

UNITED STATES	)	VI CORPS
v.	)	Trial by G.C.M., convened at
Private FORREST E. WEISSINGER	)	APO 306, U. S. Army, 12 April
(37 429 058). Service Company,	)	1944.
First Special Service Force.	)	Dishonorable discharge and
	)	confinement for 20 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Forrest E. Weissinger, Service Company, First Special Service Force, did, at Pozzouli, Italy on or about 31 January 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty to wit: Accompanying his unit on its movement by sea to a combat area and did remain absent in desertion until he was apprehended at Santa Maria, Italy on or about 19 February 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. The trial judge advocate stated that he had evidence of one previous conviction but this evidence was not introduced. He was sentenced to

**CONFIDENTIAL**

280165

(340)

**CONFIDENTIAL**

dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on or about 31 January 1944, accused was a member of Service Company, First Special Service Force (R. 6,11) which was bivouacked at Pozzouli, Italy (R. 11). On that morning, the company commander announced to the organization that it was going north into an active battle zone (R. 7,12,13). Accused was present when this announcement was made (R. 12). Later that day the organization broke camp, embarked on "LSTs" and went to the "Anzio Beachhead" (R. 7,9,11). Accused was present at a company roll call as the unit went aboard the "LST" (R. 11,13). They landed at the "Anzio Beachhead" at approximately 1300 hours 1 February 1944 (R. 11), and accused was not present at that time (R. 9,11). He was absent from his organization without authority from 31 January 1944 to 19 February 1944 (R. 9,13). The company morning report was received in evidence without objection (R. 8). It showed that accused was carried "dy to AWOL 1530 hrs" as of 31 January 1944 (Pros. Ex. 1). It was stipulated that accused was apprehended at Santa Maria, Italy, on or about 19 February 1944 (R. 13,14).

Accused made an unsworn statement which related to his actions after his apprehension at Santa Maria. He stated that while in confinement he talked with a "Capt. Sigmund" and told him about "this nervous trouble I have been having for a long time". He was then taken to the 36th General Hospital and admitted for examination (R. 15). He was in the hospital for 16 days but underwent only the routine daily inspections. He was then sent to a replacement depot with a hospital disposition paper stating that he had been recommended for "Class B limited service for psychoneurosis". He was later arrested and held for trial.

Defense counsel then said:

"In substantiation to parts of that testimony I have an admission slip from the 36th General Hospital, the examination of Major Erickson and the summary of the reclassification board for identification and examination by the court" (R. 17).

The documents referred to were neither offered nor received in evidence.

4. It thus appears from the evidence that at the place and time alleged, accused absented himself from his organization without proper authority and remained unauthorizedly absent until apprehended at Santa Maria, Italy, on 19 February 1944. There is evidence that in the morning of the day the company was to leave, accused's commanding officer advised the company at a formation at which accused was present, of the imminent departure of the unit to a combat area. The same day the organization left by boat for the "Anzio Beachhead". Accused was present at the embarkation but did not accompany his command upon this mission. The conclusion that he

**CONFIDENTIAL**

( 341)

had absented himself with the specific intent of avoiding hazardous duty as alleged is fairly inferable from these and the other circumstances in evidence (AW 28). In his unsworn statement accused did not deny his guilt. Although vaguely he mentioned suffering from a "nervous trouble" and stated he had been recommended for "Class B limited service for psychoneurosis", obviously the court concluded, and justifiably so, that these unsworn suggestions alone were not sufficient to raise an issue as to his insanity (MCM, 1928, par. 63).

5. There is attached to the report of investigation of the charges, accompanying the record of trial, an affidavit dated 13 March 1944, by Major Clifford O. Erickson, Medical Corps, Chief of Neuropsychiatry, 36th General Hospital, containing the following:

"I have personally examined Private Forrest E. Weissinger, from a psychiatric standpoint. I find that he is suffering from psychoneurosis, anxiety state, mild, chronic. I feel that he is sane and is capable of distinguishing between right and wrong, and in general, capable of adhering to the right. I feel that, because of his emotional instability, his actions are at times to a great extent guided by his emotions rather than his judgment. I do not believe, in general, that it can be said that he is incapable of adhering to the right despite of this."

"It is certainly true that this man has, during all of his life, displayed symptoms of emotional instability and poor reaction to stress or excitement, and I feel that he has not been suitable material for combat duty, nor do I believe that he ever will be."

There is also attached to the report of investigation, a statement that a disposition sheet for accused made following his hospitalization in the 36th General Hospital from 9 February 1944, to 9 March 1944, shows a diagnosis of "Psychoneurosis, anxiety state, mild, chronic" and contains a statement that accused "will not be able to stand combat duty at any time. suitable for non combat duty--quartermaster, ordnance, etc." There is also attached a report of psychiatric examination on 11 April 1944, by Captain Stephen W. Ranson, Medical Corps, Neuropsychiatrist, 38th Evacuation Hospital, which report contains the following:

"This patient was subjected to a thorough psychiatric examination. His intelligence is normal. There is no evidence of any abnormal thought trends, or evidence of psychosis (insanity). No important neurotic trends can be elicited (apart from the patient's own statement that he is 'psychoneurotic') Diagnosis: No disease."

6. The charge sheet shows that accused is 34 years old. He was inducted into the Army 24 August 1942. He had no prior service.

7. The court was legally constituted. No errors injuriously affecting

(342)

# CONFIDENTIAL

the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

Russell E. Koenig, Judge Advocate.  
\_\_\_\_\_, Judge Advocate.

Howard Simpson, Judge Advocate.

(343)

**CONFIDENTIAL**  
Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
9 May 1944.

Board of Review

NATO 2022

U N I T E D   S T A T E S	)	PENINSULAR BASE SECTION
v.	)	Trial by G.C.M., convened at
Private ROBERT L. DONNELLY	)	Naples, Italy, 14 March
(13 131 982), Battery B,	)	1944.
36th Field Artillery.	)	Death.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Robert L. Donnelly, Battery "B", 36th Field Artillery, did, at Venafro, Italy, on or about 1900 hours, 16 December 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Naples, Italy, on or about 27 January 1944.

CHARGE II: Violation of the 92d Article of War.

Specification: In that Private Robert L. Donnelly, Battery "B", 36th Field Artillery, did at Naples, Italy, on or about 20 January 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Tec 5th Grade John P. Brown, Jr., 57 th Military Police Co., a human being by shooting him with a pistol.

262462

**CONFIDENTIAL**

(344)

CONFIDENTIAL

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

3. An extract copy of the morning report of Battery B, 36th Field Artillery, was received in evidence without objection. It showed the following remarks with reference to accused:

\*17 December 1943

\*13131982 Donnelly, Robert L. Pvt  
Above EM AWOL fr 1900 hrs as of 16 December 1943

\*4 February 1944

\*13131982 Donnelly, Robert L. Pvt  
Fr AWOL to Conf P.B.S. Stockade as of 27 January 1944  
(R. 7; Pros. Ex. 1).

Sergeant Frank J. Barresi, 57th Military Police Company (R. 9), testified that on the night of 20 January 1944, he was sergeant of the "vice squad", and that he and Technician Fifth Grade John P. Brown, of the same company, were working on the "black market" in Naples, Italy (R. 9,10). As they were riding down Piazza Dante in a "command car", witness saw accused standing and five civilians lying down just off the sidewalk. Witness stopped the car, called accused over and asked what he was doing there. Accused replied that the group was waiting for a friend to come and take them to a hotel to spend the night. Accused refused to give witness his name or his organization but said he was working at the port. Accused asked witness the time and witness replied it was "ten minutes after eleven". After waiting a few minutes for accused's "friend to come around" witness and Brown stepped out of the car and walked over and asked the five civilians what they were waiting for. They also replied they were waiting for a friend to come and take them to a hotel. Witness then drew his pistol and ordered them to get into the car "as suspicious characters" (R. 10). He testified further;

"They started to get in the car and three or four of them were in the car by the time I thought about searching them and by the time I got over to the car they were all in and I took them down the street. T/5 Brown got in the car and this G. I. here (witness pointed at accused) sat right behind me facing the opposite door here and just as we got down here to the corner of the Questura, T/5 Brown hollered, "Look out Barresi, he's got a gun". I looked over my shoulder and saw the fire go just past me. I stopped the car and I

262462

- 2 -

CONFIDENTIAL

**CONFIDENTIAL**

struck this G. I. over here and moved his arm end as I swung back. I hit him with my left hand. I tried to throw off his gun and he hopped over the front seat and out of the door and I shot at him and I saw where he went. He turned right. I was right behind the command car as he started down the street. I took up the chase and I fired at him just as he turned right down an alley and down some steps where I lost him. I came back to the car and looked around for T/5 Brown and I found him about twenty feet from the front of the command car. I looked him over for wounds but I didn't see any. I asked some Carabinieri who were standing near to come over and help me take him into the station. I arrested the five civilians and the doctor was called and when I got back the doctor came over and that is when I found out he was dead" (R. 10).

Upon cross-examination witness testified that accused was not under the influence of intoxicating liquor;--that he appeared to be sober. Brown had his "gun" out during the ride but witness did not know what he was doing with it or whether or not he attempted to shoot the accused (R. 11). When Brown "yelled" witness stopped the car. When witness turned around he did not see a pistol in the hands of accused (R. 12). He saw the flash "go right by me" and accused was the closest person to him and sitting directly behind witness. None of the others attempted to flee after the shot was fired. The civilians were searched for firearms after they arrived at the Questura. No arms were found on them but a "Berretta" pistol was picked up near the scene of the shooting about an hour later (R. 13).

De Martino Pasquale, a resident of Naples, testified that he met accused on the night of the shooting (R. 13,14) at about 2130 hours. At about 2300 hours witness and his friends were standing with accused on the Piazza Dante when a sergeant, whom he identified as Barresi "and his friend" drove up and came to see what they were doing there. After some conversation "he took us for questioning" (R. 14). Accused was sitting in the back of the car and while they were driving toward the Questura Building, accused shot one of the American soldiers "in the front" (R. 15). Witness testified that he had an Italian "Berretta" pistol in his possession but "threw it out for about twenty yards" after the shooting (R. 15) because he did not want to get into trouble. The gun had not been fired (R. 17). He did not know whether accused was drunk or sober. He did not talk with accused (R. 15) but did not smell alcohol on the breath of accused (R. 16). There was no conversation between deceased and accused in the car. Deceased was sitting "so as to face us". He had a "club and also a pistol in his hands which he pointed at us" (R. 17). Accused had a "Berretta" pistol in his hand. He did not have it in his hand when he entered the car. Witness thought he took it from under his coat. Accused moved so fast "we didn't have time to do anything about it" (R. 16). Accused fired one shot, went out the front door (R. 17) and ran away (R. 16). Witness took it for granted that it was the American soldier in the car who fired the shot, for "none of us fired a shot". Deceased carried a flashlight which he flashed during the ride "and that way we think the American soldier fired the shot. It could be seen--the gun was in his hand" (R. 18).

262462

**CONFIDENTIAL**

(346)

CONFIDENTIAL

A medical officer testified that Brown was dead when he examined him on or about 20 January 1944. A bullet had entered the right anterior surface of the chest, resulting in death. Deceased was identified by military police of his own unit and by his identification tags (R. 7,8).

Staff Sergeant Rudolph Sturm, an agent of the Criminal Investigation Department, Provost Marshal Office, Peninsular Base Section, testified that on 27 January 1944, in response to a telephone call, he went to the station of "District Number 3" (in Naples) and found accused there. Witness took accused with him to the "Questura". En route accused told witness that "he killed the M.P. and that now that he was caught he didn't expect anything". Sergeant Sturm took accused to the office of the Criminal Investigation Division where the latter was warned that "according to Article of War 24" he might remain silent, that anything he did say "could be used for or against him if the case resulted in a trial" (R. 19,20). Following this warning, accused made a written statement which was received in evidence without objection (R. 21; Pros. Ex. 3). He stated he left his organization when it was near Venafro about two weeks before Christmas, 1943, went to another town and then to Naples, where he lived in different hotels. He stated further that:

"On January 20th, 1944, I was drinking all day long at different places. In the evening, I left the place where I was living, together with six Italians, with the intention of robbing a civilian store. I was drunk at the time. We walked down a side street near Via Roma toward Piazza Dante. The Italians dropped the tools on the side of the street and when we reached Piazza Dante, one of the Italians went back to get the tools. Before he came back, a command car flashed the lights on us. I was standing and the civilians were sitting down there in the park. An M.P., who spoke Italian, was in the truck and spoke to me: 'What are you doing?' I told him that the civilians were taking me to a hotel. He said, 'What are you sitting there for?' and I said 'We are waiting on a guy.' We waited there and about five minutes later, one of them said, 'Get in the car.' They then put the civilians and myself in the back of the command car. I thought I heard the sergeant tell the T/Cpl., 'Take this and hold it on 'em.' The corporal asked the sergeant who was driving, 'Should I load it?' The driver said, 'Hell Yeah.' Then the corporal turned around and kept the pistol on me all the time. The driver said, 'Watch him, he may be armed.' We came down here about five or six blocks and the driver slowed down. Then I took out my pistol and pulled the trigger. The T/Corporal saw me pull the trigger and he drew back in the seat. He didn't say anything. I don't know if I pulled the trigger again or not. I remember the driver hit me on the side of the head. I scrambled around and got over the seat, out of the car, and started to run. I heard a shot fired just as I was going around the corner.

CONFIDENTIAL

**CONFIDENTIAL**

(247)

About that time I stumbled down some steps. I got up, found a doorway to a house, opened the door, and lay down on the floor right inside the door. I slept there, and the next morning I got up and went (Pros. Ex. 3).

Accused at first told Sergeant Sturm that he had thrown his pistol, a German Luger, away, but after giving his statement he accompanied Sergeant Sturm to a place he had described as a hall and showed Sturm the pistol with which he shot deceased. It was a German Luger (R. 19) and was received in evidence without objection (R. 20; Pros. Ex. 2).

Accused elected to remain silent.

4. It thus appears from the evidence that at the place and time alleged accused absented himself without leave and remained absent until he was returned to military control as alleged in the Specification, Charge I. Accused was absent without leave in a theater of active military operations and being in Naples most of the time had ample opportunity to surrender to military authorities. The intention to remain permanently absent can be inferred from his unexplained prolonged absence and the attendant circumstances (MCM, 1928, par. 130a). His refusal to give his name and organization when apprehended and his resistance to being taken into custody are also significant factors in the determination of that issue. The findings of guilty of desertion are fully supported by the evidence.

It further appears from the uncontradicted evidence that at the place and time alleged in the Specification, Charge II, while absent in desertion, accused shot with a pistol and killed Technician Fifth Grade John P. Brown, Jr., 57th Military Police Company, the person named in this Specification. The evidence shows that after Brown and another military policeman had lawfully taken accused into custody, the latter, in throwing off the restraint thus imposed upon him, shot Brown with a pistol at close range and killed him. This fatal assault was shown to have been wholly unprovoked, wanton and willful. There is evidence that Brown had his drawn pistol in his hands, but there is no suggestion that he attempted to use the weapon other than lawfully and in the pursuit of his duty. Obviously, the homicide was accompanied by an intent to oppose force to persons lawfully engaged in the duty of taking accused into custody. From this and the other circumstances in evidence, compelling inferences of malice aforethought arise. The evidence amply demonstrates that the homicide was without legal justification or excuse (MCM, 1928, par. 148a).

In his voluntary statement accused said that during the day of the fatal shooting he had been drinking "all day long" and "was drunk at that time". However, the noncommissioned officer who was with deceased at the time of the killing testified that accused was not under the influence of intoxicating liquor and appeared to be sober. One of the Italians who was with accused when he was apprehended testified that he did not smell alcohol on accused's breath. In his statement, accused demonstrated a clear, connected recollection of the events surrounding the fatal assault. The

**CONFIDENTIAL**

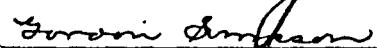
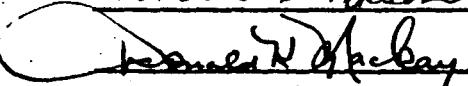
(343)

# CONFIDENTIAL

court was warranted in concluding that he was in full possession of his mental faculties when he committed the homicide. The court properly found accused guilty as charged (NATO 213, Smith; NATO 1070, Jones).

5. The charge sheet shows that accused is about 20 years of age. He enlisted in the Army 24 October 1942, and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence to death or imprisonment for life was mandatory upon the court-martial upon conviction of accused of murder in violation of Article of War 92.

 Donald W. McKey, Judge Advocate.  
 Gordon Thompson, Judge Advocate.  
 Donald W. McKey, Judge Advocate.

262462

6  
CONFIDENTIAL

**CONFIDENTIAL**

(249)

Branch Office of The Judge Advocate General  
with the

North African Theater of Operations

APC 534, U. S. Army,  
9 May 1944.

Board of Review

NATO 2022

UNITED STATES )

PENINSULAR BASE SECTION

v. )

Trial by G.C.M., convened at  
Naples, Italy, 14 March

Private ROBERT L. DONNELLY )  
(13 131 982), Battery B, )  
36th Field Artillery. )

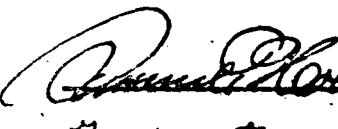
1944.

Death.

HOLDING by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

 Judge Advocate.

Simpson, Judge Advocate.

Donald N. Mackay, Judge Advocate.

NATO 2022

1st Ind.

Branch Office of The Judge Advocate General, NATOUS, APC 534, U. S. Army,  
9 May 1944.

TO: Commanding General, NATOUS, APC 534, U. S. Army.

1. In the case of Private Robert L. Donnelly (13 131 982), Battery B, 36th Field Artillery, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50, you now have authority to order execution of the sentence.

262462

**CONFIDENTIAL**

NATO

~~CONFIDENTIAL~~

(350)

NATO 2022, 1st Ind.

9 May 1944 (Continued).

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2022).

*Hubert D. Hoover*

NOTICE OF PUBLICATION

to be served upon the defendant

in the case

HUBERT D. HOOVER  
Colonel, J.A.G.D.  
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 32, NATO, 16 May 1944)

RECEIVED 16 MAY 1944

RECORDED IN THE RECORDS.

RECORDED IN THE RECORDS.

**CONFIDENTIAL**

(35)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
20 May 1944.

Board of Review

NATO 2023

U N I T E D   S T A T E S

v.  
Private ISAAC WALKER  
(37 100 985), (Replacement),  
402d Replacement Company,  
1st Replacement Depot.

MEDITERRANEAN BASE SECTION

Trial by G.C.M., convened at  
Oran, Algeria, 10 March 1944.  
Dishonorable Discharge and  
confinement for 20 years.  
Eastern Branch, United States  
Disciplinary Barracks,  
Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Isaac Walker (NMI), a Replacement, Company "B", 13th Battalion, 1st Replacement Depot, did, at or near Cenastel, Algeria, on or about 10 February 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Sergeant Norris T. Schreffler American currency, value about twenty-seven dollars (\$27.00), about 250 francs in French currency, value about five dollars (\$5.00), one (1) wrist watch, value about eighteen dollars and seventy-five cents (\$18.75), one (1) fountain pen, value about five dollars (\$5.00), and one (1) pocket knife, value about one dollar (\$1.00), total value about fifty-six dollars and seventy-five cents (\$56.75), the property of the said Sergeant Norris T. Schreffler.

**CONFIDENTIAL**

262466

~~CONFIDENTIAL~~

CHARGES

CRIMES I: Violation of the 93d Article of War.

Specification: In that Private Isaac Walker (NMI), a Replacement, 400nd Replacement Company, 1st Replacement Depot, did, at Oran, Algeria, on or about 18 January 1944, by force and violence and by putting him in fear, feloniously take, steal, and carry away from the person of Technician Fifth Grade Russell S. Ramler, American and French Currency, value about fifty nine (\$59.00) dollars, the property of the said Technician Fifth Grade Russell S. Ramler.

CRIMES II: Violation of the 96th Article of War.

Specification: In that Private Isaac Walker, a Replacement, 400nd Replacement Company, 1st Replacement Company, was at Oran, Algeria, on or about 21 January 1944, drunk and disorderly in uniform in a public place, to wit St. Eugenie Highway.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States Disciplinary Barracks, Greenhaven, New York", as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that at about 2320 hours on 10 February 1944, as he was returning from the Red Cross Club to the 1st Replacement Depot at Canastel, Algeria, Technician Fourth Grade Norris T. Schreffler, a member of that depot, noticed accused following him (R. 6,7). It was a clear moonlit night (R. 7). Accused presently overtook Schreffler and after they had walked together about twenty or thirty yards, accused "stepped with his left foot kind of back around" Schreffler and placed the blade of a knife against the latter's stomach. While holding the knife in that position, accused searched Schreffler (R. 7) and took from his person seventeen dollars in "blue seal" currency, one ten dollar "gold seal" bill, approximately 250 francs, a black "Wasp" fountain pen, a "FX" pocket knife, and an Ordnance issue, seven jewel, Elgin wrist watch. The watch had pocket knife scratchings (XIX) on the inside of the back of the case and had a bright red wrist band (R. 8). Schreffler testified that during the course of the search, accused threatened to cut him saying "Don't try anything funny, I'm awful fast with this blade" (R. 16). Accused also said that "he hadn't been paid for some time, the government is fucking him and he might as well fuck somebody else". He also mentioned that he knew Schreffler would "get the M.P.'s" (R.-8,9). Schreffler also testified that the reason he let accused take his property was because "my chief interest was to keep that blade out of me" and because of accused's threats (R. 16). There was

~~CONFIDENTIAL~~

262466

**CONFIDENTIAL**

(353)

no discussion between them about a sale of the watch (R. 14). When they separated Schreffler turned about after taking two or three steps and watched accused as far as he could see him in the moonlight (R. 9). Schreffler then called the "M.P.'s" by telephone (R. 9,14).

The next morning Schreffler went to the office of the Field Director of the Red Cross at the depot and "made it known that there was \$17.00 of American money that was not gold seal". When he left the Red Cross building he saw accused going into a battalion headquarters (R. 9). Schreffler reported this at the Provost Marshal's Office and it was arranged to have a Sergeant Clark accompany him to the battalion headquarters. There they saw accused and Clark inquired of him the time of day but did not "get a very good look at the watch" (R. 10,18). Shortly afterwards another noncommissioned officer followed accused into an office the latter had entered, purposing to ask accused about buying the watch. When accused and this non-commissioned officer came out Schreffler heard accused say that he wanted \$100.00 for the watch. Clark then spoke as if he wanted to buy the watch (R. 10) and accused also told him that he would sell it for \$100.00 (R. 18). From there Schreffler, Clark and accused went to an orderly room where Schreffler examined the watch and recognized it as his own (R. 11). Accused told Schreffler he had purchased the watch for \$40.00 but did not claim to have bought it from Schreffler (R. 16). He told Clark he got the watch from a Sergeant Oliver (R. 20,21) and told First Lieutenant William C. Burkett, 401st Replacement Company, that he had "got it from a friend of his" (R. 29). This officer took the watch from accused (R. 23).

Schreffler and Technician Fourth Grade Hardy Stafford, 690th Coast Artillery, were in the Red Cross snack bar at Canastel on the afternoon of 21 February 1944. Stafford brought Schreffler to talk to accused at the latter's request (R. 12,24,26). In Stafford's presence accused asked Schreffler whether he "would not appear at any trial and would talk to his company commander -- that he would be willing" to pay him what he said he "lost" if Schreffler would "drop the case against him" (R. 12,25,27,28). Stafford testified that accused "stated that he had stolen the watch and the fountain pen" (R. 25), but qualified this testimony by stating that he understood the language to be "whatever" he "took" from Schreffler (R. 27). He testified that he did not remember whether the word "stolen" was used or not (R. 28).

It was stipulated that the value of the wrist watch, as of 10 February 1944, was \$10.00 and the approximated value of a "GI" knife sold at the Post Exchange was \$1.00 (R. 29).

The evidence further shows that on 18 January 1941, Technician Fifth Grade Russell S. Ramler, 385th Replacement Company, went to Oran, Algeria, where he had two drinks of "bad vino", some wine and some beer (R. 35,36,42). He got lost and was worried about getting back to camp at Canastel when, sometime between 2115 and 2200 hours, he met the accused. The latter said he was stationed at Canastel also and knew the way so the two soldiers walked together in the "Gambetta" section (R. 36,41). Ramler saw the face of accused by the light of passing motor vehicles (R. 38,44,46). When they had turned down an alley accused suddenly placed a knife against Ramler's

**CONFIDENTIAL**

**CONFIDENTIAL**

(354)

throat (R. 36) and inflicted a wound about two inches long on the side of his neck (R. 37,38). Ramler proceeded to run away but had gone only about 12 feet (R. 45,46) when accused overtook him and threw him to the ground (R. 36). Accused told Ramler to keep quiet or he would kill him (R. 46) and took three ten-dollar bills, a 1,000 franc bill, a few hundred francs and a wallet from Ramler's person (R. 37). Ramler testified he was "very scared" and believed that his life was in danger (R. 46). Accused then left and Ramler went first to "M.P. Headquarters" and then afterwards to a dispensary where he "was sewed up" (R. 37).

Private Howard G. Beckman, 56th Quartermaster Sales Company, testified that he met accused at the colored Red Cross Club in Oran on 21 January 1944, and after the two soldiers had had some drinks, they went to a field just out of the city to "get laid". Accused had a bottle of cognac which he handed to Beckman. The latter, only pretending to drink, noticed that accused was holding an open knife in his hand. Beckman asked accused what he was going to do with the knife and the latter replied that he was going to use it on Beckman. Beckman pushed accused and started running toward the St. Eugenie Highway, with accused in pursuit (R. 30). The latter overtook Beckman, seized the front of his field jacket and raised his knife "with the blade sticking up and ready to come down". In the meantime a group of Frenchmen gathered around the soldiers. Accused said, "Give me back the ten dollars you stole". Beckman testified accused was drunk, as evidenced by his manner of speech, his "unsteadiness, his eyes", and the smell of liquor on his breath (R. 31). Beckman also testified that he had not taken ten dollars or any money from accused, although on 24 January he had told an officer of the "C.I.D." that he would be willing to give accused "ten dollars to forget the whole matter" (R. 31,32).

On 22 January 1944, accused was told by a noncommissioned officer of the Criminal Investigation Division that "he didn't have to make a statement if he didn't wish to", and that any statement that he made might be used against him (R. 77). He was also asked if he were aware of his rights under Article of War 24, to which he replied in the affirmative (R. 33). After these warnings, he made two written statements which were introduced in evidence (R. 34,35,77,78,79; Pros. Exs. B,O). These statements had been typed by a noncommissioned officer. Accused watched while they were being written and according to the testimony of the noncommissioned officer insisted from time to time that certain changes be made (R. 76,77,81,82).

In his first statement, accused stated that on 21 January 1944, he visited a home in Oran where he had some wine and then went to the Red Cross Club where he met Beckman; that the two of them went to a bar and had some wine, returned to the Red Cross Club and drank some cognac; that Beckman and accused then went to a field to "get laid" and as they approached Highway "D", Beckman grabbed accused, threw him on the ground and took his pocket-book; that there was a group of Frenchmen there and about that time the "M.P.'s" came and took Beckman and accused into custody. He stated further that on 19 January 1944, he gave the personnel officer of the 13th Replacement Battalion \$50.00 and on 21 January, \$20.00, all of which he had won at gambling and which he asked be sent to his wife; that the total money he sent home since coming overseas did not exceed \$200.00 (Pros. Ex. B).

**CONFIDENTIAL**

262466

**CONFIDENTIAL**

(355)

In the second statement, accused stated that he went to Oran on pass on 18 January 1944; that he was at "Joe's Bar" for about an hour and a half and then went to a restaurant to have something to eat after which he went to a Frenchman's house where he had something to eat but nothing to drink; that he went to a bar and drank cognac and muscatel until closing time, then took a street car into the center of Oran, waited in line for a truck, and arrived at his camp about 2200 to 2210 hours; that he did not know the names of the other soldiers in his tent; that on 19 January, 1944, he gave his battalion personnel officer \$50.00 which he had won gambling to be sent to his wife and \$20.00 more on 21 January 1944; that he did not know the names of the people with whom he was gambling (Pros. Ex. C).

Accused testified that he went as far as the third grade in school and that he could read and write only enough to spell his name (R. 49). Concerning the Schreffler incident he testified that he met Schreffler in camp and the latter asked him if he wanted to buy a watch to which he replied affirmatively and said "Let me see it". Accused "just looked at the top of it" and was told by Schreffler that the latter wanted \$40.00 for the watch, whereupon accused said he would buy it (R. 49,72) and gave Schreffler four ten-dollar bills (R. 50,59,72) that he had won gambling (R. 49). Accused then went to Oliver's tent (R. 50,57) and had a short talk with him but did not show Oliver the watch nor say anything about where he had gotten it nor did he tell any of the witnesses who testified at the trial that he had gotten the watch from Oliver (R. 58,71). The following morning at battalion headquarters he was asked by a Corporal Williams what he would take for the watch and he replied one hundred dollars (R. 50). Afterwards accused went in the office of a Sergeant Brown who told him "this man said you got his watch" (R. 50,51). Accused answered "I have, but I bought the watch", and Brown said something about "scratchings" on the back of the watch. The watch was taken from him and accused was then taken before the company commander who asked for his billfold. This officer took therefrom one "blue seal" ten-dollar bill and some other money which he put in an envelope (R. 51). He did not get a fountain pen, pocket knife or any money from Schreffler. He made no threats against him when he got the watch. While under arrest, he sent for Schreffler (R. 51) in order to make certain that he was the man that sold him the watch; that at that time he asked Schreffler whether they could not make some kind of an arrangement since he did not steal the watch but had bought it from a soldier. He further offered to pay him for the pen that he had lost (R. 52,60). He never stole anything from Schreffler and never told anybody that he had done so nor did he ever threaten Schreffler with a knife (R. 52).

Accused testified concerning the Ramler incident that he was not in Oran on 18 January and had never seen Ramler before he saw him in the "C.I.D." office. He never attacked Ramler with a knife nor did he take any money from him (R. 53,67).

He testified further, concerning the third incident, that he met Beckman on the night of 21 January at the colored Red Cross and that they went out and had a few drinks together (R. 53). They then joined some other soldiers with whom they drank some cognac. He and Beckman then walked to a field in order to "get laid" but could not find anybody there and started

**CONFIDENTIAL** 62466  
-5-

**CONFIDENTIAL**

back to the road. At a place about 100 or 200 feet from "D Road", Beckman grabbed and tripped accused, put his legs on accused's elbows and removed ten dollars from the latter's pocket. Beckman then ran away with accused in pursuit shouting, "If I catch you I'll kill you for taking my money". He overtook Beckman where some French people were standing. At that time accused had a knife in his hand which was not open, but with which he would have considered cutting Beckman if he had had "time" (R. 54,61). The "M.P.'s" came along and searched Beckman who did not have the money although accused had told them Beckman had gotten ten dollars from him. They took the knife from accused (R. 54). In addition to this knife he had another which he had brought from the "States" and carried to clean his "fingernails and things like that" (R. 57). He signed a statement which contained everything he said at that time but did not read the statement before he signed it nor did anyone else read it to him. Everything he said in that statement was true. The money he said he sent home was obtained by gambling (R. 56). He had not been paid for several months because he had to make good a charge of \$135.00 when it was necessary for the "M.P.'s" to "come after" him while he was "AWOL" before coming overseas (R. 59).

He testified further that when he made a statement to the "C.I.D." non-commissioned officer on 22 January, he did so after the latter said that he wanted him to make a statement but that accused was not warned of his rights in any way (R. 62,69). He did not tell this noncommissioned officer that he could not read or write (R. 65). He signed the statement about a week or two later in the presence of a Lieutenant Ganley (R. 64,65,69,74), who did not tell him that he did not have to sign the statement (R. 74). The only time the statement was read to him was in the courtroom (R. 64).

Master Sergeant Edmund Kirk Morrow, 13th Replacement Battalion, testified that accused had asked some of the men to read letters for him from his wife and that he had read letters at the request of accused (R. 86,87). Technician Fourth Grade Walter Lee Larson, of the same battalion, testified that accused had asked him to write letters for him and that he knew that another noncommissioned officer had written two or three letters for accused (R. 87,88).

4. There is evidence that at the place and time alleged in the Charge and its Specification, accused forcibly, by putting him in fear and without his consent, took from the person of Sergeant Norris T. Schreffler, the person named in the Specification, the money and articles as alleged and substantially of the values averred. The value of the fountain pen taken was not shown. There was proof that the larcenous taking by accused was accomplished by menacing his victim with an open knife, thus creating a well founded apprehension of present danger which warranted the victim in making no resistance. Accused denied the robbery but the court was warranted in rejecting as improbable his denials, especially in the light of his conflicting testimony as to how he came into the possession of the stolen watch and his sudden enrichment practically contemporaneously with the commission of the crime. The elements of robbery were sufficiently proved. Accused was properly found guilty as here alleged (MCM, 1928, par. 149f).

**CONFIDENTIAL**

**CONFIDENTIAL**

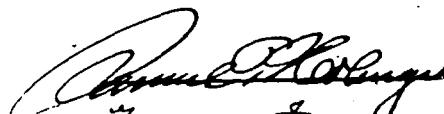
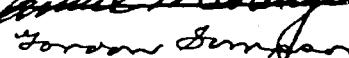
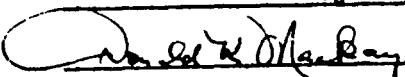
(357)

There is also evidence that at the place and time alleged in Additional Charge I and its Specification, accused forcibly, by putting him in fear and without his consent, took from the person of Technician Fifth Grade Russell S. Ramler, the person named in this Specification, money in amount substantially as averred. There was proof that accused cut Ramler on the neck, pursued and overtook him as he fled, threw him to the ground and after threatening his life if he made an outcry, searched his victim and robbed him of American and French currency. Ramler testified he was in fear of his life and the court was warranted in concluding that this fear arose from a reasonably well founded apprehension of present danger. The court was also justified in rejecting as improbable accused's claim that he had never seen Ramler before the occasion when the robbery was being investigated and further that he had neither attacked Ramler with a knife nor taken any money from him. The elements of the crime of robbery were sufficiently established. Accused was properly found guilty as alleged (MCM, 1928, par. 149f).

It further appears from the evidence that at the place and time alleged in Additional Charge II and its Specification, accused was drunk and disorderly in uniform in a public place. The testimony of accused itself demonstrates that he was creating a considerable disturbance on the St. Eugenie Highway at the time alleged and accused admitted in both his statements and his testimony that he had been drinking. He testified that at the time he was pursuing another soldier with a knife and there is other substantial evidence that he was drunk and disorderly. It is reasonable to infer that he was in uniform.

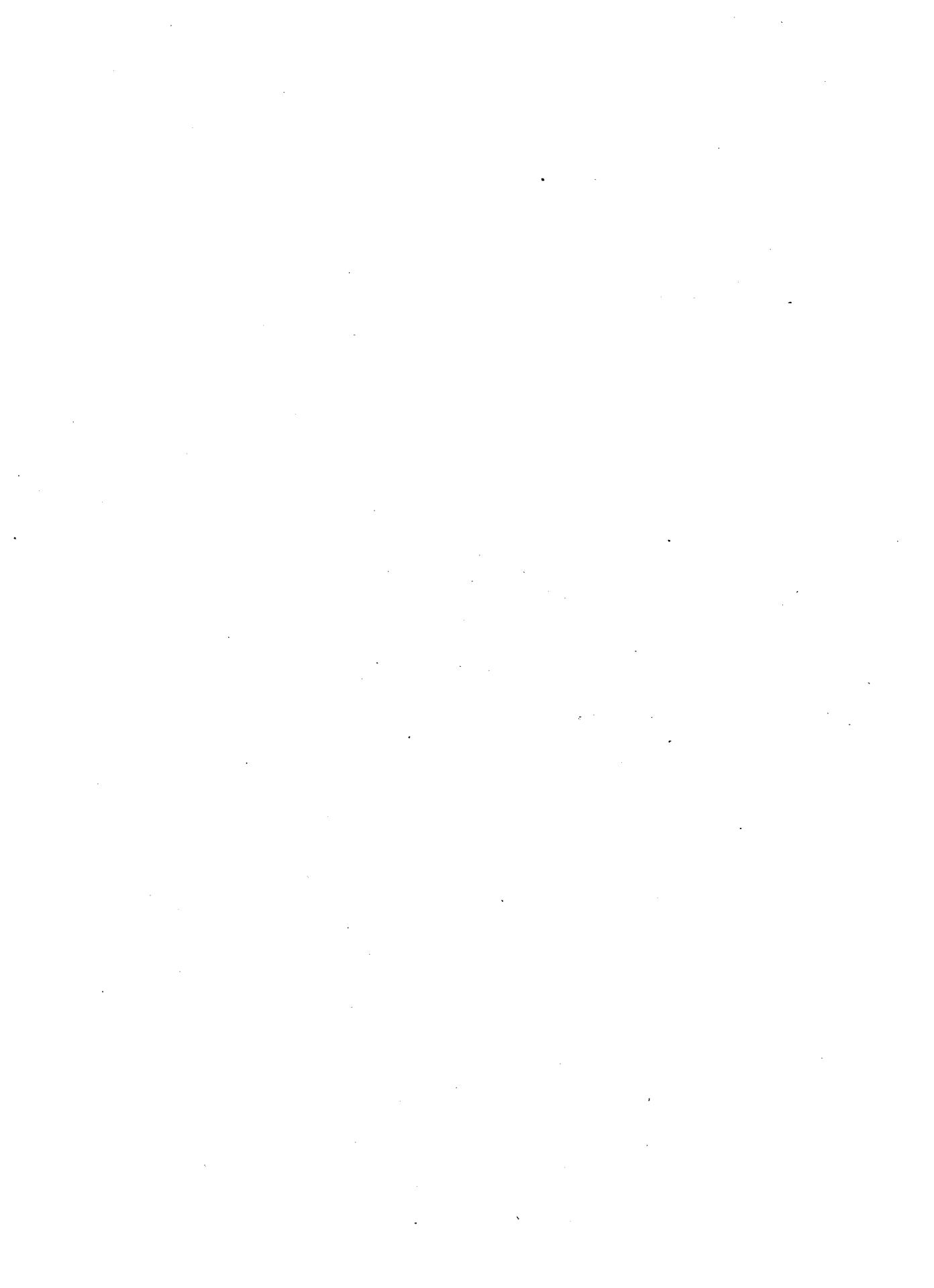
5. The charge sheet shows that accused is 25 years old. He was inducted into the Army 4 November 1941, and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

 James D. Hargan, Judge Advocate.  
 Gordon Simons, Judge Advocate.  
 Donald K. McRae, Judge Advocate.

**CONFIDENTIAL**

282466



Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

~~CONFIDENTIAL~~

APO 534, U. S. Army,  
12 May 1944.

Board of Review

NATO 2045

U N I T E D   S T A T E S	)	45TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at
Private JAMES H. SANDERS	)	Anzio Beachhead, Italy,
(35 119 066), Battery D,	)	19 April 1944.
106th Antiaircraft Artillery	)	Dishonorable discharge and
Automatic Weapons Battalion.	)	confinement for 15 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

---

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates..

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Pvt. JAMES H. SANDERS, Battery D, 106th AAA AW BN, did at Stageing Area four (4) miles northeast of Ferryville North Africa on or about 11 July, 1943 desert to Service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit; amphibious operations and did remain absent in desertion until returned to organization by Personnel Center #6, on February 13, 1944.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, except the words "desert the service of the United States by" and "with intent to shirk important service, to wit, amphibious operations" and "in desertion", substituting for the first and third

267560

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~

exceptions respectively, the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty; not guilty of the Charge, but guilty of a violation of Article of War 61. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 15 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on or about 11 July 1943, accused was a member of Battery D of the 106th Antiaircraft Artillery Automatic Weapons Battalion which had been located in the vicinity of Ferryville, Tunisia. Having been in the hospital, he returned to the Battery on 10 July 1943, on which date the majority of the men of the battery, who comprised the first or "assault" wave, left. It was general knowledge they were en route to Sicily. Accused was told to wait and come with the second wave which was to land on "D plus 5" (R. 4,9). About 1300 hours, 11 July 1943, accused was reported missing and was not with his battery again until February 1944. He did not have permission to be absent (R. 5,9). The organization was in combat in Sicily and later in Italy where it suffered casualties (R. 5,6). One member of the battery testified that he saw accused "at the 5th Army Rest Camp" at Naples in December, but that accused did not return to his organization until after it was "up here" (Anzio Beachhead, Italy) (R. 10).

An extract copy of the morning report of accused's organization, introduced without objection, showed the following entries:

"July 11/43 - Pvt Sanders Dy to AWOL 1400 hrs. \*\*\*

Feb 13/44 - Pvt Sanders Reasgd and Jd orgn fr Pers Center #6" (Ex. A).

Accused testified he left without a pass, "to get something to drink". He "got to drinking" and "hitchhiked" to "Bon", a distance of about 100 miles. He stayed in "Bon" for about a week and as he was "pretty tired", he "turned into the MPs to let them take me back". He had known that part of his battery had left and that the rest of the battery was getting ready to go (R. 13,14) to Sicily (R. 11). He also testified that at "Bon"

"I turned into the MPs where I was kept for thirty-six days. I told them my outfit was going on an invasion and I told them where they were located. They kept me in the guardhouse anyhow and later brought me to a replacement center near Bizerte. They kept me there then for sometime before they shipped me to Sicily" (R. 13).

and that

"There I got off-limits and they picked me up again and put

267560

~~CONFIDENTIAL~~

me in the stockade for eight more days. When I got out of there, I came over here to Naples and went to the replacement center there. I've been there ever since until I came back to my outfit. I was trying to get out of there but they wouldn't ship me. Others from the outfit came and went but they kept me until one day one of the sergeant's came to the replacement center for some of the boys and he took me with them" (R. 12).

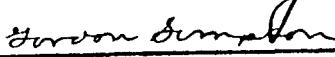
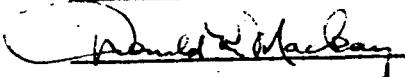
4. It thus appears from uncontradicted evidence that at the place and time alleged, accused absented himself from his organization without proper authority and remained unauthorizedly absent therefrom until he rejoined it over seven months later as averred. Accused testified that he was under military control within various units other than his original organization for most of the period of his absence. His testimony finds support in part in the morning report entry of his organization showing that he was reassigned to his company on 13 February 1944, and rejoined it from a personnel center. It is, however, unnecessary to determine the legal propriety of the findings of absence without leave during the entire period alleged, for the offense was complete when accused absented himself without leave (NATO 1087, Lapiska) and the legality of the sentence does not depend upon the duration of the absence (MCM, 1928, note, p. 97).

5. Evidence of two "previous convictions" by summary courts-martial, one for absence without leave from 30 December 1943, to 1 January 1944, and one for breach of restriction on 9 November 1943 (R. 16), was erroneously received by the court. The commission of the offenses involved in these previous convictions followed and did not precede the commission of the offense for which accused was on trial. Evidence of previous convictions must

"relate to offenses committed during a current enlistment, appointment, or other engagement or obligation for service of the accused, and in case of an enlisted man during the one year, and in the case of others during the three years next preceding the commission of any offense charged"  
(MCM, 1928, par. 79c). (Underscoring supplied.)

6. The charge sheet shows that accused is 21 years of age, that he was inducted into the Army 4 March 1941, and had no prior service. He stated he was inducted 3 March (R. 16).

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

  
Donald P. MacKay, Judge Advocate.  
  
Gordon Simpson, Judge Advocate.  
  
R. H. St. John, Judge Advocate.

267560



(363)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army.  
9 May 1944.

Board of Review

NATO 2046

U N I T E D   S T A T E S	)	45TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at
Private RALPH J. JAMRUSKA (36 305 255), Company F, 179th Infantry.	)	APO 45, U. S. Army, 18 April 1944.
	)	Dishonorable discharge and confinement for 20 years.
	)	Eastern Branch, United States Disciplinary Barracks,
	)	Greenhaven, New York.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Ralph J. Jamruska, Company F, 179th Infantry, did, at APO 45, U.S. Army (more particularly the vicinity of Anzio Beachhead, Italy) desert the service of the United States, on or about 11 February 1944, by absenting himself from his organization without proper authority with intent to avoid hazardous duty, to wit: engage with the enemy, and did remain absent in desertion until he was returned to military control on or about 20 February 1944.

CHARGE II: Violation of the 61st Article of War.

Specification: In that Private Ralph J. Jamruska, Company F,

270796

CONFIDENTIAL

CONFIDENTIAL

179th Infantry, did, without proper leave, absent himself from his post and duties at APO 45, U.S. Army (more particularly the vicinity of Piedmonte, Italy) from about 12:50 PM, 17 January 1944 to about 6:30 PM, 18 January 1944.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years, three fourths of the members present concurring. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. As to the Specification, Charge I, the evidence shows that on 11 February 1944, accused was a rifleman in the 2d Platoon, Company F, 179th Infantry, which was located "in the first bivouac area that the Division landed in back by the coast" on "the Beachhead". The company had received orders to move that night to a forward assembly area and preparations for the move were being made (R. 4,7). The orders had been made known to the whole company. They were "striking tents and rolling rolls" and "were supposed to move out" at about 2100 hours (R. 5). At 2300 hours, the company moved to the forward assembly area which was "near the front", approximately two and one-half miles from the enemy, where they received some artillery fire. Accused did not accompany his organization to the assembly area. Neither his first sergeant nor his company commander had given him permission to absent himself. On 13 February, the company went into combat in which it sustained about 100 casualties. After "the big push", around 19 or 20 February, accused was returned to the company by the mess sergeant (R. 5,6,8). An extract copy of the morning report of his company, admitted without objection, contained the following entries respecting accused: "Duty to AWOL 2100 Feb 11/44" and "AWOL to confinement to stockade Feb 20/44" (R. 4; Pros. Ex. B).

As to the Specification, Charge II, an extract copy of the morning report, similarly admitted, shows accused was absent without leave from his company from 1250 hours 17 January 1944, to 1830 hours the following day (R. 4; Pros. Ex. A). This absence occurred near Piedmonte, Italy (R. 6,9).

The defense introduced a report of a psychiatric examination of accused containing the diagnosis "Constitutional psychopathic state, chronic alcoholism (Private has poor judgment & is unable to profit by experience)". The report states accused's "attitude is one of apparent indifference" and, that at the time of the offense he was not suffering from a defect of reason resulting from a disorder of the mind. A discharge under "Section Eight AR 615-360" was recommended (R. 10; Def. Ex. I).

Accused elected to make the following unsworn statement:

270796

CONFIDENTIAL

"In pleading not guilty on the first charge to desertion because I did not have any intent of deserting, and had gone to the company on 20 February to the kitchen with the mess Sgt. and the Captain got mad at me and told me to go in with the M.P.'s and they would take care of me. I was with the M.P.'s a while and one day I talked with Captain Watkins and said I would like to go back up front. I might as well go up there and try and redeem myself and maybe it will be a little easier on me. The Captain sent the Lt. up and said that Captain Ness would not do anything. I wanted to go up front but as things were the Captain wanted me to stay with the M.P.'s. My eyesight is kind of bad. It has always been off and everybody tells me I am cross-eyed. When we had the other Company Commander he used to take it easy on me on account of my eyesight. At night I can't see very good. I guess that's all" (R. 11).

4. It thus appears from the uncontroverted evidence that on "the Beachhead" (at Anzio, Italy) and at the time alleged in the Specification, Charge I, accused absented himself from his organization without proper leave and remained unauthorizedly absent for the period of time averred. There is evidence that the entire company had been informed on 11 February 1944, of the orders to go forward that night to a forward assembly area. Preparations were made and that night the movement was executed. The company subsequently entered into combat and suffered severe losses. It is a matter of common knowledge that during the period involved, the entire beachhead at Anzio was under enemy fire and attack, and that the fighting there was severe. Accused did not accompany his organization and did not rejoin it until about nine days later after "the big push" was over. The conclusion that he had absented himself with the specific intent of avoiding the hazardous duty alleged is fairly inferable from these and the other circumstances in evidence. He was properly found guilty as here specified (AW 28).

It also appears from uncontroverted evidence together with his plea of guilty, that at the place and time alleged in the Specification, Charge II, accused absented himself from his organization without proper leave and remained unauthorizedly absent for the period alleged.

The diagnosis in the psychiatric report did not raise any issue as to the sanity of accused (MCM, 1928, par. 63).

5. In the Specification, Charge II, accused is charged with absenting himself "from his post and duties" rather than from his command, guard, quarters, station or camp. The use of the quoted words rather than those of Article of War 61, under which the Specification was laid, is not usual nor the preferable manner of pleading this offense. However, the Specification does describe substantially an absence from command for a certain period. This is the gravamen of the offense charged. Accused was in no sense misled by the language employed (NATO 1087, Lepiska).

CONFIDENTIAL

6. Accused stated his name is spelled Jamruszka, not Jamruska as it appears on the charge sheet (R. 12).

7. The charge sheet shows that accused is 23 years old and was inducted into the Army 6 December 1941.

Accused stated he was inducted on 14 November, and that 6 December 1941 "is the date of my re-enlistment in the regular army" (R. 12).

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

Ramsey K. McRae, Judge Advocate.  
James J. Murphy, Judge Advocate.  
Donald R. Shulberg, Judge Advocate.

CONFIDENTIAL

270796

~~CONFIDENTIAL~~  
Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

(367)

APO 534, U. S. Army,  
20 May 1944.

Board of Review

NATO 2047

U N I T E D   S T A T E S

v.  
Private JOHN E. PLANTE  
(31 017 298), Battery B,  
36th Field Artillery.

) VI CORPS

) Trial by G.C.M., convened at  
APO 306, U. S. Army, 12 April  
1944.  
Dishonorable discharge and  
confinement for 30 years.  
Eastern Branch, United States  
Disciplinary Barracks,  
Greenhaven, New York.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

-----  
1. The record of trial in the case of the soldier named above has  
been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 64th Article of War.

Specification: In that Private John E. Plante, Battery "B" 36th  
Field Artillery, having received a lawful command from  
Captain James C. Maguire, Battery "B" 36th Field Artillery,  
his superior officer, to drive his jeep to the observation  
post, did at vicinity of Caiazzo, Italy, on or about 0700  
hours, 23 October 1943, willfully disobey same.

CHARGE II: Violation of the 75th Article of War.

Specification: In that Private John E. Plante, Battery "B" 36th  
Field Artillery, did at vicinity of Venafro, Italy on or  
about 1600 hours, 19 November 1943, run away from his battery,  
which was then engaged with the enemy, and did not return  
thereto until apprehended at Naples, Italy on or about 21  
November 1943.

~~CONFIDENTIAL~~

269900

**CONFIDENTIAL**

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for a period of 30 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on the date alleged in the Specification, Charge I, accused was a member of Battery B, 36th Field Artillery (R. 9). The location of the battery at the time is not disclosed. The battery executive officer, a lieutenant, testified that he occupied a wall tent with "Captain Maguire", the battery commander, that accused lived in a pup tent 15 yards away, and that while witness was lying in bed on the morning of the date in question he heard "the guard" call accused and tell him "to get up and go to the O.P." (R. 6). Witness testified that he did not hear accused's reply but heard "the guard" call a Sergeant DePrater, chief of the detail, and heard Sergeant DePrater tell the guard to tell accused that "if he would not go to the O.P. he must report to the Battery Commander" (R. 7). In about 15 minutes accused entered the tent occupied by witness and Captain Maguire, the battery commander, and stated that he would not go to the "O.P.", whereupon the battery commander said to him,

"Well, now, I am your battery commander and your superior officer and I give you this lawful order to go to the O.P. this morning with the O.P. party."

Before the battery commander finished this statement, accused said, "I refuse to go". He did not do so, insofar as witness knew. Accused was placed in arrest (R. 7). In response to a question as to whether accused gave any reason for refusing to go to the "O.P.", witness testified that accused gave his "usual type" of reason, that "he was sick or something was the matter with him. Nothing serious." Witness was then asked if the battery commander at that time gave this reason "sufficient thought to send this man for an examination" and witness replied:

"In my estimation, he did. You see, this is the culmination of a series of events in which Pvt. Plante had refused to drive to the O.P. He said shells bothered him. He had spoken to me and Capt. Maguire about that before and the result was we weren't too impressed with that and every time he was told to go up he would get out of it because he had a headache or something. As a matter of fact, Capt. Maguire sent him to the Battalion Surgeon to see what was the matter with him and he sent him back" (R. 8).

The executive officer further testified that on the date alleged in the Specification, Charge II, the battery was "up in the Venafro valley" and was being shelled by the enemy (R. 7). About 1730 hours the shelling ceased and march order was given (R. 7). At that time the chief of detail,

**CONFIDENTIAL**

**CONFIDENTIAL**

Sergeant DePrater, reported to the witness that accused was missing (R. 7). The witness testified that he then

"told Sgt. DePrater to get somebody to look around for him. We were quite busy. He sent Sgt. Riley and one other man to look for him. They came back later and said they had looked in his slit trench and where his pup tent was but could not find him" (R. 7).

Accused did not appear with the battery later that afternoon and witness did not see accused again until the day of the trial, 12 April 1944 (R. 7).

The instrument sergeant of the battery of which accused was a member testified that on the date alleged in the Specification of Charge II, 19 November 1943,

"We had been under a terrific shell barrage and had received a march order. Since Pvt. Plante was in our section we went to look for him to take him along with us, and he wasn't near his tent or his slit trench and fearing he might have been hit we searched the area for him" (R. 10).

Witness was then asked if he made "a personal search of the area" and replied "I didn't make a personal search" (R. 10). The witness testified further that although he continued to serve as instrument sergeant of the battery until "March 8th" he could not "say the date" he last saw accused after the "19th of November" but recalled that it was "at an M.P. station" "at Cagliari" (R. 11).

An officer in accused's battery testified that on 21 November 1943, when in Naples, Italy, he recognized accused, took him into custody and turned him over to military authorities there (R. 11,12). When arrested accused appeared calm, collected and "nonchalant" (R. 13). He said he had come to Naples and was staying with an "engineer outfit". He had no authority to be in there (R. 11,12).

According to the stipulated testimony of a Captain Verner, 36th Field Artillery Regiment, offered by the defense, that officer saw accused on "22 October 1943 at about 1500 hours with a note from Captain Maguire to examine him, as he had refused to go to the OP because of appendicitis" (R. 13,14). Captain Verner found accused "highly apprehensive" and complaining of pain. His symptoms were "highly exaggerated", but witness found that he had "a slight increase of muscle tone over the appendix region which was not voluntary". Witness later reported to the company commander that witness "could only suggest one or two days rest" and that accused "had a mild subsiding appendicitis and was highly apprehensive but not pathologically so" (R. 14).

Two psychiatric reports on accused were, by stipulation, read in evidence, one by the defense and one by the prosecution. Both appear to have been made by the same medical officer and to have been based on

**CONFIDENTIAL**

observation of accused from 27 December 1943 to 18 January 1944. The dates of the respective reports are not shown in the evidence. The report offered by defense states that on 19 November 1943 accused,

"had become so disturbed under the effect of shell fire that he was no longer under the control of his own will. In my opinion he is suffering from: Psychoneurosis hysterical type - panic reaction - battle precipitated" (R. 14).

and that his mental state was such that he was unable to refrain from his wrongful acts (R. 15). The report further states that in the opinion of the examining officer accused was able to comprehend the nature of the proceedings of a court-martial and, with assistance of counsel, conduct his defense, and that at the time of the alleged offense of 19 November accused was not suffering from "a defect of reason resulting from disorder of the mind", but because of the above neurotic condition he "would be unable to control his acts and could take off in a flight (run-away panic reaction)" (R. 14,15).

The psychiatric report read in evidence by the prosecution states that as of "22 October 1943" accused

"was becoming tense and emotionally unstable, but not sufficient to justify a diagnosis of a formal psychiatric disorder. In my opinion he is suffering from: Emotional instability with inadequate personality. He is an unstable person who when the going becomes difficult becomes upset and takes off with no regard for authority or consequences." "He was under good control at the time" (R. 16).

This report states further that in the opinion of the examining officer accused was able to comprehend the proceedings of a court-martial and, with assistance of counsel, direct his defense and was not, at the time of the alleged offense of 22 October, suffering from "a defect of reason resulting from disorder of the mind" and his mental state was not such that he was unable to refrain from such act (R. 16,17).

Accused elected to remain silent (R. 18).

4. It thus appears from uncontroverted evidence that at the time alleged in the Specification, Charge I, accused, having received a lawful command from "Capt Laguire, the Battery Commander", to go to an observation post, willfully disobeyed that command.

It was alleged that accused received the order which he was shown to have disobeyed from "Captain James C. Laguire" and that the command was "to drive his jeep to the observation post". The officer who gave the command was sufficiently identified as the officer alleged in the Specification despite the failure to prove his first name or initials. And the order "to go" to the observation post, which the evidence established, was substantially the same as that alleged. The essence of the command was the

CONFIDENTIAL

**CONFIDENTIAL**

directive to go to the observation post, and the manner of going, whether by "jeep" or otherwise, was inconsequential. There is no material variance here. Nor is the absence of proof of the place of the commission of this offense of any moment. The controlling consideration is the willful refusal of accused to proceed as lawfully directed by his superior officer and it is unimportant where the command was given and disobeyed. Accused was in no sense misled or injured by the deficiencies in proof (Underhill's Crim. Ev., 4th Ed., p. 106; Wharton's Crim. Ev., 11th Ed., p. 1799; NATO 1461, Sulewski; NATO 1279, Alex; NATO 44, Gilbert).

There is testimony that at about the time of this offense accused was "apprehensive", complained of pain, and gave some evidence of a physical disorder. There is nothing to indicate that he was not physically capable of performing the duty required by Captain Maguire's command.

It further appears from uncontradicted evidence that at the place and time alleged in the Specification, Charge II, accused left his battery while it was engaged with the enemy and remained absent until he was apprehended in Naples two days later. The unit had been subjected to heavy enemy artillery fire. It was when this shelling ceased and the battery received orders to move that accused was found to be missing. He was later found in Naples where it was shown he had no authority to be. The court was warranted in concluding that accused was serving in the presence of the enemy and that he misbehaved himself by running away as alleged (L.C.M., 1928, par. 141).

5. The stipulated testimony of Captain Verner was to the effect that when that officer saw him on 22 October accused was "highly apprehensive". It is not suggested by this testimony, however, that accused was suffering from any mental disorder affecting his responsibility for his conduct on that date. The report by the psychiatrist pertaining to the condition of accused on that date contained a conclusion, moreover, that accused was then capable of distinguishing right from wrong and of adhering to the right, although emotionally unstable to a certain degree.

The report of the psychiatrist pertaining to the condition of accused on 19 November contains a conclusion that on that date accused's mental control had deteriorated to the extent that he was unable to refrain from his wrongful acts. Paragraph 78a of the Manual for Courts-Martial, 1928, provides that:

"A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right".

It was necessary for the court therefore to determine whether accused was, on 19 November 1943, so far free from mental defect, disease or derangement as to be able to adhere to the right. In the determination of this issue it was quite proper for the court to consider the opinion of the psychiatrist.

5  
**CONFIDENTIAL**

**CONFIDENTIAL**

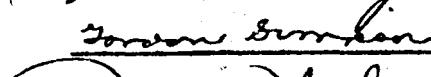
It was the duty of the court also to consider the facts in evidence in the light of its own knowledge of human motives and behavior under battle conditions (Dig. Op. JAG, 1912-40, sec. 395 (3)). Accused ran away from his battery while it was under severe artillery fire. He had previously stated that "shells bothered him", and he had, upon the basis of an exaggerated sense of physical disability, refused to obey an order by his battery commander which would have taken him nearer the front. An officer who saw accused in Naples, Italy, two days after he had run away from his battery, testified that accused appeared to be calm, cool and nonchalant. Upon all the evidence it was within the province of the court to find that at the time of his offense accused was mentally capable of distinguishing right from wrong and of adhering to the right.

6. The charge sheet shows that accused is 25 years old; that he was inducted into the Army of the United States 21 February 1941, and had no prior service.

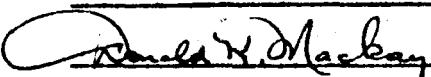
7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.



Donald W. MacKay, Judge Advocate.



Gordon S. Morrison, Judge Advocate.



Donald W. MacKay, Judge Advocate.

**CONFIDENTIAL**

(373)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
13 May 1944.

Board of Review

NATO 2114

U N I T E D   S T A T E S	)	45TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at
Private TRUMAN C. BURGESS	)	Anzio Beachhead, Italy,
(20 832 933), Headquarters	)	21 April 1944.
Battery, 171st Field Artillery	)	Dishonorable discharge and
Battalion.	)	confinement for 20 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Truman C. Burgess, Hq. Btry. 171st F.A. Bn., did at Sesto Compano, Italy on or about 14 November 1943 desert the service of the United States by leaving his assigned duty as driver of Liaison Section #2, while being on duty with 180th Inf. at a C.P. which was then engaged against the enemy, with intent to absent himself without proper leave from his organization in order to avoid hazardous duty, did remain absent until he surrendered himself to the military authorities at Naples, Italy on or about 18 January 1944, after the engagement was concluded.

CHARGE II: Violation of the 75th Article of War.  
(Disapproved by the reviewing authority.)

(374)

Specification: (Disapproved by the reviewing authority.)

CHARGE III: Violation of the 94th Article of War

CONFIDENTIAL

Specification: In that Private Truman C. Burgess, Hq. Btry. 171st F.A. Bn., did at Sesto Compano, Italy on or about 14 November 1943, knowingly and without proper authority willfully apply to his own use and benefit a Ford & C&R USA W-20207090 of a value of about \$800.00, property of the United States furnished and intended for the Military service thereof.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 80 years, three fourths of the members of the court present concurring. The reviewing authority approved only so much of the "findings as finds the accused guilty of the specification and charge, Charge I and and the specification and charge, Charge III", approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 14 November 1943, near Sesto Compano, Italy, accused was on duty as a "peep" driver in the "Liaison Section" of Headquarters Battery, 171st Field Artillery Battalion, which was at the time "supporting" the 180th Infantry Regiment (R. 4,5,6,9). One witness described accused's duties as follows:

"He drove this peep, sir, a wire peep. We ran lines between the Field Artillery CP and the Infantry CP and we used his peep for that. He remained in the Infantry CP at all times for us to call on him for wire, or to haul rations or water or anything like that" (R. 7).

In the discharge of his duties it was a "pretty common" occurrence for accused to come under fire (R. 7). Headquarters Battery was "in a valley on the left side" of Venafro and the command post of the 180th Infantry was about four or five miles away "under the hill on which Sesto Compano is located" (R. 9). One of the noncommissioned officers of the battery testified that the battalion was engaged in combat and was "shelled practically every day there at Venafro after the 14th of November" (R. 6,7). This non-commissioned officer also testified that on 14 November the battery had "just been pulled off the lines for a few days" but still had a liaison officer with the infantry which was "in rest" but both the artillery and infantry units were expected to go back into combat shortly. Wire communication between the units was being maintained at the time. The liaison section of Headquarters Battery was assigned not only to the infantry regiment but also to a "Ranger Battalion" and when so assigned, it was "subject to call at any time" (R. 10).

CONFIDENTIAL

A noncommissioned officer of his battery testified "relative to accused" that on or about 14 November 1943,

**CONFIDENTIAL**

"we came back to the rear echelon. We had been on the front for 14 or 15 days and we came back there to stay awhile. We pulled in at the kitchen and there was no place to park our vehicle there and he went to search for the motor park which was about three or four hundred yards away. He left then to go to the motor park. \*\*\*Later when Burgess did not come back we checked the motor park and we saw the peep was gone" (R. 5).

Accused had no authority to take the vehicle to any place other than the motor park (R. 8,9). A search for accused was conducted the following day and neither he nor the "peep" could be found (R. 5). The vehicle was next seen in the battery area about 28 or 29 December. In the meantime, the unit had again been in combat (R. 6).

On 18 November 1943, accused, driving a Headquarters Battery vehicle, a "quarter-ton peep", was seen by the first sergeant of Battery A, 171st Field Artillery Battalion, about two and a half miles from Venafro, going away from the battery location (R. 11).

The morning report of accused's organization, which was introduced in evidence without objection, showed that he absented himself without leave 14 November 1943, was dropped from the rolls as an absentee 13 December 1943, and was reassigned to his battery and placed under arrest 19 January 1944 (R. 4; Ex. 4).

A battalion warrant officer went to the 101st Military Police Motor Pool in Naples about 10 or 15 December and "found this peep and brought it back". It had the same number as the vehicle which had been reported missing. This warrant officer testified that it "was the one that was reported to us as being missing" (R. 13). He also testified that the value of a quarter-ton "C & R Car" was \$1470.00 (R. 13,14).

Accused remained silent (R. 14).

4. It thus appears from the uncontradicted evidence that at the place and time alleged in the Specification, Charge I, accused absented himself from his organization and duties without leave and remained unauthorizedly absent until on or about 18 January 1944. There is proof that he was on duty as a driver for a liaison section of his battery which had been lending artillery support to units of the 180th Infantry Regiment in an action near Sesto Campano, Italy. His place of duty was at the infantry command post "at all times" except when hauling wire, rations, water or other provisions. On these missions it was not uncommon for him to encounter enemy fire. Although accused's battery and the infantry unit to which his section was attached for liaison duty had withdrawn from the front lines at the time accused absented himself, there is evidence from which it could be inferred that they were then still subject to artillery fire and moreover were

**CONFIDENTIAL**

CONFIDENTIAL

expecting to go back into combat shortly. The court was warranted in its conclusion that under these and all the other circumstances in evidence, accused entertained the specific intent of avoiding hazardous duty when he absented himself.

It was alleged that accused's unauthorized absence was terminated by surrender but the proof does not show how he was returned to military control. Where, as here, the gravamen of the offense is the quitting of his organization with intent to avoid hazardous duty, the manner of the termination of the unauthorized absence is not of controlling importance (AW 28; MCM, 1928, par. 130a).

It further appears from uncontradicted evidence that at the place and time alleged in the Specification, Charge III, accused willfully and without proper authority applied to his own use a "quarter-ton jeep", also described in the evidence as a "C & R" car, property of the United States furnished and intended for the military service thereof. The evidence shows that the duties of accused included the operation of this car and that when directed to leave it in a motor pool, he drove the vehicle away without authority and it was not returned to the organization to which it was assigned until about six weeks later. The Specification alleges the make and number of the vehicle in question but the proof does not supply these descriptive details. It does sufficiently appear, however, that accused wrongfully took and used an automobile of the kind alleged. Its value was shown to be in excess of the amount pleaded. All material elements necessary to establish accused's guilt were sufficiently proven. He was properly found guilty as charged (MCM, 1928, par. 150i).

5. The charge sheet shows that accused is 23 years old. He enlisted in the Oklahoma National Guard on 2 July 1940. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

 Judge Advocate.  
Howard L. Johnson, Judge Advocate.  
Daniel H. MacLean, Judge Advocate.

CONFIDENTIAL

**CONFIDENTIAL**

(377)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
22 May 1944.

Board of Review

NATO 2121

U N I T E D   S T A T E S	)	EASTERN BASE SECTION
v.	)	Trial by G.C.M., convened at
Private PHILLIP FIELDS	)	Bizerte, Tunisia, 14 April
(38 262 817), 3894th	)	1944.
Quartermaster Gas Supply	)	Dishonorable discharge and
Company.	)	confinement for life.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.  
-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 92d Article of War.

Specification 1: (Finding of not guilty.)

Specification 2: In that Phillip Fields, (P)Rivate, 3894th Quartermaster Gas Supply Company, did at Douar el Merazig, near Bizerte Tunisia, on or about the 12th day of September 1943 aid and abet Willie Griffin, Private Adrian Mercier and Private David Johnson, all of the 3894th Q M Gas Supply Company (formerly Co B, 209th Quartermaster Battalion) in the forecibly and feloneously and against her will having carnal knowledge of Mabrouka, a young Arab woman, by the said Privates Griffin, Mercier and Johnson.

Accused pleaded not guilty to the Charge and the Specifications. He was found not guilty of Specification 1 and guilty of the Charge and Specification 2 thereunder. No evidence of previous convictions was introduced.

**CONFIDENTIAL**

267067

**CONFIDENTIAL**

He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 12 September 1943, from 13 to 15 colored American soldiers, including accused and Privates Willie Griffin, Adrian Mercier and David Johnson, all members of the 3894th Quartermaster Gas Supply Company, went to the home of one Abderrahman and his wife Mabrouka, an Arab woman, at Douar el Merazig, near Bizerte, Tunisia, in ostensible search for some enemy "paratroopers" who were believed to have landed the preceding evening. Accused was armed with a "tommy gun", one soldier had a pistol, the others had rifles (R. 6,7,8,9,12,15,16,24). Seven or eight of the soldiers, including Griffin, Mercier and Johnson entered the room where Mabrouka was. Without saying anything to her they took hold of her, threw her down and removed her clothing. Four of the soldiers had intercourse with her (R. 8,13,14,15). Mabrouka testified that when the first soldier got on top of her the others "took my arms and shoulders and they were laying me down", and that the penis of each of the four soldiers penetrated her. She "was crying and hollering most of the time". She testified:

"I cried and hollered and told my husband to come in, called my husband to come to my aid, told him that these soldiers are having an intercourse with me and I was very scared" (R. 13).

Mabrouka's husband, Abderrahman, and her brother-in-law heard her crying and "hollering", saying "come here, they are having an intercourse with me" - "these Americans are attacking me" (R. 7,8,27). Griffin, Mercier and Johnson were seen by the husband, one beside her on the ground, one on top of her having intercourse and the third "had her by the arms" (R. 8). The husband was in front of the door but was guarded by Griffin and later by another soldier who struck him on the chest (R. 7,13,37). Mabrouka was not able to identify accused or any of the soldiers who had intercourse with her. She testified:

"I was so excited and scared myself I didn't pay no attention, would not be able to know them, to identify them rather" (R. 14).

Three white American soldiers, also searching for "paratroopers", entered the room and there saw two colored soldiers have intercourse with the woman (R. 29,44,48). One of these soldiers testified that the woman was talking in a "medium tone of voice", and was not crying or making much noise, "just talking". Asked if he had any opinion "as to why the woman was talking in pleading tones", witness testified, "No, sir, some of the colored boys said she was wanting an Arab" (R. 29,32,33,34). This soldier also testified that the colored soldiers in the room were unarmed and though no one said anything to him he was afraid of them. He did nothing to help

**CONFIDENTIAL**

267067

**CONFIDENTIAL**

(379)

the woman. He did not stay in there long, just long enough to see that "one got off and the other one got on" "that woman" (R. 29,30). After being in the room for three or four minutes he and the other two left the building (R. 30,33,34,36) and found "this colored soldier with a tommy gun" arguing with some white soldiers (R. 32). Another white soldier testified the woman was not crying, remonstrating or objecting in any way (R. 47).

When Abderrahman was struck on the chest by one of the soldiers who guarded him he left and went to a searchlight battery a short distance away for help (R. 7,8). As he left he saw accused in the courtyard about 12 feet from the front of the house, armed with the "tommy gun" (R. 10,11,26). Abderrahman's brother testified that when Abderrahman had gone he saw accused standing by the door and saw him enter the room where he remained about five minutes, coming out before Abderrahman returned (R. 25,26,27,28).

Abderrahman went about half a kilometer or a kilometer to the area of the 354th Coast Artillery Searchlight Battalion where he told two white soldiers that somebody was "zig-zigging his mademoiselle" (R. 8,37,41). They armed themselves and with three other men from their organization followed Abderrahman toward the house (R. 37,38,41). When about 30 yards away they were stopped by accused armed with the "tommy gun", who asked their business (R. 38,41). Abderrahman testified that accused, the "soldier that had the tommy gun when I got to the house\*\*\*was around the house standing around" (R. 8,11).

Five witnesses, including a Staff Sergeant Walter Bell of accused's organization, testified that when the white soldiers told accused the Arab had reported to them someone was being raped, accused stated there was no rape occurring and that he had "a tommy gun to prove it" (R. 18,31,36,38,42,45). Bell testified accused was the "man leading" the argument and had "his tommy gun at port arms" (R. 18,19,20). It was not a "friendly meeting" for "the colored soldier that had the tommy gun" felt "pretty rough" (R. 30). A number of accused's organization were with him at that time including Mercier, Griffin and Johnson (R. 18,19). Two of the three white soldiers who had been in the room were also present at the "argument" (R. 32,45,49).

Accused testified that about 1300 hours 12 September 1943,

"We had orders to search for paratroopers and went back on the truck with Charles Arnold. I didn't get up to the house. I got off the truck and went off to the right and stood off to myself. I was standing over there at the time the Arab run and told the searchlight battery that they had some raping go(i)ng on at their house and they came over. When they came over, they come to me and they tell me about some raping going on. I told them there was no raping going on. I kept arguing there was no raping going on. After that Sergeant Bell came up and stopped the argument. We stood around a while. Then I left and went and got in my truck" (R. 52).

He denied entering the house, testifying that the closest he got to it was

**CONFIDENTIAL**

267067

**CONFIDENTIAL**

about 30 yards. Accused testified he did not see an Arab man near the house, did not see anyone come out of it and did not see any colored soldiers close to the house. He did not know that the Arab man was going for help but knew "the boys came there and told him". Accused testified further that he had a "tommy gun" which was the only one there. He did not stop the white soldiers when they came up; it was they who stopped and "wanted to tell me there was some raping going on". Accused testified he "didn't go in" the house and "hadn't seen" any rape being committed (R. 52, 53.54).

4. There is evidence that at the place and time alleged accused aided and abetted Privates Willie Griffin, Adrian Mercier and David Johnson while they, or at least one of them, aided by the others, forcibly and without her consent had unlawful carnal knowledge of Mabrouka, the woman named in the Specification. For a brief period of time accused was inside the room where the rape was committed and for most of the time he, armed with a submachine gun, stood outside the house in a position in which he might act as an outlook or guard. When white soldiers appeared on the scene at the solicitation of the woman's husband, accused held them at bay and when they remonstrated that raping was going on, accused in denying it threateningly stated he had "a tommy gun to prove it". It is shown that witnesses left the room while the assaults on the woman were still being committed and at a time when the argument was going on outside the house between the accused and the newly arrived soldiers. The accused's threatening conduct with respect to this incident evinces the purposeful role he had assumed, knowingly calculated throughout to prevent any interference with the acts of those of his companions who were perpetrating the rape upon the woman. His conviction of the offense as charged was justified (NATO 643, Moor).

5. Accused was charged, in violation of Article of War 92, with both raping and aiding and abetting the rape of Mabrouka, at the same place and time.

At the time of arraignment defense entered a special "plea":

"My plea is the duplicity of the charge, sir, of one transaction, substantially one transaction should not be made the basis of an unreasonable multiplicity of charges".

The court denied "the motion" (R. 5).

The court thus apparently treated the "plea" as a motion that the prosecution elect between the two Specifications. However, it is clear "a motion to elect--that is, a motion that the prosecution be required to elect upon which of two or more charges or specifications it will proceed--will not be granted" (MCM, 1928, par. 71a). Insofar as the plea by the defense was the equivalent of such a motion it was properly denied.

In the "plea" defense stated that the pleadings constituted an unreasonable multiplicity of charges. \*\*\*there are times when sufficient doubt as to the facts or law exists to warrant making one transaction the basis

**CONFIDENTIAL**

267067

**CONFIDENTIAL**

(381)

for charging two or more offenses" (MCM, 1928, par. 27). It would appear that there was here sufficient doubt as to the facts to justify such pleading. It might be disclosed that accused actually raped Mabrouka as well as aided and abetted others when they raped her. It may well be that the accuser did not choose to rely upon the fact that one who aids and abets the commission of rape may be properly charged and convicted as a principal (infra) and decided to set forth not technically but factually the offenses he charged. In any event the court found accused not guilty of Specification 1, thereby terminating any multiplicity that may have existed in the pleadings. The sentence imposed is the lesser of the punishments authorized for a conviction of either Specification and it cannot be said the substantial rights of accused have been injuriously affected by the ruling or the pleading (AW 37).

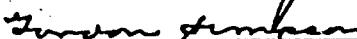
Accused could have been found guilty of rape, as one who aids and abets rape can properly be charged and convicted as a principal (NATO 385, Speed; NATO 1242, Jeffers, et al.). It is within the option of the pleader however, to charge the aiding and abetting as such, as was done here (NATO 1047, Henderson, et al.).

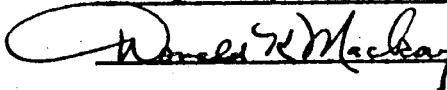
While there is a seeming inconsistency in finding accused not guilty of Specification 1, which alleged rape, and guilty of Specification 2, which at law is rape (by virtue of the statute making aiders and abettors principals), such findings do not have the legal effect of vitiating the conviction of Specification 2 (Dig. Op. JAG, 1912-40, sec. 395 (44); CM 197115, Frollich; CM 222652, Schroeder).

6. The charge sheet shows that accused is 25 years old. He was inducted into the Army 5 November 1942 and had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

  
James E. Chapman, Judge Advocate.

  
Vernon Simpson, Judge Advocate.

  
Donald R. Mackay, Judge Advocate.

**CONFIDENTIAL**



**CONFIDENTIAL**

(383)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
18 May 1944.

Board of Review

NATO 2139

UNITED STATES

v.

Private EDWARD GRABOWSKI  
(36 302 822), Company H,  
36th Engineer Regiment  
(Combat).

) VI CORPS

) Trial by G.C.M., convened at  
APO 306, U. S. Army, 25  
April 1944.  
Dishonorable discharge and  
confinement for life.  
Eastern Branch, United States  
Disciplinary Barracks,  
Greenhaven, New York.

-----  
REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Edward (NMI) Grabowski, Company "H" 36th Engineer Regiment (Combat) did, near Maiori, Italy on or about 23 September 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Salerno, Italy on or about 25 January 1944.

Specification 2: In that Private Edward (NMI) Grabowski, Company "H" 36th Engineer Regiment (Combat) did, at the front line 12 miles northwest of Anzio, Italy, on or about 6 March 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to

**CONFIDENTIAL**

268916

**CONFIDENTIAL**

avoid hazardous duty to wit: Combat duty as Infantry, and did remain absent in desertion until he was apprehended at Anzio, Italy on or about 22 March 1944.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. As to Specification 1 of the Charge, the evidence shows that on or about 23 September 1943 at Maiori, Italy, accused absented himself from his organization without leave and was not present with his command thereafter until approximately 12 February 1944 (R. 8,9,10,11; Pros. Ex. 1). His organization, with the exception of its motor pool and trucks, which were left as a rear echelon, had moved to an assembly area by Chiumzi Pass on 23 September to take part in an attack. A search for accused was made in both the assembly area and the rear echelon but he could not be found (R. 9,10,11). His company commander testified that accused had no permission to be absent from his organization between the dates of 23 September 1943 and 11 February 1944 (R. 10). On or about 24 January 1944, a member of the British Corps of Military Police turned accused over to a noncommissioned officer of the 803d Military Police Battalion at Salerno, Italy (R. 12,13,14).

As to Specification 2 of the Charge, the evidence shows that accused was returned to his organization "on the left flank of the beachhead" (at Anzio, Italy) about 12 February 1944 (R. 10). The company was in the front lines "acting as infantry" from about 10 February to 23 March, exchanging small arms fire with the enemy and being subjected to hostile artillery fire (R. 15,17). Among other duties, accused was used on "several occasions" to carry wire to the company outpost (R. 16,20). He was armed with a loaded rifle but his company commander gave orders that ammunition was not to be issued to him except in case of attack. This officer testified that the "guards which were placed over him had orders to give him ammunition at a moments notice" (R. 18). Accused's platoon sergeant testified that while accused was never alone, he was not under guard; that accused "was never allowed to carry ammunition on a wire detail" but there was never an occasion when the witness took accused's rifle from him and left him with only a bayonet (R. 20,21,22). About 4 March, accused's right knee cap was injured "by carrying the barbed wire" from the rear to the area in front of the company's lines (R. 15,19). His company commander testified that he sent accused to the battalion aid station from where the

"doctor called me up and said he would like to send the man to a hospital, and I asked him if he could get around sending him to the hospital but treat the man himself" (R. 19).

At the aid station, it was found that accused had a "penetrating knee wound"

**CONFIDENTIAL**

**CONFIDENTIAL**

(385)

and a medical officer was about to send him to the "47th Medics" when accused's company commander requested that accused be held at the aid station. Accordingly, he was kept at the station where he was placed on a litter and given "hot water bottle packs the rest of the evening and the next day". This treatment "took the swelling down on the knee". At first the medical officer had thought "there was some barbed wire in the knee but when he looked it over he found there wasn't any and that it was just a swelled knee" (R. 23). Accused was returned from the aid station on 6 March and a soldier passing in a "jeep" took him to Battalion Headquarters, which were about a quarter of a mile from his company command post (R. 23,24, 25). However, accused did not proceed to his organization and report but absented himself without leave which absence continued until 22 March 1944, when he was apprehended sitting in a cave "along the beach about 1000 yards north of Anzio" and sent back to his organization (R. 16,17,21,26; Pros. Ex. 2,3).

Accused testified that in March he carried rations and water from the company to the platoon command post, strung barbed wire "about fifty yards away from the enemy machine gun, and stood guard"; that while standing guard he had no ammunition for his rifle but was supposed to get it from the guards on the next post in case of any attack; that while stringing wire, the other men with him were armed but he "didn't even have a rifle" (R. 27); that one of the noncommissioned officers said he "couldn't have any ammunition"; that on one occasion when within range of the enemy, his platoon sergeant asked accused why he did not use his rifle and accused replied he had no ammunition whereupon this sergeant took his rifle, leaving him with nothing but a bayonet (R. 28). He testified further that on 4 March he had a wound on his knee from barbed wire and went back to the aid station where "the doctor" was about to send him to a hospital in an ambulance when "the First Sergeant or Company Commander called on the phone and told him he should hold me there"; that when he left the "jeep" which had taken him away from the aid station, his leg hurt him and he thought he would "go back toward Anzio figuring to go back to the hospital" but when he got to Anzio, he could not find a hospital; that he was afraid to go back to his company because "they wouldn't give me a rifle that I could use" (R. 28,29).

4. It thus appears from uncontradicted evidence that at the place and time alleged in Specification 1 of the Charge, accused absented himself from his organization without leave and remained unauthorizedly absent until apprehended in Salerno, Italy, on or about 25 January 1944. He left his command as it was preparing to go into action against the enemy and remained absent until apprehended more than four months later. The circumstances justify an inference that accused quit his organization with intent to avoid the hazardous duty of combat. The court was warranted, moreover, in concluding from the circumstances in evidence that accused absented himself without leave with the intention of remaining permanently away from his organization. The evidence supports the findings of guilty of desertion as here charged (MCM, 1928, par. 130a).

It further appears from uncontradicted evidence that at the place and

**CONFIDENTIAL**

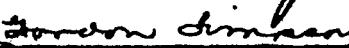
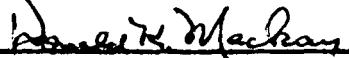
## CONFIDENTIAL

time alleged in Specification 2 of the Charge, accused again absented himself from his organization without leave and remained unauthorizedly absent until apprehended at Anzio, Italy, about 16 days later. Accused's company, which was a unit of a combat engineer regiment, had been operating as infantry in an engagement with the enemy and in the course of his duties in that action, accused was injured and sent to the rear to the battalion aid station. After two days accused was released to rejoin his organization. This he did not do but went to Anzio where he was apprehended in a cave about a fortnight later. The court was warranted in concluding from these and the other circumstances in evidence that accused entertained the specific intent of avoiding the duty of engaging in combat with the enemy when he absented himself. He admitted that he was afraid to go back to his company but explained that this fear was grounded on the fact that "they wouldn't give me a rifle that I could use". The explanations and denials of accused were for the court to weigh. There was evidence that accused was armed with a loaded rifle at all times and either had ammunition or could obtain it upon a moment's notice. The findings of guilty as here specified have ample support in the evidence (MCM, 1928, par. 130a; AW 28).

5. The defense pleaded in bar of trial on Specification 1 of the Charge that there had been constructive condonation of the desertion therein alleged (MCM, 1928, par. 69b). This plea is only appropriate where a deserter has been restored to duty without trial pursuant to the provisions of Army Regulations (See Dig. Op. JAG, 1912-40, p. 995). No such action was shown to have been taken in the instant case. Except as there provided, the mere restoration of a soldier to duty does not constitute a bar of trial (Winthrop's, reprint, pp. 270,271).

6. The charge sheet shows that accused is 24 years of age. He was inducted into the Army 18 October 1941, and had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

  
James E. O'Leary, Judge Advocate.  
  
Gordon Dinsmore, Judge Advocate.  
  
Donald M. Mackay, Judge Advocate.

CONFIDENTIAL

**CONFIDENTIAL**

(387)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
23 May 1944.

Board of Review

NATO 2171

U N I T E D   S T A T E S	)	FIFTH ARMY
v.	)	Trial by G.C.M., convened at
Private JOSEPH C. TATKO	)	APO 464, U. S. Army, 18 March
(32 281 286), Company A,	)	1944.
343d Engineers (General	)	Dishonorable discharge and
Service).	)	confinement for ten years.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay; Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93d Article of War.

Specification: In that Private Joseph C. Tatko, Company A, 343rd Engineers (GS), did, at or near Naples, Italy, on or about 12 December 1943, with intent to defraud, falsely alter seven (?) Allied Military Currency notes of one hundred lire denomination by adding an extra zero to the figures thereon, which said Allied Military Currency notes were writings of a public nature, which might operate to the prejudice of another.

CHARGE II: Violation of the 61st Article of War.

Specification: In that Private Joseph C. Tatko, Company A, 343rd Engineers (GS), did, without proper leave, absent himself from his organization at Pietravairano, Italy, from about 5 December 1943 to about 20 December 1943.

**CONFIDENTIAL**

266993

**CONFIDENTIAL**

(388)

CHARGE III: Violation of the 96th Article of War.

Specification 1: In that Private Joseph C. Tatko, Company A, 343rd Engineers (GS), did, at Naples, Italy, on or about December 1943, wrongfully use morphine, a narcotic drug.

Specification 2: In that Private Joseph C. Tatko, Company A, 343rd Engineers (GS), did, at Naples, Italy, on or about December 1943, wrongfully have in his possession a quantity of a habit forming drug, to wit, morphine.

He pleaded guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 5 December 1943, near Pietravairano, Italy, accused absented himself from his organization without leave and on 20 December 1943, was arrested in Naples (R. 5,8; Ex. A). About 7 December he had made the acquaintance of Corporal William B. Storch, Company B, 135th Infantry Regiment, and they together with another American and three British soldiers were living in an apartment at the time of accused's apprehension (R. 5,7). Storch testified he saw accused add an "extra '0'" to about six 100-lira notes by means of a toothpick and black ink. He gave one of the notes to the American soldier and another "to one of the English boys" (R. 6,7). Storch examined an Italian lira note which had been marked "Exhibit B" and testified it was similar to the notes accused had altered (R. 6).

Accused made a voluntary statement to a noncommissioned officer of the 1178th Military Police Company after the latter had explained to him that he was not being threatened, that he did not have to make any statement and that "anything said in the statement in case this came to trial would be held against him or for him". Accused stated that he had altered six or seven 100-lira notes "by adding the zero" and "had given a couple of notes to some boys to pass". He also stated "that the notes were passed at night when it was dark so that the Italians would not notice the difference" (R. 14,15).

When arrested, a 100-lira note which had been "raised" to represent a 1000-lira note was taken from accused. It was produced at the trial and marked Exhibit "F" (R. 9). Three similar notes were taken from a Private Beuche to whom accused said he had given "some notes" (R. 11,15; Exs. G,H, I). Another such note was taken from a "Private Jussaume" who was one of the soldiers living with accused in the Naples apartment (R. 8,9; Ex. J). A Criminal Investigation Division agent, who had assisted in accused's arrest, took these notes as well as the bottle of metallic ink which had

**CONFIDENTIAL**

266993

**CONFIDENTIAL**

(389)

been found in accused's rooms immediately after his apprehension (R. 9, 10; Ex. L), to an "identification expert" who testified that the ink used to alter the notes was similar to that which the bottle contained (R. 11,12).

Storch also testified that he had seen accused with a glass vial labelled "morphine", a hypodermic syringe and a needle and that accused "would take the vial and break it off and take the needle and stick himself with it". This occurred nearly every day (R. 6). A "C.I.D. Agent" who had arrested accused on 20 December found on his person a glass vial, hypodermic syringes and needle, a box containing three other vials and two more needles, and a tube which contained two tablets. The box containing the three vials and the two needles was marked Exhibit "M" and the tube containing the two tablets was marked Exhibit "N". Both were introduced in evidence (R. 9,10, 11). After taking these articles (Exs. M,N) from accused, they were turned over to "Agent Desmond" (R. 10,11) who in turn delivered them to "Major Allen of the 15th Medical Laboratory" (R. 13). Major Allen would testify, it was stipulated, "to this effect":

- "1. A tablet, three sealed ampoules, two unsealed ampoules, a syringe and three hypodermic needles were received from Agent Desmond on 16 March 1944 for identification as morphine.
- "2. Contents of ampoules were confirmed as morphine hydrochloride by Marquis' Test, Husemann's Test, Ferric Chloride test and Silver Nitrate test. Quantitatively, each ampoule contained 0.019 gm. of morphine hydrochloride.
- "3. The tablet was established to be morphine sulfate by Marquis' test, Husemann's Test, Ferric Chloride test and Barium chloride test.
- "4. Syringe and needles gave positive tests with alkaloidal precipitants, and Marquis reagent indicating their use for the administration of morphine containing solutions" (R. 13).

In his voluntary statement of 23 December, accused "stated that he had used drugs for the past 15 years and before he came into the Army and is still using them" (R. 15).

Accused remained silent (R. 16).

4. It thus appears from accused's pleas of guilty as well as from the uncontroverted evidence that accused was guilty of forgery as alleged in the Specification and Charge I, of absence without leave as alleged in the Specification and Charge II, of wrongfully using morphine, as alleged in Specification 1, Charge III, and of the wrongful possession of morphine as alleged in Specification 2, Charge III.

It is shown, with respect to the forgery alleged, that accused falsely altered Allied Military Currency notes and intended to pass them as genuine. These notes are of a nature "which would, if genuine, apparently impose a

**CONFIDENTIAL**

266993

**CONFIDENTIAL**

(390)

legal liability on another or change his legal liability to his prejudice" (NGM, 1928, par. 149j).

5. The charge sheet shows that accused is 30 years old and was inducted into the Army 18 April 1942. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. Penitentiary confinement is authorized for the offense of forgery here involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 1401, Title 22, Code of the District of Columbia.

James E. Blaylock, Judge Advocate.  
Gordon Simpson, Judge Advocate.  
Daniel W. MacLean, Judge Advocate.

266993

**CONFIDENTIAL**

~~CONFIDENTIAL~~

(391)

Branch Office of The Judge Advocate General  
with the  
North African Theater of Operations

APO 534, U. S. Army,  
2 June 1944.

Board of Review

NATO 2190

U N I T E D   S T A T E S	)	PENINSULAR BASE SECTION
v.	)	Trial by G.C.M., convened at
Private HAROLD VENABLE	)	Naples, Italy, 20 April 1944.
(32 268 909), attached to	)	Dishonorable discharge and
Headquarters Detachment,	)	confinement for ten years.
10th Replacement Battalion,	)	Federal Reformatory,
2d Replacement Depot.	)	Chillicothe, Ohio.

-----

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

-----

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification 1: In that Private Harold (NMI) Venable attached to Headquarters Detachment, 10th Replacement Battalion, 2nd Replacement Depot, did, without proper leave, absent himself from his station at Personnel Center Number 6, Italy from about 12 January 1944 to about 2 February 1944.

Specification 2: In that Private Harold (NMI) Venable attached to Headquarters Detachment, 10th Replacement Battalion, 2nd Replacement Depot, did, without proper leave, absent himself from his station at Stockade, Peninsular Base Section, near Melito, Italy, from about 9 February 1944 to about 27 February 1944.

CHARGE II: Violation of the 69th Article of War.

~~CONFIDENTIAL~~  
~~CONFIDENTIAL~~ 266691

Specification: In that Private Harold (N.M.I) Venable attached to Headquarters Detachment, 10th Replacement Battalion, 2nd Replacement Depot, having been duly placed in confinement in Stockade, Peninsular Base Section, near Melito, Italy, on or about 4 February 1944, did, at Stockade, Peninsular Base Section, on or about 9 February 1944, escape from said confinement before he was set at liberty by the proper authority.

CHARGE III: Violation of the 94th Article of War.

Specification: In that Private Harold (N.M.I) Venable attached to Headquarters Detachment, 10th Replacement Battalion, 2nd Replacement Depot did, at Naples, Italy, on or about 24 January 1944, feloniously take, steal, and carry away thirteen (13) cases of "D" rations of the value of about \$99.84, property, of the United States furnished and intended for the military service thereof.

He pleaded not guilty to the Charges and Specifications. He was found guilty of the Charges and of all Specifications except Specification 1, Charge I, of which he was found guilty except the words "2 February 1944", substituting therefor the words "24 January 1944", of the excepted words, not guilty, of the substituted words, guilty. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. As to Specification 1, Charge I, a certified extract copy of the morning report of Headquarters Detachment, 10th Replacement Battalion, 2d Replacement Depot, was introduced in evidence showing that accused absented himself without leave therefrom on 12 January 1944, and remained so absent until 2 February 1944 (Pros. Ex. 2). A military policeman testified that he apprehended accused in Naples, Italy, shortly after 2230 hours on 24 January 1944 (R. 10).

As to Specification 2, Charge I, and the Specification, Charge II, the evidence shows that accused had been confined in the Stockade of the Peninsular Base Section for a "violation of some military rule or regulation" and that he escaped therefrom on 9 February 1944. He remained absent until 27 February 1944 (R. 6.7; Pros. Ex. 1).

As to Charge III and its Specification the evidence shows that about 2230 hours on 24 January 1944, military police Sergeants Larry L. Muscarella and Martin Henriksen were patrolling Via Roma in Naples, Italy, when a speeding Army truck with three enlisted men in the driver's seat and five

**CONFIDENTIAL**

(393)

"persons" in the rear attracted Muscarella's attention. The military policeman pursued the truck and as they drew alongside it, and while Muscarella "was talking to the driver to stop the truck, he was continuing at a slow rate of speed, the five men jumped off the truck and ran away". Muscarella "put Sgt. Henriksen in charge of those in front of the truck and gave chase and caught one English soldier who was dressed in American clothing". Thirteen cases of "D" or "K" rations, property of the United States Government, were found in the truck. Accused and two or three other soldiers in the truck were arrested and the rations turned over to the Criminal Investigation Division, and the truck impounded (R. 10,11,12). Muscarella testified he knew they were "D" rations because "they had markings on the cases and one case was open" and also because he had been given "D" rations "for breakfast, dinner and supper many times". However, upon being pressed he said they may possibly have been "K" rations (R. 11,12).

Accused, on 28 January 1944, after having had Article of War 24 explained to him, made a sworn statement which was introduced in evidence without objection. This statement recited that it had been explained to accused that he could remain silent and that whatever he said might be used against him. The statement was as follows:

"On 22 January 1944, I was A.W.O.L. I had been A.W.O.L. since the day before Christmas - in Naples. I met a fellow named 'Joe' whom I had seen on a few occasions before. He asked me if I wanted to help out on a deal that night. I said yes, if it was O.K. He promised me an equal share of what was made. That night we couldn't get a truck so it was put off til(1) Sunday. On Sunday 'Joe' said we couldn't get a truck so we were to run the job on Monday. About 1739 hours, Monday, I met 'Joe' and six or seven soldiers, one a white boy who was a British soldier dressed in American Uniform. One of the boys got a truck from the 28 Q.M. Motor Pool, and we all started out in the truck just after the black out. It was about 2020 hours. Then we went to the 550 Dump and 'Joe' and I went inside the dump while the rest waited in the truck. 'Joe' and I found some 'D' rations and threw them over the barbed wire fence. We threw thirteen of them to the other boys when I heard a shot fired at us. I dropped down and said 'Let's get out of here.' Joe and I went back to the truck going through a tunnel that goes under the road. The truck then started down the street. We got into Naples when two M.P.'s stopped the truck. The five of the boys ran away. I was in the back and before I thought to run the M.P.'s got me and the white boy in the back. They also got Long who was driving. We were supposed to go to an Italian house with the load. The revolver that was found in the truck belonged to 'Joe'. When we went into 550 Dump we walked right by the guard on the gate" (Pros. Ex. 3; R. 8,9).

The prosecution requested the court to take judicial notice of "ration price list", and "that D rations lists at \$7.80 per case" (R. 13).

**CONFIDENTIAL**

266691

(394)

Accused elected to remain silent and no evidence was offered by the defense (R. 13).

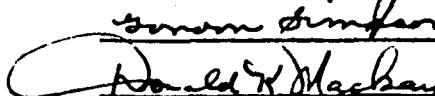
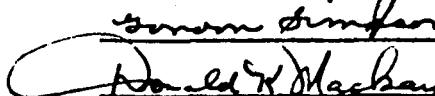
4. As to Specification 1, Charge I, the evidence shows that on 12 January 1944, the accused went absent without leave from his station as alleged and remained absent until 24 January 1944, a date, as found by the court, when accused was apprehended in Naples, Italy.

As to Specification 2, Charge I, and the Specification, Charge II, the evidence shows that after having been duly confined in the Stockade, Peninsular Base Section, accused escaped therefrom on 9 February 1944, without having been released or set at liberty by proper authority, and remained absent until 27 February 1944. The confinement is presumed to be legal (MCM, 1928, par. 139b). The offenses here involved are established by the evidence.

The evidence shows that at the place and date alleged in Specification, Charge III, accused, in company with other soldiers, drove a truck to an Army ration dump and therefrom surreptitiously took and carried away 13 cases of "D" rations. The truck with the rations thereon was stopped on the highway by military policemen and accused was apprehended. In his voluntary sworn statement accused admitted he was absent without leave and stated he had gone to the dump with a person by the name of Joe who had solicited his help on "a deal", for which he had been promised "an equal share of what was made". They "were supposed to go to an Italian house with the load". As also shown by the other evidence, the other soldiers jumped off and ran away when the truck was stopped and before accused "thought to run". The statement of accused finds sufficient corroboration in the facts and circumstances as disclosed at the time of his apprehension. It is shown that the rations were property of the United States, furnished and intended for the military service thereof, as alleged, and that they were officially listed at a value of \$7.80 a case. The facts and circumstances warrant the inference that accused intended to deprive the government permanently of the rations in question. The findings of guilty are supported by the evidence (MCM, 1928, pars. 149g, 150i).

5. The charge sheet shows that accused is 19 years of age, that he was inducted into the Army 4 June 1942, and that he had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. Penitentiary confinement is authorized for the offense of larceny of property of the United States of a value in excess of \$50.00, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Sections 82 and 87, Title 18, United States Code.

 Donald P. Thompson, Judge Advocate.  
 James D. Singletary, Judge Advocate.  
 Donald W. Mackay, Judge Advocate.

