

BRANCH OFFICE
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD OF REVIEW
OPINIONS

NORTH AFRICAN
THEATRE
MEDITERRANEAN
THEATRE

VOL. 1
1943-1944

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HOLDINGS OPINIONS AND REVIEWS

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BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

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



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

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Nov 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 1 B.R. (NATO-MTO)

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FOREWORD

By direction of the President, pursuant to Article of War 50 $\frac{1}{2}$, the Branch Office of The Judge Advocate General with the United States Army Forces in the North African Theater of Operations was established 8 March 1943; on 1 November 1944, this office was redesignated the Branch Office of The Judge Advocate General with the United States Army Forces in the Mediterranean Theater of Operations. Concurrently with its establishment, the Secretary of War by direction of the President vested in the Theater Commander confirming authority under Article of War 48 and the powers set forth in Articles of War 49 and 50. From its inception until 20 July 1943, Colonel Adam Richmond, U.S. Army, was the Assistant Judge Advocate General in charge, then Colonel Hubert D. Hoover, U.S. Army, was in charge until 15 May 1945; Brigadier General James E. Morrisette, U.S. Army, was in charge for the periods 13 July 1945 to 4 September 1945 and 8 October 1945 to 23 October 1945; during the intervals 15 May 1945 to 13 July 1945, 4 September 1945 to 8 October 1945, and 23 October 1945 to inactivation 31 October 1945, Colonel Ellwood W. Sargent, U.S. Army, was in charge.

The present collection contains (to the best information available at the time of publication) all the holdings, opinions and reviews of the Board of Review of this Branch Office. There is also included the 1st Indorsement of the Assistant Judge Advocate General in cases where he differed with the Board of Review, in cases of legal insufficiency in whole or in part, or where addressed to the Theater Commander. A note indicating final disposition with GCMO reference appears at the end of cases ordered executed by the Theater Commander. "Short holdings," which find the record of trial legally sufficient to support the findings of guilty and the sentence, without any discussion of the facts or arguments, are not included. In the CONTENTS of each volume, there is indicated, opposite the original NATO or MTO number of each case, the CM number allocated to the case in the JAGO when the record of trial was received.

Similar collections of the Board of Review materials are being made for each of the several Branch Offices which operated in overseas theaters. This includes the Branch

Offices of The Judge Advocate General which were established to serve the Army Forces in the European Theater of Operations, in the Mediterranean Theater (originally North African Theater) of Operations, in the India-Burma (originally China-Burma-India) Theater, in the South West Pacific Area, in the Pacific Ocean Areas, and the Pacific. An Index and Tables covering these materials will be added as soon as practicable. The volumes of materials from the foreign Boards of Review will constitute a companion series to the compilation of Holdings, Opinions and Reviews of the Boards of Review sitting in Washington, D.C. Together these will make conveniently accessible the most comprehensive source of research materials on military justice in the zone of the interior and in combat areas.

15 April 1946



THOMAS H. GREEN
Major General
The Judge Advocate General

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WAR DEPARTMENT

In the Office of The Assistant The Judge Advocate General
APO 512, U. S. Army

Board of Review

NATO 1

5 April 1943

UNITED STATES

MEDITERRANEAN BASE SECTION

v.

Captain GORDON K. ROGERS
(O-355578), MC, 105th
Coast Artillery Battalion
AA.

Trial by G.C.M. convened at Oran,
Algérie, 9 February 1943.
Dismissal from the service.

OPINION of the BOARD OF REVIEW
McCARTNEY, WHITE and FRANCE, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the above named officer and submits this, its opinion, to the Assistant The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1. In that Captain Gordon K. Rogers, Medical Corps, while stationed at Camp Hulen Texas, on or about Dec. 28, 1941, did commit an indecent act upon the person of Pvt. John O. Choate, ASN 34029251, namely, manipulate the penis of, the said Pvt. Choate.

Specification 2. In that Captain Gordon K. Rogers, Medical Corps, did, while stationed at Camp Young California, between the early part of May 1942 and the middle of June, 1942, make improper and indecent advances to T/5 Robert L. Starns ASN 20436207, namely attempt to manipulate the penis of said T/5 Robert L. Starns. (amended to present form at beginning of trial.)

Specification 3. In that Captain Gordon K. Rogers, Medical Corps, did, while stationed at Djidjelli, Algeria, on or about Dec. 29, 1942, commit an indecent and improper act upon the person of PFC. William V. Coldiron, ASN 15076068, namely, manipulate the penis of said PFC. Coldiron.

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(2)

3. The accused pleaded not guilty to the Charge and all specifications thereunder. He was found guilty of specifications 1 and 3 and the Charge and not guilty of specification 2. He was sentenced to be dismissed the service. No evidence of previous convictions was introduced. The findings and sentence were announced in open court. The reviewing authority approved the sentence and forwarded the record for action under Articles of War 48 and 50¹.

4. The evidence as to the specifications and the Charge of which the accused was found guilty may be summarized as follows:

For the Prosecution.
As to specification 1.

Private John O. Choate testified: he was a member of the Medical Detachment stationed at Camp Hulen, Texas, on December 28, 1941 (R. 7); the accused was a member of that organization and on the day in question drove in an automobile from the camp to the home of the accused in town to assist the accused to pack, as accused was leaving to go to a school; accused drove the car and witness sat at his right (R. 8); accused started talking about women and started feeling the penis of witness through his clothes; accused rubbed and squeezed it and continued doing so for about five minutes; witness was scared; when they reached town they entered the home of accused and started to pack; accused asked him if he had ever been sucked off and witness answered "no" (R. 9); accused then asked witness to let him do so. Objection was made by the defense to this line of questioning. The objection was at first overruled but upon further objection and by consent of the prosecution the evidence was stricken and the court directed not to consider the same (R. 10). Upon cross-examination witness further testified he did not attempt to leave the automobile; denied that the wife of accused was in the car (R. 11); admitted he had been punished for AWOL at the instance of the accused who had also reprimanded him upon various occasions (R. 12). Upon re-direct examination witness testified he had not reported the incident because he was afraid and since he could not prove the offense; he only told about the occurrence when questioned in January 1943 (R. 13). In response to questions by the court, witness testified: he had known the accused since March, 1941; he was transferred to the Medical Detachment in October, 1941; he never related the experience with accused to anyone until he told three investigating officers (R. 14). Witness then repeated in detail (R. 14 - 16) the same facts given on direct examination and added that while in the home of accused and at the time of the conversation above referred to, the accused again started playing with his penis and witness objected; witness is twenty-two years old (R. 15) and reached the eighth grade in school; he knew of no one else being in the house during the events in question; they were about half an hour packing; he was standing when the incident occurred in the house and he objected to the accused (R. 16).

As to specification 3.

Private First Class William V. Coldiron, testified (R. 25): he

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has known the accused about four months; he is in the Medical Detachment and was on December 29, 1942; on said night he drove the accused from the British hospital back to the detachment about 12:45 (R. 25); upon arriving he went to his quarters and saw the 1st Sergeant; the accused invited them to have a drink; witness had one drink which was brought to him at his cot (R. 26); after he was in bed the accused and the 1st Sergeant came out of the accused's room, went to the balcony where they stayed 10 or 15 minutes, then the 1st Sergeant went downstairs and the accused came and sat on his cot; that accused put his hand on witness' chest, then on his stomach and worked on down; witness had his left arm raised so the back of his left hand was over his eyes; accused laid his head on witness' arm (R. 27) and worked his left hand down until he got hold of the penis of witness and then rolled it around until the accused had an emission; accused continued to play with the private parts of witness and then stopped, got up and went to his room; witness then got up and went to the hallway door (R. 28); then downstairs; he went directly to the 1st Sergeant and reported; next morning he reported to the dental officer, Doyle C. Magee; accused was not drunk; while the accused was manipulating his penis the accused made hard-breathing noises (R. 29). On cross-examination witness testified: the incident occurred about 1 o'clock AM on December 30th; it was warm in the hallway where he slept; that he had four blankets; the accused slipped his hand down under the covers; he did not object when the accused started to play with him (R. 30); the accused played with him approximately a minute before his emission, then waited three to five minutes, then started again; he did not object at the second incident; that his past relationship with the accused had been pleasant (R. 31); witness denied any trouble with the accused or that accused had charged him with offenses except one instance of AWOL (R. 32 - 33). On re-direct examination he testified: he permitted the acts of the accused because the accused was an officer and he was a private and he had no proof and by himself could prove nothing on the accused; previously he had not been unfriendly to the accused (R. 33); the AWOL above referred to occurred in the states when he went home to get married (R. 34). Upon examination by the court witness again detailed the events in question substantially as on direct examination and testified: that he had had no prior trouble with accused; denied any other relations with accused; that when he went down stairs he had on only the top of his summer underwear; that he is twenty years old and reached the 9th grade in school (R. 35).

For the Defense.

The accused, Captain Gordon K. Rogers, having been advised of his rights as a witness, at his own request testified under oath (R. 36):

As to specification 1.

That he knew Private Choate and on December 28, 1941, he was at Camp Hulen, Texas (R. 36); on the day in question he received orders to go to a station in Pennsylvania and he busied himself turning over property and preparing for the trip; about 5 o'clock his wife came for him in the car; he got

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Choate to go help him pack at home; he drove the car, his wife sat beside him and Choate rode in the back seat; nothing happened between him and Choate; he denied playing with Choate's penis (R. 37); he denied any indecent proposition to Choate; nothing unusual happened at his home; he denied playing with Choate there; Choate helped handle some heavy boxes; his wife was present; no one else was there; it took about two hours to do the packing; when finished they returned to camp and he left about 9 o'clock; he again denied having played with Choate at any time (R. 38); he had had trouble with Choate several times for being AWOL and careless; Choate was a sulky type and represented accused (R. 39); Choate was resentful because accused punished him and wouldn't let him travel; Choate showed his resentment by his attitude toward his work (R. 40). He further testified (R. 43):

As to specification 3.

That he knew Coldiron and on the night in question Coldiron did drive him to the British hospital and back; on return nothing happened; he denied sitting on Coldiron's bed or putting his face near Coldiron or putting either of his hands on Coldiron (R. 43); he denied putting his hand on Choate's penis or even touching him; his relationships with Coldiron were not entirely pleasant; he severely reprimanded Coldiron last October for being AWOL and Coldiron resented it and was sulky; he had reprimanded Coldiron on several occasions for negligence, failure to carry out orders and for erasing numbers off the "Jeep" (R. 44); Coldiron had denied removing the numbers. On cross-examination accused testified (R. 45): that the witnesses against him have it in for him and that the prosecution is a fabrication of lies (R. 45); when he returned on the night of December 29, 1942 he went to the dispensary, saw the sergeant then went to his room; he had a drink with the Sergeant in his own room; did not recall going out to the balcony; he has been out of medical school six years and married since August 1941 (R. 46); he left the States in August 1942; he had two drinks on the night in question; after drinking with the Sergeant the latter left and he undressed, read a while after he got in bed; about 45 minutes later he got up to go to the latrine and passed Coldiron's bed; denied sitting on the bed; he did offer Coldiron a drink in his room when the Sergeant was present and which Coldiron took (R. 47); he was not sure whether Coldiron took the drink there or if the Sergeant took it to him; he again denied sitting on Coldiron's bed or having any contacts with him; he denied that Choate sat in the front seat by him during the trip from camp to his house in December 1941; Choate sat in the back seat (R. 48); upon examination by the court the accused testified (R. 50); he felt the 1st Lieutenant of the outfit was responsible for the whole case; they had never gotten along; the Lieutenant was vengeful because he had been unable to get a promotion; when time for the first efficiency report on the Lieutenant came, he had told his Colonel he didn't see how he could turn in a satisfactory report (R. 50); at the instance of the Colonel he turned in a satisfactory report; the Lieutenant never cooperated with him and had made accusations against him; he had turned the Lieutenant in one time for AWOL; they had trouble in England over an assign-

ment of the Lieutenant to a gas school (R. 51); he denied taking hold of the penis of the men involved or making any improper advances to them; he named the Lieutenant in question as Lieutenant Magee (R. 52).

After an adjournment from February 9 to February 16, 1943, the accused again took the stand when the court reconvened and testified (R. 54): That six or seven people were occupying the dispensary on December 29, 1942; he identified a floor plan of the dispensary (R. 54) and testified as to various details in connection therewith (R. 55). The exhibit was offered and admitted in evidence as Exhibit "A" (R. 56).

Captain Francis C. Grevemberg was called as a witness for accused and testified (R. 56): he has known accused two and a half years; accused has been his best friend since January 1941; the reputation of accused for morality with special reference to unnatural sex acts is very good; accused was a strict and exacting officer; that practically every officer of the battalion was against him or grew to dislike him because of his reports about their work, mostly about sanitation (R. 57). On cross-examination he testified: he served on a board that investigated the charges against the accused; he discovered no evidence of conspiracy or a frame-up against the accused (R. 58). On re-direct examination by the defense he testified: he was one of three officers appointed to investigate the case and was cautioned that there might be some underhanded work but no evidence of such was found; he was recorder for the board; accused was not present and did not examine any of the witnesses or make any statement (R. 58). On recross-examination he testified: he was put on the board because he was friendly to the accused and because the Colonel thought something existed but no evidence of collusion was found (R. 59).

REBUTTAL

Staff Sergeant Lorenzo B. Wilson testified (R. 60): he was on duty the night of December 29, 1942 in the capacity of 1st Sergeant when the accused and Coldiron returned about 11 o'clock; he and Coldiron fixed the accused's bed (R. 60); then Coldiron went to bed in the corridor; the accused offered him a drink which he took and a drink was taken to Coldiron at his bed; he did not remember whether he or accused took the drink to Coldiron; after finishing his drink he went downstairs to bed about 11:30; he saw Coldiron about 12:45 (R. 61); Coldiron who was dressed only in his undershirt woke him up; Coldiron was trembling (R. 62). Over objections (R. 62 - 63) the witness was permitted to state Coldiron's conversation with him. He testified that when Coldiron woke him, Coldiron's first words were "That man must be crazy, Sergeant" and continued to relate that the accused had played around with him; that witness told him to go back upstairs but he would not, so witness sent him to quarters; next morning he talked further with Coldiron (R. 63). The witness then related what Coldiron told him on this occasion, the story being substantially as testified to by Coldiron in court. (R. 64). On cross-examination witness testified he did not know whether any of the matters said by Coldiron were true (R. 64); he admitted the accused had reprimanded him upon various occasions (R. 65).

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Upon examination by the court (R. 66) he repeated the facts concerning his awakening by Coldiron and again described how Coldiron was dressed; he had had one drink that night - the one with the accused (R. 66); Coldiron did not appear to be drunk; the drink given them by the accused was gin; one drink is all he knew that Coldiron had; there were some patients occupying rooms there that night (R. 67); Coldiron did not tell him he had an emission, he just said the accused played around with him and that accused put his hand on Coldiron's penis; Coldiron also told of the noises accused was making with his mouth (R. 68).

1st Lieutenant Doyle C. Magee testified (R. 68): he has known the accused since January 1941; he knows Choate but had never spoken to him concerning an occurrence between him and the accused in December 1941 (R. 68); he knows Pfc. Coldiron; early morning, before breakfast, December 30, 1942, Coldiron came to see him. Over the objection of the defense (R. 69) witness detailed the conversation. He testified: Coldiron said first "I think Captain Rogers is crazy". Witness then related the story told him by Coldiron which was substantially as Coldiron testified as a witness (R. 70); this witness testified he did not know whether or not the facts told by Coldiron were true; that he had had misunderstandings with the accused (R. 71); he referred to a difficulty over signing for some dental property and the incident of the AWOL in California in July 1942; he denied ever making any statement "that there would be some changes made around there" (R. 72 - 73).

5. The evidence as to specification 2, of which the accused was found not guilty is not summarized. It may be said that there was nothing in this part of the case affecting injuriously or prejudicial to, the substantial rights of the accused.

COMMENTS

6. Serious objection was made by the defense to the introduction of certain evidence by the prosecution in three instances which call for consideration.

The witness Choate was permitted to testify concerning an indecent proposal made to him by the accused while said parties were present at the home of the accused in December 1941 (R. 10). This testimony indicated a further offense on the part of the accused and one for which he was not on trial. After the evidence was heard and upon further objection by the defense and with the consent of the prosecution, it was ordered that this testimony be stricken from the record and not considered by the court.

In cases of the character here involved it is difficult if not impossible to remove the effect of prejudicial testimony of inflammatory nature and if actually inadmissible the striking of such evidence does not always cure the evil done.

The evidence in question, however, was not improper and might quite properly have remained an actual part of the formal body of evidence. The testimony regarded an offense closely related in nature and character to that for which the accused was on trial. The testimony concerned an incident which occurred at the time of and during the commission of the specific offense for which the accused was on trial. This incident evidenced an intent and a disposition on the part of the accused, having a direct bearing upon and connecting him with commission of the offense for which he was on trial. Under these circumstances the evidence of this incident was relevant as a part of the res gestae. Sec. 193, Underhill's Criminal Evidence.

It was within the province of the court to consider the relevancy of this evidence.

"The rule of res gestae under which it is said that all facts which are a part of the res gestae are admissible, is a rule determining the relevancy and not the character or probative force of the evidence. If the court determines that the fact offered is a part of the res gestae, it will be accepted, because, as it is said, that fact is then relevant. Relevancy is always a judicial question to be determined according to the issue which is to be tried. Taking the main facts which are embraced in the commission of any crime and which are essential to be proved, it will be found, in most instances, that they are connected with others which are not essential to be proved, but which tend more or less to prove those facts which are to be proved. Every occurrence which is the result of human agency is more or less implicated and involved with other occurrences. One event is the cause or the result of another, or two or more events or incidents may be collaterally connected or related. Circumstances constituting a criminal transaction which is being investigated by the jury, and which are so-interwoven with others, and with the principal facts which are at issue that they can not be very well separated from the principal facts at issue without depriving the jury of proof which is necessary for them to have in order to reach a direct conclusion on the evidence, may be regarded as res gestae."

Sec. 191, Underhill's Criminal Evidence.

The board is therefore of the opinion that no error prejudicial to the rights of the accused resulted from the original admission of the testimony in question, even if the subsequent action of the court in striking the same did not remove the effect thereof because of its character.

The other evidence under consideration concerns the admission over the objection of the defense of that part of the testimony of Staff Sergeant Wilson (R. 62) and 1st Lieutenant Magee (R. 69) in which they were permitted to detail the story related to them by Private Coldiron in connection with the offense involved in specification 3. The accused was not present at the time Coldiron told his story to either Sergeant Wilson or Lieutenant Magee. In the instance of Sergeant Wilson two conversations with Coldiron were involved.

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In connection with the first conversation with Sergeant Wilson the evidence discloses that Coldiron immediately arose from his cot after the accused committed the act which is involved in Specification 3 and had left him, and went downstairs dressed only in an undershirt and reported the incident to the Sergeant. He was trembling. His first words were, "that man must be crazy, Sergeant".

It should be noted that the testimony of this witness was introduced in rebuttal and after the defense had asserted that the charges against him were the result of collusion and were a fabrication.

The evidence in question was clearly admissible not only upon the theory that it was in rebuttal of the inference that the testimony of Coldiron in court was manufactured (Par. 124, MCM, 1928) but also it was admissible as a part of the res gestae. The statements testified to by Sergeant Wilson as made by Coldiron, were made contemporaneous with the transaction to which they related; they were made under the strain of the event; they appeared spontaneous and the complete details of the event were not recited at the time. These circumstances indicate spontaneity and impromptu out-pouring of facts. There was no indication of deliberation, premeditation or consideration in the circumstances of Coldiron's actions or recitation of events. See sections 196, 198, and 200, Underhill's Criminal Evidence and C.M. 193666 (1930), Par. 395 (22) Dig Op., J. A. G. 1912 - 1940, where it was said:

"The rule in cases involving rape and kindred offenses that evidence as to a complaint made shortly after the commission of the offense is admissible is equally applicable to a complaint made by a young boy pathic in the trial of an offense involving sodomy."

Sergeant Wilson also testified concerning a further detail of events by Coldiron the next morning after the occurrence in question and Lieutenant Magee likewise testified to a similar conversation. These occurrences can hardly be considered a part of the res gestae but again it should be noted, this evidence was introduced in rebuttal and after the issue of collusion and fabrication of testimony had been raised by the defense. Neither witness in question purported to vouch for the truth of the remarks of Coldiron related to them and by them repeated in court. The evidence was not admitted as proof of the facts related. The sufficiency of the evidence to sustain the finding of guilt does not depend upon this evidence. The testimony in question concerning statements made by Coldiron at a previous time for comparison with his testimony in court and as relevant to the issue of fabrication was proper. Par. 124, MCM, 1928 and Sec. 445 Wharton's Criminal Evidence.

7. The record of trial in the present case is legally sufficient to support the findings and the sentence.

(9)

John F. McCarty Judge Advocate

Martin F. White Judge Advocate

Charles E. France Judge Advocate

(10)

BR-1 1st Ind.
Branch Office, Judge Advocate General, NATOUS, APO 512, 11 April 1943.

TO: Commanding General, NATOUS, APO 512.

1. Captain Gordon K. Rogers, Medical Corps, 105th Coast Artillery Battalion, was tried before a general court-martial convened by the Commanding Officer, Mediterranean Base Section, upon the following charge and specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain Gordon K. Rogers, Medical Corps, while stationed at Camp Hulen Texas, on or about Dec. 28, 1941, did commit an indecent act upon the person of Pvt. John O. Choate, ASN 34029251, namely, manipulate the penis of the said Pvt. Choate.

Specification 2: In that Captain Gordon K. Rogers, Medical Corps did, while stationed at Camp Young, California, exact date unknown, make improper and indecent advances to T/5 Robert L. Starns ASN 20436207, namely attempt to manipulate the penis of said T/5 Starns.

Specification 3: In that Captain Gordon K. Rogers Medical Corps, did, while stationed at Djidjelli, Algeria, on or about Dec. 29, 1942, commit an indecent and improper act upon the person of PFC William V. Coldiron, ASN 15076068, namely, manipulate the penis of said PFC Coldiron.

He pleaded not guilty to the charge and to the specifications thereunder. The court rendered findings of guilty of specifications 1 and 3 and of the Charge and not guilty of specification 2, and sentenced the accused to be dismissed the service. The Commanding Officer, Mediterranean Base Section, approved the sentence and forwarded the record of trial for action under Articles of War 48 and 50 $\frac{1}{2}$.

2. The pertinent part of Article of War 48 provides: "In addition to the approval required by Article 46, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

* * * * *

"(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be car-

BR-1, 1st Ind.
11 April 1943
(Continued)

ried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division;"

3. On February 13, 1943, the Secretary of War, by direction of the President, signed a letter addressed to the Commanding General, United States Army Forces, North African Theater of Operations. The text of this letter is as follows:

"The Commanding General, United States Army Forces, North African Theater of Operations is vested with and empowered to exercise all of the powers, statutory or otherwise, pertaining to courts-martial of a commanding general of the Army in the field, including the power of confirmation of sentence of general courts-martial and included powers conferred upon 'the commanding general of the Army in the field' in time of war by Articles of War 48 and 49; and is further empowered by the President to exercise the powers set forth in Article of War 50; the exercise of such powers, however, to be subject to and in accord with the provisions of Article of War 50 $\frac{1}{2}$."

4. Article of War 50 $\frac{1}{2}$ requires that before a sentence involving dismissal is ordered executed, the board of review must, with the approval of the Judge Advocate General, hold the record legally sufficient to sustain the sentence. By direction of the President and pursuant to the provisions of Article of War 50 $\frac{1}{2}$, a branch office of the Judge Advocate General has been established in this theater and a board of review and an assistant Judge Advocate General designated therefor.

5. The record of trial in the case of Captain Gordon K. Rogers, Medical Corps, has been examined by the Board of Review in the Branch Office of the Judge Advocate General in this theater and the Board has rendered its opinion in writing that the record is legally sufficient to support the findings and sentence.

6. I approve the holding of the Board of Review.

The first specification alleges that the offense was committed on December 28, 1941, when the officer was stationed at Camp Hulen, Texas. The officer had received orders to proceed to Carlisle Barracks. In the afternoon he drove from Camp Hulen to town for the purpose of packing. He took with him Private Choate. Private Choate stated that he sat on the front seat next to the accused who was driving; that after leaving camp the accused placed his hand on Choate's penis and rubbed and squeezed it for about five minutes. The accused testified that his wife drove the car to camp at about 5:00 P.M.; that he got in behind the

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(Continued)

wheel and his wife sat on the front seat and he believed Private Choate sat on the back seat. Private Choate stated that the accused's wife was not in the car nor did he see her on reaching the house.

The second specification of which the accused was found not guilty alleges that the offense took place while the accused was stationed at Camp Young, California, between the early part of May and the middle of June, 1942. With respect to this specification, T/5 Robert L. Starns testified that he had requested the accused to administer the Wasserman test. The accused said he would let him know later. Starns went to the accused's tent as directed, removed his clothes and was told by the accused that there was no need to worry. Starns dressed and started to leave when the accused felt Starns' penis and said, "How is your hammer hanging?" The accused then asked if Starns were going to the movie that night and when he received an affirmative reply he told Starns to drop by the tent before he went. Starns stated that when he arrived at the tent the accused was preparing to take a bath and told Starns to come in the bath house. Starns entered the bath house and sat on a bench. After his bath the accused sat on the bench and placed his hand on Starns' leg between the knee and hip. Starns rose and left.

The accused testified that Starns had been to see him several times for a Wasserman test and that he saw no occasion to give the test. He recalled the occasion testified to by Starns. His version is that when Starns asked to be examined Starns was dirty and the accused told him to get cleaned up, then come by accused's tent and he would talk to him. When Starns returned the accused was taking a bath and Starns came into the bath house looking for him. The accused denied touching Starns or making the remark, "How is your hammer hanging?"

The third specification alleges the offense occurred on December 29, 1942, while the accused was stationed at Djidjelli, Algeria. On that night Private Coldiron drove a jeep to the 69th British Hospital to return the accused to his quarters in the Hotel de Plaza. Coldiron was on duty that night and slept on an iron bunk in the hallway on the second floor, outside the accused's room. When Coldiron and the accused returned, 1st Sgt. Wilson and Coldiron made up the accused's bunk. The accused offered Wilson a drink of gin, which he accepted. The same offer was made to Coldiron who had gotten into his bed in the hallway. Either the accused or Sgt. Wilson took the drink to Coldiron. After Sgt. Wilson left to go to his room on the first floor, Coldiron stated that the accused sat down on the side of his (Coldiron's) bed, put his hand under the blankets and played with Coldiron's penis until he caused an emission. He waited several minutes and started the same act again, then he arose and went into his room. When he left, Coldiron got up and went to Sgt. Wilson's room, awakened him and told him what had occurred.

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The next morning Coldiron reported the matter to Lt. Magee. The accused admitted that Coldiron drove him to his quarters as testified by Coldiron. He admitted that Sgt. Wilson was present when they arrived and that he offered Sgt. Wilson and Private Coldiron a drink. He denies, however, that he sat on Coldiron's bed or touched his person. Sgt. Wilson corroborated Private Coldiron's testimony insofar as it related to Coldiron awakening Wilson and relating what had happened. Lt. Magee also corroborated Private Coldiron's testimony that the latter had reported the affair to Lt. Magee.

The accused maintains that the testimony of the three soldiers is a fabrication of lies; that their testimony was prompted by revenge for punishments imposed. The weight to be accorded the testimony of any witness is primarily a function of the court, for it is in a better position to judge such questions from an observation of the witness, and his manner of testifying. Prior to the filing of charges a board of officers investigated the matter. One member of the board was Captain Grevemberg, who was so detailed because of his friendship with the accused. Captain Grevemberg testified that the board found no evidence of collusion of witnesses.

In view of the Board of Review's holding that the record is legally sufficient to support the findings and sentence and my approval of that holding, you are authorized to direct the execution of the sentence.



ADAM RICHMOND
Brigadier General, USA
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 3, NATO, 12 Apr 1943)

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WAR DEPARTMENT

(15)

In the Office of The Assistant The Judge Advocate General
APO 512, U. S. Army

JAG Op.

12 April 1943

Board of Review
NATO 5

UNITED STATES

v.

Staff Sergeant THOMAS B. OSBORNE
(6398565), Battery B, Thirty-
Sixth Field Artillery.

MEDITERRANEAN BASE SECTION

Trial by G.C.M., convened at Oran,
Algeria, 2 February 1943.
Dishonorable Discharge, forfeiture
of all pay and allowances, and con-
finement at hard labor for life.
Penitentiary.

OPINION of the BOARD OF REVIEW
McCARTNEY, WHITE, and FRANCE, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the above named soldier and submits this, its opinion, to The Assistant The Judge Advocate General.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Staff Sergeant Thomas B. Osborne, Battery "B", Thirty-Sixth Field Artillery, did, near Saint Cloud, Algeria, on or about 11 December 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Lyle T. Clarke, a human being, by shooting him with a pistol.

3. The accused pleaded not guilty to the Charge and the specification thereunder. He was found guilty of the Charge and the specification. No evidence of previous conviction was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, but pending further orders directed the accused to be held in confinement at Disciplinary Training Center Number 1 and withheld execution of the sentence pursuant to Article of War 50 1/2.

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4. The evidence may be summarized as follows:

For the Prosecution

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T/5 Kenneth L. Chapman testified (R. 5): he identified the accused and the bivouac area of their organization; he saw the accused about 9:00 o'clock of the evening involved (R. 5); the accused, on the way to the latrine, stopped to talk with witness and others; while so doing he pulled out his pistol, cocked it and replaced it in his belt (R. 6); he made a remark that he liked killing men; later witness heard the voice of Clarke, the deceased, about twelve or fourteen yards away (R. 7); he then heard a pistol cocked, followed by two shots; he did not know who fired the shots; by flashlight he saw a man he could not identify moving away; he ran up, found Clarke lying on his back and exclaiming that Osborne had shot him (R. 8). On cross-examination he testified that the accused had not cocked the pistol the first time but had only pulled the hammer back; he heard the pistol cocked just before the first shot; the deceased was "pretty drunk"; he then testified the deceased was not drunk (R. 9) but had been drinking; he knew the accused and the deceased well; he was in the same battery with them; there was no hostility between them; he knew of no arguments they had had; the deceased was hot headed and liked to fight; when witness first saw the accused at the time he pulled his gun, he was not in an argumentative mood; accused talked in the usual way (R. 10); accused was not rough, he came up and started joking; there was nothing unusual in the actions of accused; accused had been drinking and was feeling pretty good (R. 11).

Captain McChord Williams, Medical Corps, testified (R. 12): he was on duty the day in question as surgical officer of the day; he examined Clarke about 9:30 P.M. and pronounced him dead twenty minutes later; in his opinion death was caused by gun shot wound (R. 12); no autopsy was performed; a complete physical examination revealed no organic disturbances (R. 13).

Corporal Joseph Schierberl testified (R. 14): he saw the accused around nine o'clock on the day in question; he was about eight yards away from accused and heard accused say to the deceased that his (accused) section was best; they were standing face to face about one foot apart; he also heard the accused say "nobody would be taken out of his section because he would shoot him first" (R. 14); a few minutes later he heard a shot, then another shot; five or ten minutes elapsed between the remark above referred to and the first shot. On cross-examination he testified the deceased was not drunk but was drinking (R. 15); the deceased was aggressive when he was drinking; deceased was aggressive drunk or sober. On examination by the Court, witness testified he was about two feet behind deceased when the shots were fired (R. 16); he did not see who fired the shots; accused was in front of the deceased when witness went to pick up a drunken soldier; he did not see a gun in the hand of accused (R. 17); the accused spoke in an ordinary tone of voice in saying his section was best; the moon was shining; he could see about 60 feet; just a few seconds after deceased was shot witness went to him; accused was walking away; deceased mentioned no names (R. 18); he did not hear the deceased say anything in reply to the statement of accused that his section was best; it was about a minute between the shots; he saw deceased fall; he did not know whether

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the deceased fell after the first or second shot; he saw accused with the gun in his right hand after the first shot was fired; he had not heard the pistol cocked or the slide slipped back (R. 19). On re-direct examination he testified he was busy putting a drunk in a tent when the incident began (R. 19); this was five or ten minutes before the shooting; his back was to accused and deceased; he was nearer the deceased (R. 20). On further examination by the court he testified he was about three yards from accused when the accused fired the second shot; accused then walked away; he was not sure how far accused and deceased were apart; he did not know the direction the second shot was fired; the last time he saw accused he was ten or fifteen yards from deceased, walking away and around some bushes (R. 20).

Pfc. Paul P. Pruss testified (R. 21): on the night in question he saw accused and deceased talking; they were about five feet apart; the two men kept saying their respective sections were better than the other; accused pulled his pistol from his right-hand pocket, cocked it, and put it in his left-hand pocket (R. 22); at the time the accused put his gun in his left-hand pocket witness heard accused say to deceased something about a razor; he heard accused say either "have you got a razor" or "can you pull your razor in a hurry"; in reply deceased put his hands in his pocket and laughed; he did not see a razor and started to walk away; a few seconds later he heard a shot; turned saw deceased falling and accused going up the path (R. 24); he heard and saw the second shot fired; he was about fifteen feet away; after the second shot accused ran; he heard deceased say the accused had shot him; at the time of the discussion between accused and deceased about their sections there was no indication of anger; only accused talking in a loud tone of voice; he saw nothing in the hands of deceased (R. 24). On cross-examination he testified accused cocked the pistol and changed it from his right to his left pants pocket (R. 24); he was not sure it was to the left hip or pants pocket; when he first observed them accused and deceased were about five feet apart; at the time of the shooting they were about the same distance (R. 25). On examination by the Court he again related the nature of the conversation between accused and deceased and the remark of Osborne about a razor; the first shot followed in about a minute and the second ten or fifteen seconds after the first; he heard deceased say the accused shot him; when he testified he saw accused cock the pistol he meant that accused released the hammer; at the second shot the accused had the pistol in his hand holding it down along his side aimed at the ground (R. 26).

Captain Osmyn W. McFarland, Medical Corps, testified (R. 27): examined the deceased at the scene of the shooting; he examined the gun shot wound; deceased was conscious and answered questions concerning his birth place, age and serial number (R. 27); he had heard the two shots and arrived at the scene about two minutes after the last shot; deceased was conscious and asserted the accused had shot him (R. 28). On cross-examination he testified he heard the deceased say "Osborne is afraid of me" (R. 29). On examination by the Court he testified; he was with the deceased about five minutes before they took deceased to the hospital; he found no razor in the pockets or on the body of deceased but did not examine for such (R. 29); deceased gave no indication he thought he was about to die (R. 30).

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Captain Osborne Todd testified (R. 30): he was medical officer on duty the date in question; he examined the accused at about 9:30 (R. 30); he observed a slight odor on the breath of accused; there was no evidence of intoxication; a blood sample was taken and analyzed; in his opinion accused was sober; accused showed no evidence of nervous tremor but seemed rather cool (R. 31).

Staff Sergeant John F. Derbin testified (R. 31): he was on duty at the station hospital the day in question and saw the deceased there (R. 31); he took the blood specimen taken from accused by Captain Todd and turned it over to Sergeant Kriegbom (R. 32).

Sergeant Robert W. Kriegbom testified (R. 32): he analyzed the blood specimen in question (R. 32); there was no alcohol present; the test was made around ten or ten-thirty (R. 33).

For the Defense

The accused, Staff Sergeant Thomas B. Osborne, being advised of his rights, expressed the desire to testify under oath, and testified (R. 33): about 8:30 or 9:00 o'clock on the night in question he started to the latrine (R. 33); he stopped to talk to a group of soldiers; he explained the statement attributed to him by T/5 Chapman (see R. 7) about liking to kill men by testifying that the battery commander had made a speech saying they were going up front and he wanted the men to be brave and good soldiers. Some of the men had been absent and accused told the group they would have to do lots of crawling and fighting; that in cases they would have to crawl a mile to kill people; he admitted having his pistol out and pulling the hammer but it was not loaded; returning from the latrine he passed the deceased and others in a group; deceased was drunk (R. 34); at this point in the trial defense counsel endeavored to introduce testimony concerning an incident occurring previously that day between the deceased and another soldier in which deceased, in the course of an argument, had pulled a razor and held it to the throat of that soldier. Upon objections by the Trial Judge Advocate this evidence was excluded (R. 34-36). Accused was permitted to testify that the deceased did carry a straight razor; as he approached the group which included the deceased someone asked him which was the best section, the detail (Sic Signal) or gun section; that started an argument with deceased, who suddenly went wild and pulled out his razor; accused started backing up and got his pistol out of his right hand hip pocket (R. 36); he had changed his pistol from his left hand to his right hand pocket; the deceased started at him and he pulled his pistol and pulled the slide back; he thought deceased was going to cut him with the razor and kill him; deceased was coming at him and he backed up five or six paces; the ground was rocky, there were bushes around, and he was about to fall down; he then pulled his pistol and shot; he was nervous and shaky and the gun went off again pointed at the ground; he believed the deceased capable of doing him bodily harm and would kill him (R. 37). Defense Counsel again attempted to introduce testimony tending to show that the accused knew or believed the deceased was a dangerous man; that he carried a razor, and had threatened others with it. Upon objections by the Trial Judge Advocate, this evidence was again excluded. Objection was also sustained to a question as to why the accused shot Clarke and another as to whether or not accused thought the deceased would cut him with the razor (R. 38).

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Accused then testified he saw the occurrence between the deceased and the soldier Adams; deceased was half crazy and was around trying to start arguments; one of his arguments was with Adams. At this point the Trial Judge Advocate withdrew his objection to the testimony concerning the incident with Adams and the Law Member reversed his ruling stating the evidence in question would be considered by the Court (R. 39). Accused further testified that after the shooting he was nervous and scared; he walked about ten yards and threw the pistol in the bushes; he then went to battalion headquarters and reported to an officer what he had done, who then called the Adjutant and the MP's (R. 39). On cross-examination he testified that after he and the deceased got through talking the deceased pulled his razor and started at him; deceased had the razor in his watch pocket; accused was about five paces away and started backing up; the razor was in the hand of deceased; everything happened quick; Pfc. Pruss made a mistake when he testified the pistol was changed from the right hand to the left hand pocket (R. 40); at the time of the change he did not pull the slide back; he is right handed; he had no reason to change the gun from one pocket to the other (R. 41); his argument with deceased was not much of an argument; he had seen deceased draw his razor that night and didn't know what he (deceased) would do; deceased had threatened him before in 1940; he loaded his pistol just before he shot (R. 42); he loaded his pistol by pulling the slide back when deceased pulled the razor all the while deceased was coming toward him with the razor; he started backing up at the time he pulled his pistol; he backed up rapidly; he pulled his pistol and loaded it while moving backward. On examination by the Court he reiterated the deceased had a razor (R. 43); he never saw the deceased shave with it; he testified the remark attributed to him by Pfc. Pruss (see R. 23) about the razor was in fact a statement to the deceased that "you pull your razor in a hurry"; the discussion with deceased about sections lasted about three minutes; the reason he left the scene of the shooting was because he was scared (R. 44); he was sober; the deceased was drunk; deceased was always raising cane when he was drinking and had used his razor on Adams that night; he got within five paces of deceased and was about ten paces away when he shot; deceased was coming at him and he did not know how many paces deceased had taken; the distance between them when he shot was possibly three or four paces; he did not think to call for assistance (R. 45); Staff Sergeants were permitted to carry loaded arms at all times; deceased did not use the razor to shave with but used a safety razor; the remark he made about the razor was made after it was pulled; he made the remark about nobody would be taken out of his section or he would shoot him first (see R. 14). Accused was prevented from explaining the remark at this point but later did. See R. 50; there were lots of rocks and bushes around the scene of the shooting and if he had turned he probably would have fallen; he was scared to try to turn; there were small bushes about and the tents could not be pitched in a straight line (R. 46); he did not think he could have gotten away; he is larger than deceased; it was the razor that scared him; accused again reiterated the facts of the argument as to the best section, the attack on him by the deceased, and the subsequent events (R. 47); he might have fallen over rocks and bushes if he had tried to turn; he had had no arguments or trouble with deceased previously that day; he knew deceased was quarrelsome when drinking (R. 48); he was scared the deceased was going to cut him with the razor; he didn't see deceased open the razor, everything happened so fast; deceased pulled the razor first; he backed up as far as he could; he was still going back and deceased was still coming at him when he shot; he was lucky he did not fall down; he stumbled into bushes in backing up; he

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did not think he might have to use his pistol when he changed it from one pocket to the other (R. 49); he loaded just before he shot and intended to shoot to stop deceased, who was coming at him with the razor; deceased just pulled it out and started at him; he usually carried his pistol in his right hip pocket but being in a hurry at mess time had put it in the left pocket (R. 50). On re-direct examination he explained the statement referred to (see R. 14 and R. 46) concerning shooting anyone taking anybody out of his section by testifying that the circumstances connected with the remark were that a soldier was drunk and raising cane and somebody told him that if he didn't shut up he would be locked up; that he (witness) passed by just then and the drunk appealed to him not to let anyone lock him up; that to please the drunk he did say he would shoot anyone that tried to lock up anybody out of his section (R. 50 and 51); this was an hour before the shooting (R. 51).

Private James L. Adams testified (R. 51): on the night in question he had trouble with the deceased, who pulled a razor on him; he had been in a fight and deceased had accused him of starting it, which he denied; deceased forced him to admit he did start the fight (R. 51); the razor was close to his neck; deceased was drunk; accused was present at the time (R. 52); he was drunk but knew the deceased had the razor at his throat (R. 53).

Private Joseph J. Cwikla testified (R. 54): he was present and saw the deceased pull his razor and put it to Adams' throat; deceased was drunk and boasted he was not afraid of anybody in "B" battery and that if he couldn't beat them up with his fists he could cut them down with his razor (R. 55). On examination by the Court he testified the deceased pulled the razor from his watch pocket; he had been drinking but was not drunk (R. 56).

Rebuttal

Private Harold N. Price, testified (R. 57): on the morning after the shooting he went to look for the pistol and found the razor; a straight razor in a sheath (R. 57); he found it fifteen or twenty feet from where he was told the deceased fell down; the area was bushy and rocky; some of the bushes were three or four feet high, others just shrubs; there was no cap on the sheath (R. 58). On examination by the Court he testified he had turned the razor over to the battery commander; it had a yellow handle; it belonged to deceased (R. 58); he had seen it in the possession of deceased (R. 59). Witness was shown a razor in Court which looked like the one in question, but he would not identify it for sure (R. 59).

Comments

The evidence clearly established the fact of homicide by the accused. But to sustain the finding of guilty of the charge of murder, every necessary element of the crime denounced by the Article of War and described in the specification must be established by competent evidence.

A vital element thus required to be proved was that the killing was unlawful and done with malice aforethought. In the absence of malice aforethought, an unlawful homicide is manslaughter rather than murder. (MCM, 1928, par 149 a.).

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The defense of the accused consisted of the contention that he shot in self defense.

There was little, if any, dispute in the testimony upon any material fact. The accused and deceased engaged in one of those fruitless arguments over an immaterial and insolvable matter, as human beings unfortunately so often do. The accused was in good humor. The deceased was drunk. It was clearly established that the deceased was an aggressive and belligerent person of a threatening, violent, and vindictive nature; that he carried a straight razor, which was not used for shaving; that he had that very day offered violence to another soldier by drawing his razor and placing it at the throat of that soldier. The accused was present at this incident and knew the violent character of deceased. The only direct evidence as to the material facts and circumstances surrounding the shooting came from accused. His testimony was undisputed and in many respects corroborated. In the course of the argument the deceased drew his razor and started towards the accused. It was night time, the terrain was rocky and covered by bushes. The accused retreated some distance but finally shot and killed his attacker, who was still pursuing him. He testified he was in fear for his life; that in retreating farther he might fall; that he was scared and shaky. One of the statements made by deceased just after the shooting was "Osborne is afraid of me". A razor is a terrifying instrument in the hands of a drunken person and one known to use or threaten to use it as an offensive weapon.

The Court did not accept the plea of self defense. It is not the province or purpose of the Board of Review to weigh the evidence. It cannot be said that the evidence, however impelling, admitted only of a finding of not guilty. It was within the province of the Court to determine whether the accused acted reasonably under the circumstances and retreated as far as he could safely go before shooting his assailant. But all the facts referred to are quite cogent in considering whether there is any evidence of the existence of malice.

There was no direct evidence of malice. No hostility existed between the accused and the deceased. The accused was in good humor, even in a joking mood. The argument was not heated. He had made no threats against the deceased and did not make any at the time of the argument. There was no evidence of premeditation. There was no evidence establishing a motive for the homicide other than the asserted belief of the accused that it was necessary for him to shoot in self defense.

There is a general rule of law that malice may be presumed from the use of a dangerous weapon, but the presumption is not and should not be absolute. Otherwise every instance of unjustified homicide accomplished by the use of a dangerous weapon would be murder and there would be no lesser offense of manslaughter. Not only may the presumption be rebutted, but also, under certain circumstances, it may not even arise.

In Underhill's Criminal Evidence, section 557, it is said:

"A legal presumption of malice may arise from the deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death. Where provocation is shown, however, of more than a slight degree, the presumption of malice does not arise."

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Again:

"With the presumption of malice removed, it is for the jury to find whether malice existed on all the facts, and not merely from the use of a deadly weapon alone."

As stated above, under the circumstances of the sudden affray and provocation, it is the opinion of the Board of Review that the presumption of malice is removed and that there was no evidence upon which to find that malice existed.

Being a soldier stationed in an active theater of war, the mere fact that the accused was armed with a loaded pistol was not sufficient to establish intent or premeditation or malice. The statements of the accused made sometime prior to the incident in question, to the effect that he "liked killing men" and "would shoot anyone trying to take anybody out of his section" were fully explained and had no connection with or relationship to the deceased or the incident involving his death.

Winthrop, page 672, defines malice aforethought thus:

"The term malice, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility, but simply the wrongful intent essential to the commission of crime. When used, however, in connection with the word 'aforethought' or 'prepense', in defining the particular crime of murder, it signifies the same evil intent, as the result of a determined purpose, premeditation, deliberation, or brooding, and therefore as indicating, in the view of the law, a malignant or depraved nature, or, as the early writer, Foster, has expressed it, 'a heart regardless of social duty and fatally bent upon mischief'".

In Miller on Criminal Law, Section 92, it is stated:

"In order to determine whether malice was present or not, in any particular homicide, and thus to distinguish between murder and voluntary manslaughter, it is customary to use the test of whether the killing was done in mutual combat upon a sudden quarrel, or whether the accused was subjected to such provocation by the deceased, as to cause sudden hot blood or passion, as a result of which his reason was so disturbed or obscured that he acted rashly, without deliberation or reflection and from passion rather than judgment. This is, of course, in no way inconsistent with a finding that the accused acted intentionally, but rather that his intention was formed and carried out more hastily, with less deliberation and cool consideration, than if he had been acting under normal emotional conditions."

Winthrop, pages 674 and 675, further states:

"Manslaughter. This crime is defined as an unlawful killing without malice aforethought express or implied. It is this absence of malice aforethought which distinguishes manslaughter from murder; its commission being ascribed

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to the 'infirmity of human nature', and not to a depraved or wicked heart. The only malice in manslaughter thus is the wrongful intent which is an ingredient in crime in general. Homicide is commonly manslaughter, where, being unaccompanied by an intent to kill, it yet lacks some element which would have made it 'justifiable' or 'excusable' in law."

There being no evidence to establish the element of malice aforethought, the record of trial is not legally sufficient to support the finding of guilty of murder or the sentence imposed by the court.

It should be noted that the law member of the Court made numerous rulings which excluded competent evidence on the part of the accused, particularly testifying to show that the deceased was of a violent and vindictive nature. See page 674, Winthrop. Subsequently the law member reversed his rulings, admitted the evidence in question, and ruled that the same would be considered by the Court. It is presumed that the Court did so consider the evidence in question, and, therefore, that no substantial prejudice resulted to the accused, but such a practice is not to be condoned.

For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty as involves a finding of guilty of the lesser included offense of voluntary manslaughter in violation of Article of War 93 and legally sufficient to support only so much of the sentence as involves dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period not to exceed ten years.

In view of the circumstances under which the offense was committed, the Board of Review believes that the accused would be adequately punished by confinement at hard labor for three years, dishonorable discharge from the service, and forfeiture of all pay and allowances due or to become due, the dishonorable discharge to be suspended until the soldier's release from confinement.

John F. McCourtney Judge Advocate

Martin B. White Judge Advocate

Charles S. Frame Judge Advocate

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Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
27 April 1943.

To: Commanding Officer, Mediterranean Base Section, APO 600, U. S.
Army.

1. The holding of the Board of Review in the case of Staff
Sergeant Thomas B. Osborne, 6398565, Battery B, 36th Field Artillery,
that the record is legally sufficient to support only so much of the
findings as involves a finding of guilty of the lesser included of-
fense of manslaughter, in violation of the 93rd Article of War, and
only so much of the sentence as is not in excess of dishonorable dis-
charge, forfeiture of all pay and allowances due or to become due and
confinement at hard labor for 10 years, is approved.

2. You are authorized to direct the execution of the sentence
when brought within the legal limitations above set forth. However,
before directing the execution of the sentence you are at liberty to
modify it as, in your judgment, the circumstances appear to warrant.

3. The record of trial, together with the holding of the Board
of Review and my action thereon, are transmitted for further action
in accordance therewith. When the general court-martial order is
published, five copies thereof will be returned to this office with
the record and the holding of the Board of Review. For record pur-
poses the case is numbered NATO #5.

Adam Richmond
ADAM RICHMOND
Brigadier General, USA
The Judge Advocate General, NATOUS

1 Incl.

Record of trial, case
of S/Sgt T.B.Osborne.

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WAR DEPARTMENT

In The Office of The ASSISTANT The JUDGE ADVOCATE GENERAL
APO 512 U.S. Army

(25)

JAG Op.
Board of Review

17 April 1943

NATO 23

UNITED STATES

v.

Technician Fifth Grade
HERBERT HOWARD (7040072)
Company H, 67th Armored
Regiment.

SECOND ARMORED DIVISION

Trial by G.C.M., convened Headquarters
67th Armored Regiment, March 16, 1943.
Dishonorable discharge, forfeiture of
all pay and allowance and confinement
at hard labor for 20 years. Federal
Reformatory.

Opinion of the Board of Review
McCartney, White, and France, Judge Advocates

1. The Board of Review has examined the record of trial in the Case
of the above named soldier and submits this, its opinion, to The Assistant
The Judge Advocate General.

2. The accused was tried upon the following charge and specification:

Charge: Violation of the 93rd Article of War.

Specification: In that Technician 5th Grade Herbert Howard,
Company "H", 67th Armored Regiment did, at the station of his
command, on or about February 8, 1943, with intent to commit
a felony, viz., murder, commit an assault upon Private Daniel
Donovan, Company "G", 67th Armored Regiment, by willfully and
feloniously shooting him in the abdomen with a dangerous weapon,
to wit a Thompson sub-machine gun.

3. The accused pleaded not guilty to the Charge and the Specification
thereunder. He was found guilty of the Charge and the Specification. No
evidence of previous conviction was introduced. He was sentenced to be
dishonorably discharged the service, to forfeit all pay and allowances due
or to become due and to be confined at hard labor, at such place as the
reviewing authority may direct, for twenty (20) years. The reviewing au-
thority approved the sentence but withheld execution thereof pending action
pursuant to the provisions of Article of War 50 1/2. The Federal Reform-

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atory at Chillicothe, Ohio, was designated as the place of confinement but pending transfer thereto under competent orders the accused was ordered placed in confinement in the Atlantic Base Prison Number 1.

4. There is little, if any conflict in the evidence, the greater part of which related to events that occurred during the hour preceding the assault in question.

The evidence of the principal witness for the prosecution, Technician Fourth Grade James W. Mendenhall, (R. 4-12) may be summarized as follows: on the night in question while visiting with a friend at a camp fire in the bivouac area of Company G, an argument among another group of soldiers around another fire some fifty yards away attracted his attention. A fight ensued and he went to the scene of the disturbance where he saw the accused with a knife in his hand and his hand drawn back. Accused was arguing with Private Donovan, a guard. Corporal Cunningham, Corporal of the guard, seized the arm of accused causing him to drop the knife and then Donovan struck the accused in the face with his rifle butt. It was a light blow. Accused started towards Donovan but was held by others. He struggled to get loose and Private Looney struck at him with his fist but missed, whereupon the accused broke loose and ran away. This occurred about 10:30 P.M. The witness returned to the fire of his friend but a few minutes before 11 o'clock started to his own bed near the kitchen. Not knowing the way he approached Corporal Cunningham and asked to be shown the way. As Donovan, the guard, was to be relieved at 11 o'clock all three walked towards the fire where the fight had taken place. As they approached this fire the witness and Corporal Cunningham veered off slightly to one side while Donovan moved more directly towards the fire. When about fifteen feet from the fire three shots were heard. Witness dropped to the ground and when he looked again he saw accused with a gun in his hands about six feet the other side of the fire. He was positive of the identification and was able to see the mark on the face of accused made by the blow from the rifle butt. Accused then disappeared. Donovan ran about twenty-five yards and fell. He was shot in the stomach.

Evidence of other witnesses may be briefly summarized as follows:

Corporal Luther L. Cunningham (R. 12-18) reiterated the facts of the disturbance at the fire at about 10:30 P.M. and the shooting at 11:00 P.M. He heard some one running off through the woods but did not see the accused at that time. Accused was sober.

Corporal Loree Saunders testified (R. 18-20) that he was posted as a guard in the bivouac area of Company H, the organization of the accused who approached with Corporal Powell between 10:30 and 11:00 o'clock. Powell and accused were talking about a fight. Accused looked in a mirror and said something about the cut place under his eye. Powell told accused to "forget it" and urged him to go to bed. Accused said he would go to bed. Powell went with accused to the tent of the latter who entered it. Powell paused outside the tent a minute or two then left. Accused talked very clear and plainly in his conversation with Powell.

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1st Lt. James Logan White (R. 21-24) had investigated the original disturbance at the fire and returned to his tent. He heard the shots and started to the fire. He heard some one running in the dark and with his flashlight saw the accused who had a Thompson sub-machine gun in his hand. Witness inquired about the matter and accused said he had "let the guard have it". Accused was not drunk. Witness took the gun from accused then went with him to the first aid station. Within half an hour he examined the gun. It had been fired.

1st Lt. James R. McCartney (R. 24-25), Acting Company Commander of accused, upon being advised of a shooting called a company formation. Accused was absent. Witness went to the tent of accused and there found eight rounds of .45 caliber ammunition loose on the bed of accused who was not there. The "tommy gun" of accused was missing.

Captain John Erbes, M.C., testified (R. 25-27) he was called to give assistance at the time of the shooting and as he left the first aid station Lt. White and accused approached. He hurriedly examined the wound on the face of accused. It was a minor injury about 1/2" or 1" long and about 1/4" deep. He examined Donovan who had been shot three times in the stomach. The wounds were such as ordinarily caused death.

The accused was the only witness in his defense (R. 29-38). He recited in some detail his various stations in the Army and the events of the evening up to the time of the fight at about 10:30 o'clock. He testified that he remembered nothing after being struck in the face by Donovan until the next morning.

While the defense did not request a special examination into the mental condition of the accused, considerable evidence was presented touching upon this subject. Accused asserted he had been ill three times with pneumonia in 1940; had been in a motor vehicle accident in which he received back and head injuries; had been denied government insurance and he understood because of his mental condition; that he had been before a board of officers under a Sec. VIII proceeding and constantly has pains in his head.

5. Comment. The fact of the assault upon Private Donovan by the accused and with the weapon as set forth in the specification is amply supported by the evidence.

The period of time intervening between the fight at the fire in which Donovan struck the accused in the face with his rifle butt and the assault by accused, was such as to warrant the court in finding that the assault was not due to sudden passion. See CM 121426 Par. 451 (2) Dig. Op., J.A.G. 1912-40.

It is a fair and natural deduction from the evidence that retribution for the injury previously received at the hands of Donovan was the motive for the assault. A Thompson sub-machine gun is a dangerous weapon and its use under the circumstances gives rise to the implication of malice aforethought. De-

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liberateness and premeditation are substantiated by the evidence that the accused returned to attack Donovan after having gone to his own bivouac area with a friend, who urged him to forget the matter and go to bed, and, after accused had actually entered his tent, he loaded his gun on his bunk. Intent is evidenced by motive, deliberation and preparation. See Winthrop p. 688 and sections 555, 556 and 559 Underhill's Criminal Evidence.

The Board is of opinion that the evidence establishes all of the necessary elements required to convict upon the charge and specification.

There was no substantial evidence indicating the accused was not mentally responsible for his acts. Many of his assertions with regard to this matter were self serving declarations, conclusions, or hearsay. His testimony was given clearly and concisely and with such evidence of memory for the details of past events as to indicate that he is an alert and intelligent individual. The Court had full opportunity to hear and observe the accused. The Court therefore properly proceeded to a final determination of the case upon its merits.

There are no errors or irregularities in the proceedings which may be regarded as injuriously affecting the substantial rights of the accused.

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

John F. McCutney Judge Advocate
Martin S. White Judge Advocate

Warren S. Frasier Judge Advocate

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NATO #23

1st Ind.

Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
25 April 1943.

To: Commanding General, 2d. Armored Division, APO 252, U. S. Army.

1. The holding of the Board of Review that the record in the case of Private Herbert Howard, 7040072, Company H, 67th Armored Regiment, is legally sufficient to support the findings and sentence is approved.

2. You are authorized to direct the execution of the sentence. However, you may at this time modify the sentence in such manner as may be appropriate and direct the execution of the sentence as so modified. I am of the opinion that there are aspects of the case which would justify you in reducing the period of confinement.

3. The following maximum periods of confinement are prescribed for aggravated assaults:

a. Assault with intent to do bodily harm - one year.

b. Assault with intent to do bodily harm with a dangerous weapon, instrument or other thing - 5 years.

c. Assault with intent to commit any felony except murder and rape - 10 years.

d. Assault with intent to commit murder or rape - 20 years.

The soldier was charged with the most serious character of assault and the court imposed the maximum period of confinement authorized.

4. The difference between murder and manslaughter is to be found in the intent of the wrongdoer. If in the heat of passion one person kills another, the offense is manslaughter. So in many cases we have the problem of determining whether the killing took place during heat of passion or whether between the time of provocation and the assault that resulted in death there was a sufficient cooling off period to enable the wrongdoer to form a deliberate and wilful intent wholly apart from the urge induced by the heat of passion. That question was material in this case. The court found that a sufficient period had elapsed after the provocation to enable the accused to formulate an independent intent. This is a border-line case. Neither the Board of Review nor myself is competent to weigh the evidence in a case of this kind. Therefore in finding some evidence to support the findings we are limited to holding the record sufficient. My remarks, therefore, are not directed to any legal defect in the record but only to your

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NATO #23, 1st Ind.
25 April 1943 (Cont.)

judgment and discretion in such action as you as convening authority may take to bring the sentence more in line with the gravity of the offense. It is my suggestion that it would be appropriate for you to consider the maximum punishment authorized in the case of an assault with intent to commit manslaughter, which is ten years, as a maximum basis for determining an appropriate period of confinement.

5. After publication of the general court-martial order in the case, five copies thereof should be furnished this office and the holding of the Board of Review returned by indorsement hereon. For identification and reference purposes the case is numbered NATO #23, which number should appear in the court-martial order immediately following the action.

Adam Richmond
ADAM RICHMOND
Brigadier General, USA
The Judge Advocate General, NATOUSA

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APO 534, U. S. Army
3 May 1943 (31)

Board of Review

MATO 61

UNITED STATES

v.

Sergeant Charles Elsworth
Lancaster (15062773) Head-
quarters and Headquarters
Squadron, Twelfth Air Force.

HEADQUARTERS NORTHWEST AFRICAN
AIR FORCE

Trial by G.C.M., convened at
Algiers, Algeria, 5,6,7 March
1943. Dishonorable discharge
and confinement for three years.
Penitentiary.

REVIEW by the BOARD OF REVIEW

Holmgren, Iles and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specifications: In that Sergeant Charles Elsworth Lancaster, Headquarters and Headquarters Squadron, Twelfth Air Force, then Sergeant, 327 Heavy Bombardment Squadron, 92nd Bomber Group, did, at Algiers, Algeria, on or about 16 January 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one George Ernest Robins, a human being by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the specification of the Charge except the words "with malice aforethought, deliberately and with premeditation" and of the excepted words not guilty, and of the Charge he was found not guilty, but guilty of a violation of the 93rd Article of War. No evidence of previous convictions was introduced. He was sentenced:

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for six (6) years.

The reviewing authority approved only so much of the sentence as provides for a dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three (3) years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and for

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warded the record of trial for action under Article of War 50%.

3. The evidence shows that the accused went into Algiers just before noon on 18 January 1943 armed with a pistol which he took along because he "heard it was rough" (R. 123). He had about two-fifths of a bottle of wine with his lunch, went window shopping with some companions, then resumed drinking about one o'clock and continued until about one forty-five o'clock when he went out to find some of his friends. Failing to find them he returned to the tavern and drank (R. 125) until around two o'clock when the place closed. He then met a woman, took her to a hotelroom and stayed until about five o'clock when they went to get something to drink (R. 126). According to accused, they went to one cafe but did not remain; went to another and started drinking. Shortly afterwards he noticed his companion smiling at a Frenchman. He said the woman brought over the Frenchman who showed accused he was armed; whereupon accused took the Frenchman's hand and put it on his own pistol "just to let him know I had a gun" (R. 126, 127). He claimed he and the woman left the cafe and parted at the post office (R. 127, 128) about six thirty or a quarter of seven (R. 129).

About 6:45 or 7 o'clock accused and an English sailor, who was identified by means of a photograph as the deceased, Able-Bodied Seaman George E. Robins, (R. 11, 107, Ex. S-3), were in a restaurant operated by Madame Clemence Brass (R. 18, 26, 27, 106, 107). They had come in together (R. 22). Accused was, as Madame Brass put it, "more than drunk" (R. 26). He had ordered food but did not eat (R. 18). He took out and flourished his pistol, "put something inside the revolver", appeared to be playing with it, pointed it in several directions and even "against himself" and seemed to be enjoying himself (R. 19, 27, 106, Ex. S-2). He knew the weapon was loaded. (R. 127) The Englishman kept telling accused to put away the pistol, that they were going to leave. Later they did get out of the restaurant together, apparently on friendly terms (R. 19, 27, 109).

Major Thomas F. Goodwin of the British Army was driving down Rue d'Isly about 8 o'clock that night when he heard what he thought "was two shots". An American soldier who appeared to be staggering, came up to the car from the left side of the street and called out to the Major to stop, that he wanted the car. He made some statement, "and the word 'shot' came into it" (R. 29). Stopping, the Major saw a crowd coming from the other side of the street carrying a British sailor whom they placed in the back of the car (R. 30). The American got in the back of the car too but when someone said he still had a gun, Major Goodwin stated that he made the soldier get out of the car where he was disarmed by someone in the crowd. He further testified that the pistol taken from the American was handed to him and he in turn gave it to two American Military Policemen who had arrived at the scene (R. 31, 32, 48, 49, 51). With the help of two British soldiers, Sappers Donnelly and Pounders, Major Goodwin took the sailor to a hospital (R. 32, 45) where he developed peritonitis from a gunshot wound in his abdomen and died on 23 January 1943 (R. 6).

Accused was identified by Pounders as being the American soldier from whom the pistol was taken (R. 54). He heard accused exclaim "I shot him" and "let's get this man to the hospital" (R. 51, 53). Sergeant Levin H. Walker, one of two American Military Policemen who chanced to be nearby, heard two

shots fired (R. 57) and he and his companion rushed to the scene where they saw a British sailor lying on the sidewalk. Someone in a crowd which had gathered around an automobile across the street about 15 yards from where the sailor was lying said "get the gun" and Walker and his companion, Corporal Artelus C. Sonnier, went into the crowd where Sonnier took a pistol away from a soldier whom they retained in their custody and identified as the accused. (R. 58, 59, 60, 61, 62). Sonnier handed the gun to Major Goodwin but the Major returned it to him. A woman handed Sonnier an empty cartridge case. He did not know where it was found. Accused was described by Walker as being unsteady on his feet, staggering but not drunk (R. 61). Sonnier said accused was "under the influence of liquor, maybe not drunk passed off but drunk" (R. 65).

The only narrative of the actual shooting was given by Robins in a dying declaration made on 22 January 1943, the day before he died, (R. 7, 91, 101, 102, 110, 112, 114, 115, 116, Ex. S-2), in which he said:

"Between 6:30 and 6:45 P.M., on Monday the 18th of January, 1943, I was having a meal and drink in a restaurant off the Rue d'Isly. Sitting at the table was an American Sergeant whose acquaintance I had already made.

"I now identify Sgt. C. E. Lancaster, ASN 15062778, of the U.S. Army, as being the Sgt. in question.

"The Sgt. took out his revolver and flourished it about, threatening a French civilian and a French Airmen, who left the restaurant. I advised him to put the weapon away, and the proprietress advised me to take him outside.

"I accompanied him outside the restaurant when he pushed me violently forward and as I turned around he fired at me, and I collapsed."

Accused was present when the dying declaration was read over to Robins and when asked if he wished to ask any questions, replied "no" (R. 68, 91, 102). On that occasion as well as on 19 January 1943, Robins identified accused as his assailant (R. 67, 112, 153).

The bullet that killed Robins was extracted after his death (R. 6), and comparative bullets were fired out of the pistol taken from accused (R. 54). Comparisons and analyses by two experts were of little significance since one testified there were not enough markings to enable him to express an opinion other than it was possible that the death bullet and the comparative missile were fired from the same pistol (R. 54, 42, 43) and the other expert testified that in his opinion the two missiles were not fired from the same barrel (R. 152, 155, 161). Both experts found that the cartridge casing handed Sonnier by the French woman and casing fired from the pistol taken from accused were exploded by an eccentric point of impact but neither attached great importance to the circumstance (R. 58, 59, 159, 160).

Accused elected to testify under oath (R. 122). He detailed with exactness his movements and conduct during the day of 18 January 1943 up until about 6:30 or 6:45 o'clock in the evening after which he said he remembered nothing except seeing a crowd of people and them being in a Military Police

station (R. 129). He gave two voluntary statements in which he repeated his remonstrance that he knew nothing of the shooting (Ex. S-10, S-12). He voluntarily submitted to questioning by medical officers while under the influence of sodium pentethol, a drug which produces a state very similar to hypnosis. Lieutenant Colonel Roy R. Grinker, Medical Corps, testified that he had "not yet found anyone capable of concealing information under this state". (R. 147). While under the influence of the drug, accused said the English seaman he met in the tavern before the period of amnesia was not the one he saw at the hospital, and he denied that he shot deceased. (R. 149, 150). Colonel Grinker had seen several soldiers who developed amnesia after drinking considerable quantities of wine (R. 147).

It is thus established by the evidence beyond a reasonable doubt that accused, at the place and time alleged, killed George Ernest Robins, a human being, by shooting him with a pistol. By the findings, accused was acquitted of murder but convicted of manslaughter in violation of Article of War 93. The Staff Judge Advocate properly reached the conclusion that under the findings as made, accused was guilty of involuntary and not voluntary manslaughter. The latter only arises where the act causing the death is committed in the heat of sudden passion caused by provocation (par. 149, MCM, 1928). There is a complete absence of testimony that there was any display of anger or passion on the part of accused nor was there any suggestion that deceased had provoked accused to the commission of the fatal act.

"Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act" (par. 149a, MCM, 1928). Although the act of accused in arming himself and flourishing the loaded revolver shortly before the shooting was not shown to have been unlawful, it was culpably negligent and the results of this wanton conduct are imputable to accused.

The court preferred to believe the explanation of accused that he was in a state of amnesia when the fatal affray occurred. The undisputed proof showed that the amnesia, if it existed, was produced by over-indulgence in intoxicants. The drunkenness thus occasioned "is not an excuse for the crime accused committed while in that condition; but it may be considered as affecting mental capacity to entertain specific intent, where such intent is a necessary element of the offense". (par. 126, MCM, 1928). The court appears to have scrutinized this evidence carefully, as should be done when drunkenness is interposed as an explanation of the commission of an unlawful act. It was justified in reaching the conclusion expressed in its findings.

The evidence amply shows that accused, while drunk from over-indulgence in liquor, shot Robins; that the shooting was a result of culpable negligence on the part of accused in getting drunk while armed with a loaded pistol and

in firing the weapon in such a manner as to inflict a fatal wound upon the English sailor; that the killing was wilful, felonious and unlawful. This was involuntary manslaughter in violation of Article of War 93.

5. Defense counsel objected to the introduction of Robins' dying declaration. After preliminary rulings which excluded the document, the law member overruled the objection and admitted the declaration in evidence (R. 9, 36, 91, 113, 114, 117). The objection was that a proper predicate had not been laid for the introduction of the statement as a dying declaration.

The nurse attending Robins testified she "had an order" that the Trial Judge Advocate "wished for a dying declaration" from Robins; that she tried to make the sailor comfortable as he was very restless (R. 111); that he was aware of his condition (R. 112) and said he had given up hope (R. 115); that he refused treatment and said on several occasions it was useless (R. 117). On the morning of the day he died, "he wasn't normal" but the nurse "would say he was perfectly compes mentis" (R. 117). On the 19th of January, accused had been taken to the hospital where Robins identified him as the man who shot him (R. 133). This testimony, together with all the other circumstances in evidence warrants the conclusion that Robins, at the time before he made the dying declaration, was in extreme and believed he was soon to die. The requirements of law were thus met and the declaration was properly admitted (par. 148^a, p. 164, IAWM, 1928).

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. 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 45^a, title 18 of the Criminal Code of the United States.

Samuel T. Holmgren, Judge Advocate.

O. Z. Ide, Judge Advocate.

Gordon Simpson, Judge Advocate.

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(36)

APO 534, U. S. Army
5 May 1943

Board of Review

NATO 61

UNITED STATES)

v.)

Sergeant Charles Elsworth
Lancaster (15062778), Head-
quarters and Headquarters
Squadron, Twelfth Air Force.)

Trial by G.C.M., convened at
Algiers, Algeria, March 5, 6,
7, 1943. Dishonorable dis-
charge, total forfeitures and
confinement at hard labor for
three (3) years. Federal Re-
formatory at Chillicothe, Ohio,
designated as place of confine-
ment.

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.

Samuel T. Holmgren, Judge Advocate.

O. Z. Ide, Judge Advocate.

Gordon Simpson, Judge Advocate.

NATO 61

lat Ind.

Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
6 May 1943.

To: Commanding General, Northwest African Air Force, APO 650, U. S. Army.

1. In the case of Sergeant Charles Elsworth Lancaster (15062778),
Headquarters and Headquarters Squadron, Twelfth Air Force, 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 $\frac{1}{2}$, you now
have the authority to order the execution of the sentence.

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NATO 61; 1st Ind.
6 May 1943 (Cont.)

2. The action of the reviewing authority in reducing the period of confinement to three years indicates that he was satisfied with the offense committed by the accused was involuntary manslaughter. The circumstances under which the offense was committed justify the reviewing authority's decision. It would now be proper for the reviewing authority to consider whether the soldier can be of any further service to the army. If so, it would not be inappropriate to suspend the execution of the dishonorable discharge, leaving the reformatory as the place of confinement but pending further orders send him to the Disciplinary Training Center in this theater. If, after a reasonable period, the soldier demonstrates that he is of no value to the army, the execution of the dishonorable discharge may then be ordered and the prisoner returned to the United States. If, on the other hand, he can become a good soldier, the suspension of the execution of dishonorable discharge will permit his restoration to duty.

3. After publication of the general court-martial order in the case, five 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 61)

ADAM RICHMOND
Brigadier General, USA
The Judge Advocate General, NATOUSA

COPY

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WAR DEPARTMENT

(39)

Office of the Judge Advocate General
for the
North African Theater of Operations

APO 534, U. S. Army
6 May 1943

Board of Review

NATO 72

UNITED STATES	}	Trial by G.C.M., convened at Casablanca, French Morocco, 19 March 1943. Dishonorable discharge, total forfeitures and confinement at hard labor for ten (10) years. Federal Reformatory at Chillicothe, Ohio, designated as the place of confinement.
v.		
Private Chester Paluszewski, 15072893, 739th Quartermaster Platoon Truck (Aviation) (Separate).		

HOLDING 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. The accused was tried upon the following Charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification: In that Private Chester Paluszewski, Seven Hundred Thirty-Ninth Quartermaster Platoon Truck (Aviation) (Separate), did, at Casablanca, French Morocco, on or about 17 February, 1943, with intent to commit a felony, viz, rape, commit an assault upon Claudie Dupart, eight years of age, by attempting forcibly and feloniously, against her will, to have carnal knowledge of her, the said Claudie Dupart.

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

Specification: In that Private Chester Paluszewski, Seven

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Hundred Thirty-Ninth Quartermaster Platoon Truck (Aviation) (Separate), did, at Casablanca, French Morocco, on or about 17 February, 1943, wrongfully abuse Claudie Dupart, a child of tender year by attempting to have carnal knowledge of her, thereby bruising and otherwise willfully maltreating the said Claudie Dupart, she being a child under the age of eighteen years.

3. The offenses alleged are separate and distinct. That under Article of War 93 is for an assault with intent to commit rape, punishable by confinement at hard labor for twenty years (MCM, 1928, p. 99), and the one under Article of War 96 is for the abuse and maltreatment of a child under 18 years of age, recognized as an offense by the D. C. Code (1940) (Section 22-901 (6:37) ch. 9), and punishable by imprisonment for a term of two years. The latter offense has been held to be lesser than and included in the offense of assault with intent to commit rape (Dig. Op. JAG, 1912-40, Section 451(2)).

Although these offenses arose from the same set of facts and may for that reason suggest an improper duplication of charges, it is the opinion of the Board that both were warranted in this case. The rule of pleading that "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person" (MCM, 1928, par. 27), is not inexorable. Deviation is permissible where, in a given situation, there may be a question as to the definiteness of evidence. In fact, the term "unreasonable", as used in the above rule, connotes unreasonableness from the viewpoint of both the legality and the appropriateness of the punishment involved. Consequently, where there is a finding of guilty in respect of two offenses involving different aspects of the same act, the punishment imposed should not exceed that which is allowable as punishment for the act in its most important aspect. This was observed by the court in the instant case.

4. Such a charge under the 93rd Article of War, requires proof that the accused made an assault upon a certain female, as specified; that there existed at the time of such assault an intent on his part to penetrate the person of such female by overcoming any resistance by force, actual or constructive, and that the offense of rape would have been committed had the accused succeeded in carrying out his purpose. It is well settled that courts-martial are governed by the common law definition of the crime of rape. The offense may be committed on a female of any age. Force and want of consent are indispensable, but the force involved in the act of penetration is alone sufficient force where there is in fact no consent. There may be no consent where the female is incapable of consenting, and a man having connection with a woman not believing he has her consent is guilty of rape. In a case of a girl of tender years, less clear opposition is

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required than in the case of an older and intelligent female (Bishop's New Criminal Law, Section 1124, subsec. 1).

No comment is necessary with respect to the obvious scope of the offense involved by the Charge under the 96th Article of War. The section of the D. C. Code, above cited, makes it a misdemeanor for "any person who shall...abuse, or otherwise willfully maltreat any child under the age of eighteen years,...".

5. The evidence shows that the accused, on the date alleged, parked a small army vehicle near the home, in Casablanca, of a family by the name of Dupart. At some time in the afternoon three children of the neighborhood got into the car for a ride and these were followed by Claudie, the 8 year old daughter of the Duparts. The accused dropped off the three children at places near their homes but did not return Claudie to her home until about 8:15 in the evening. He indicated to the girl's mother that he had taken her for a ride and was bringing her back (R. 15). When in the house the girl's drawers fell to the floor. Her mother laid her on a bed and upon looking at her legs found "irritation and red and traces of motor grease on her" (R. 15). Grease stains were found on her drawers. A doctor, who was summoned, found "irritation of the genital parts of the child" (R. 12, 13). A microscopic examination made February 20, 1943, disclosed gonococcus in full activity and one on February 24th, complete sterilization of the vaginal cut (R. 13). The evidence further shows that upon an examination of the accused on February 24th, he was found to have gonorrhea in either an acute or sub-acute stage (R. 7). He could have had this infection for more than one or two weeks (R. 7). The testimony of the victim as to what happened on that automobile ride tends to show that the accused stopped the car at some place along the route and, employing the language of the witness, "took something out of his trousers and he took off my pants." "He took something out of his drawers and he put it to me. So I screamed and he took me back home." (R. 10) "He took off my drawers and put it to me and gave me some money - coins." When asked, "Where did the American soldier touch you?" she replied, "Here. (The witness pointed to her genital area.)" (R. 17)

6. In view of the applicable principles of law, the above stated facts and circumstances appear more than sufficient to support the Charges and the specifications thereunder. In addition to the manifest abuse and maltreatment of this child, the accused clearly committed an assault and concurrently therewith endeavored, - if he did not in fact succeed - to penetrate her genital parts (R. 12, 13, 17). The assault with a concomitant intent to rape is established by his act in taking off her drawers and abusing her in a manner which is clearly discernible from all the facts and circumstances. The only reasonable view is that he did this well knowing that with a child of such tender years and lacking knowledge of such things, the intended act would have been without her consent (R. 10, 17). Furthermore, there is no question that his acts constituted the offense denounced by the above cited section of the D. C. Code, appropriately set forth herein under the 96th Article of War.

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7. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

Daniel P. Harrington, Judge Advocate.
.....*O. J. T. de*....., Judge Advocate.
Gordon Simpson, Judge Advocate.

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WAR DEPARTMENT
Office of the Judge Advocate General
for the
North African Theater of Operations

APO 534, U. S. Army
29 April 1943

Board of Review

NATO 73

UNITED STATES	MEDITERRANEAN BASE SECTION
v.	Trial by G.C.M., convened at
Private James L. Walters, 32266008, 561st Engineer Boat Maintenance Company.	Oran, Algeria, 12 March 1943. Dishonorable discharge, total forfeitures and confinement at hard labor for twelve (12) years. United States Disci- plinary Barracks, Fort Leaven- worth, Kansas.

REVIEW of the BOARD OF REVIEW
Holmgren, Ide and Simpson, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its review, to the Judge Advocate General, North African Theater of Operations.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James H. Walters, 561st Engineer Boat Maintenance Company, did at Mers el Kebir, Algeria, on or about 13 November, 1942, desert the service of the United States and did remain absent in desertion until he surrendered himself at Oran, Algeria on or about 26 January, 1943.

The accused pleaded not guilty to and was found guilty of both 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 twelve years. The reviewing authority approved the sentence.

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designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50t.

3. The 561st Engineer Boat Maintenance Company, of which accused was a member, arrived in Africa about the 11th of November, 1942 (R. 22, 23); the entire company did not disembark from the same ship (R. 23); the unit to which accused belonged was commanded by Lieutenant Howard Cook, Lieutenant Marion J. Beam being the Executive Officer (R. 23); on November 13th accused, without leave (R. 23), left the boat between 6:30 and 7:30 P.M. and went into Mers-El-Kebir with Private Samuel L. Petrie and a sailor (R. 28, 29); Petrie later returned to the ship but accused stated he wanted to go to Oran and left him (R. 29). Accused's unit disembarked on the 14th just before noon (R. 23) and took up its headquarters at Mers-El-Kebir (R. 22, 23). Accused's unit rejoined the company at Arzew on 26 January 1943 (R. 27). Accused was absent without leave from his company between 18 November 1942 and 26 January 1943 (R. 27).

23. All of that time accused was in the city of Oran and was seen there by Captain David E. Burton, his Company Commander, on 16 November 1942, at which time the Captain spoke to him. He was in his O. D. uniform, with overseas cap and blouse and had with him his M-1 rifle (R. 20). On November 29 Private Petrie saw him in Oran and was told by accused that he had attached himself to another outfit and had no intention of returning (R. 29). Petrie told accused that his company was then stationed at Arzew (R. 30).

Master Sergeant Edward E. Jones testified that he met accused about December 10, 1942 in a restaurant at Oran (R. 35); that he did not know to what organization accused was assigned at that time (R. 35); that he saw accused three or four days later and frequently thereafter (R. 35, 36); that accused stayed about three or four nights with him at the National Hotel in Oran (R. 36); that the first time accused told Jones he belonged to the 561st Company was about a week before he turned himself in (R. 36); at that time accused said he was AWOL and insisted on seeing the Chaplain, after which arrangements were made for him to see the Chaplain; that the day after he saw the Chaplain accused was to report back but did not do so; that he then went down town, found the accused in a restaurant and told him he was under arrest (R. 36, 37); that this was the latter part of January, 1943 (R. 37); that when accused first said he was AWOL he asked Jones to help find where his unit was located (R. 37); that accused had told Jones that he had had an accident, that he had been riding in a weapons carrier headed for Mers-El-Kebir and about the only thing he remembered was that they hit a power station (R. 38); during the time he knew accused, accused paid for the majority of his own meals (R. 38). *(ch
witness)*

A manager of the National Hotel, Oran, testified that accused occupied a room at that hotel with "Chief" Sergeant Edward Jones from 26

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November 1942 to the 10th or 11th of January, 1943 (R. 16), and that the bill was paid by Sergeant Jones (R. 19). On January 13, 1943, T/5 Jerry Alterman and Sergeant Harvey H. Foster, of accused's company (R. 31), met him in Oran, at which time accused inquired about his mail, asked them to have Warrant Officer James A. Waters meet him the next day, and stated that he would like to return to his company but that he was afraid to (R. 34).

During the latter part of January, 1943, accused came into the office of Major Patrick Fay, Chaplain, MBS, with Sergeant Jones; that accused told the Chaplain he belonged to the 561st Boat Regiment, which was located at Arzew, and that he had been staying at army posts; that he had an automobile accident on November 12th; the Chaplain advised accused to go back to his unit as soon as possible, in response to accused's request for advice upon the matter; accused said he had been looking for his unit all the time; the Chaplain told accused he could get transportation to his unit if he came back the next day at ten o'clock, but that accused failed to report back (R. 41,42).

On February 12, 1943, accused made a signed statement to Lieutenant Marion J. Beam, Executive Officer of his company, after having been duly advised as to his rights, which was received in evidence at the trial (Prosecution's Exhibit "B"). In this statement, accused stated that he left the boat at 5 P.M. on November 12, 1942 with Private Petrie, going into Mers-El-Kebir, and there hitch-hiking into Oran; that on returning he had an automobile accident after which he went to the boat but found his outfit gone; that he returned to Oran; that about ten or eleven o'clock in the morning he saw Captain Burton go by the Continental Hotel but that the Captain did not stop; that he met Sergeant Jones in a restaurant, and that the Sergeant took him to his company; that he stayed with this company for over two weeks at the Garage Gallieni in Oran, working with the sergeant on different jobs; that the sergeant told him that if he couldn't locate accused's outfit he would have him transferred to the sergeant's outfit; that the sergeant got a room at the National Hotel and that accused stayed with him there until about the middle of January, at which time the sergeant told accused he had located his unit in Arzew; that accused was anxious to get back to his outfit at all times and that when the sergeant did not take him back accused grew impatient and had the sergeant take him to see the Chaplain; that the Chaplain promised to send accused back to his outfit the next morning; that accused was then turned over to the MP's and sent to the 7th Station Hospital for examination; that the sergeant told accused to make believe he was crazy from the accident and to "keep mum".

Accused elected to remain silent but introduced in evidence a written statement made by Elie Levi, Manager of the National Hotel (Defense's Exhibit "A"), to the effect that Sergeant Jones had registered at the hotel 27 November 1942 and that accused stayed in the room with Sergeant Jones for nearly three months. That accused seldom left the room and that the rent was paid by Sergeant Jones.

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4. The record of trial, therefore, presents the question of law whether the evidence is legally sufficient to support the finding that accused deserted. Desertion is absence without leave with the concurrent intent not to return. In order to sustain a conviction of desertion there must be substantial evidence tending to show the necessary intent not to return to the service. It is well settled that prolonged absence, unexplained, may justify a court in inferring an intent to remain permanently absent. In the instant case the absence was of 76 days' duration. This absence of long duration, coupled with the testimony of Private Petrie that on November 29 accused said he had no intention of returning is, in our opinion, sufficient evidence of accused's intention to justify the finding of guilty.

5. 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 of both the specification and the Charge and is legally sufficient to support the sentence. The Court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The action of the reviewing authority correctly fixes the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement.

Samuel T. Holmgren, Judge Advocate.

O. Z. Ide, Judge Advocate.

Gordon Simpson, Judge Advocate.

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WAR DEPARTMENT

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

APO 534, U. S. Army
19 May 1943

Board of Review

NATO 88

UNITED STATES)	MEDITERRANEAN BASE SECTION
v.)	Trial by G.C.M., convened at
Private George (NMI) Johnson (34139890), Company C, 398th Port Battalion.)	Oran, Algeria, 11 April 1943. Dishonorable discharge, total forfeitures and to be hanged by the neck until dead.

HOLDING of 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. The accused was tried upon the following Charges and specifications:

CHARGE I: Violation of the 64th Article of War.

Specification 1. In that Private George Johnson, Company "C", 398th Port Battalion, did, at Oran Algeria, on or about April 7, 1943, strike First Lieutenant Edward J. Chodokoski, 62d Coast Artillery (AA), his superior officer, who was then in the execution of his office on the face and arms with his fist.

Specification 2. In that Private George Johnson, Company "C", 398th Port Battalion, did, at Oran, Algeria, on or about April 7, 1943, lift up a weapon, to wit a pistol against First Lieutenant Edward J. Chodokoski, 62d Coast Artillery (AA), his superior officer, who was then in the execution of his office.

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

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Board of Review, NATO 88
19 May 1943 (Continued)

Specification: In that Private George Johnson, Company "C", 398th Port Battalion, did, at or near Oran, Algeria, on or about April 7, 1943, wrongfully, and indecently, while in uniform in an open place have sexual intercourse with a woman in view of other persons.

He pleaded not guilty to and was found guilty of both charges and all specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and to be hanged by the neck until dead. The reviewing authority approved the sentence, made a recommendation of clemency and forwarded the record of trial to the confirming authority who, having been empowered so to act by the President, confirmed and commuted the sentence to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. He designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial to the Branch Office of the Judge Advocate General with the North African Theater of Operations for action under Article of War 50 $\frac{1}{2}$.

3. The prosecution's evidence in pertinent part shows:

On 7 April 1943 First Lieutenant Edward J. Chodokoski was proceeding along a road near Oran on an inspection trip when he heard loud noises and a disturbance a little distance from the road and went to investigate (R. 5). He found three soldiers seated on a cliff and a short distance away, toward the ocean, and in a depression, he saw accused having sexual intercourse with an Arab woman (R. 5, 17, 13). At that time the accused was about 10 feet from the Lieutenant and 15 or 20 feet from the three soldiers (R. 3). The accused was apparently putting on a show for the three soldiers (R. 5). The Lieutenant yelled to accused, "Stop it. Cut it out", two or three times, then moved about 10 feet along the cliff in the direction of the three soldiers and in doing so he picked up three small stones about one inch in diameter and threw them in the direction of accused, but does not think he struck accused with the stones (R. 8, 13).

One of the soldiers started walking toward accused and told him to be on his way and get out or there would be trouble (R. 9). As he approached, the Lieutenant drew his pistol, cocked it and pointed it more or less in the direction of accused and told the soldier who was approaching him to stop (R. 9). The soldier did not stop but came right on against the Lieutenant's left arm, which was outstretched, to keep him back (R. 9). In the meantime accused apparently left the ledge and came up to the Lieutenant from his right side (R. 14) and struck the Lieutenant in the mouth with his fist (R. 9, 14). The Lieutenant fell down and wrestled with accused, who was trying to take the pistol away from him. During the

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Board of Review, NATO 88
19 May 1943 (Continued)

tussle the pistol was pointed towards the Lieutenant three or four times but he managed to keep it away. Accused took the pistol away from the Lieutenant and ran and almost immediately thereafter the Lieutenant heard a shot fired (R. 10). Later, when accused surrendered the pistol the barrel was dirty and one cartridge was missing (R. 14). This shot was witnessed by one Taiti Ali, who testified that he saw a soldier fire a shot just in front of the officer, whom he identified as Lieutenant Chodokoski, and that the soldier whom he could not identify ran to his camp (R. 18).

After the Lieutenant regained his feet he was held by one of the three soldiers and the Lieutenant yelled to accused, "Stop! Drop that pistol, you will get in trouble if you don't" (R. 11). The Lieutenant broke away from the soldier who was holding him and followed accused, who ran and, when the Lieutenant was within 50 feet of him accused pointed the pistol at the Lieutenant and said something which the Lieutenant did not understand (R. 11, 12). Accused then put the pistol in his pocket and ran toward the camp, finally "converging" upon Lieutenant Maurice J. Rivet, to whom accused gave the pistol (R. 12).

On 8 April 1943 accused, after being advised of his rights, signed a voluntary statement in which he conceded the general situation up to the point where the stones were thrown by the Lieutenant. He stated that as he was having intercourse with the woman someone started throwing stones at him and he told Private Riddick (one of the three soldiers present) to stop "chinking" the rocks, to which Riddick replied that the rocks were being thrown by an officer up on the hill. That he then got up, pulled up his coveralls and started to climb the hill; that the officer had a pistol out and "then the pistol fired." That another fellow had hold of the officer's left arm and that he (accused) twisted the pistol out of the Lieutenant's hand and went down to the camp area, followed by the officer. That on the way he met Lieutenant Rivet who pointed the way to Lieutenant Correia and that accused gave the gun to Lieutenant Correia and told him what had happened (Pros. Exh. H).

4. The defense consisted of an unsworn statement by accused and the testimony of three officers. In his statement accused said, "I came up the hill and took the gun away from the officer, but I didn't hurt the officer and I didn't draw the pistol on him" (R. 26).

Captain Lewis W. Fleischer, accused's Commanding Officer, testified that accused had a good reputation among the members of his company for moral character and military efficiency (R. 23).

Lieutenant Maurice J. Rivet testified that he saw the accused at approximately 2:15 on the afternoon of 7 April 1943; that accused had a pistol at the time which he gave to Lieutenant Correia (R. 23, 24).

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Board of Review, WATO 88
19 May 1943 (Continued)

Lieutenant Edmund G. Correia testified that he saw accused on the afternoon of 7 April 1943. That accused took a pistol from his pocket and gave it to him. That Lieutenant Chodokoski was with accused at the time. That the gun was a .45 caliber army pistol with 5 rounds of ammunition in the clip and one in the chamber.

5. The offenses charged were alleged to have been committed on 7 April 1943. The case was referred for trial on 10 April 1943 and accused was served with a copy of the Charges on that date. Trial was held on 11 April 1943.

Under Article of War 70 in time of war accused may be brought to trial within 5 days. Furthermore, no objection to going to trial was made by defense at the time of arraignment and the Law Member specifically asked accused if they had had ample opportunity to prepare the defense, to which defense counsel answered in the affirmative. There was no error in bringing the case to trial under these circumstances.

An officer is in the execution of his office "when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage" (Winthrop, p. 881).

Article of War 68 provides that "all officers...have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order...persons subject to military law who take part in the same into arrest or confinement... . And whosoever, being so ordered, refuses to obey such officer...or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court martial may direct."

The Board of Review is of the opinion that the acts of the accused and his companions was a disorder such as is contemplated by the above Article of War and that Lieutenant Chodokoski, in his effort to stop the disorder, was then in the execution of his office.

The testimony of Lieutenant Chodokoski is manifestly sufficient to support the findings of guilty of specification 1 of Charge I. He saw accused as he struck witness in the mouth with his fist and accused admitted that he seized the Lieutenant's arm in an effort to take the pistol away from him.

The finding of guilty of specification 2, Charge I, is sustained by Lieutenant Chodokoski's eye-witness account of the chase; of accused's stopping, pointing the pistol toward the Lieutenant and saying something which the Lieutenant did not understand.

The allegations of Charge II and its specification are admitted by the accused in his signed statement and are testified to by Lieutenant Chodokoski.

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Board of Review, NATO 88
19 May 1943 (Continued)

6. The reviewing authority appended to the record of trial a letter dated 25 April 1943, recommending clemency, which includes the following:

"2. In this case it is to be noted that the accused did not inflict serious bodily injury nor did he disobey an order to perform a military duty. Moreover, it is my opinion that, in view of the fact that the offenses charged against the accused under Article of War 64 were military offenses committed outside the combat zone, the sentence is too severe. However, there is no power in the reviewing authority to commute the penalty of death to imprisonment. It is believed that the accused should be severely punished however, and for this reason the sentence has been approved with a recommendation for clemency by way of commutation of the sentence of death to a suitable term of imprisonment at hard labor. It is felt that if clemency is extended to the accused the commutation of the sentence of death to twenty years imprisonment would be consonant with justice and adequate punishment for the offense."

7. The court was legally constituted and had jurisdiction of the person and offenses involved. No errors injuriously affecting the substantial rights of accused were committed at the trial. The Board of Review holds that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and confirmed and commuted by the confirming authority. Confinement in the United States Disciplinary Barracks, Fort Leavenworth, Kansas, is authorized for the offenses involved.

Ronald D. Hargreaves, Judge Advocate.
O. G. Teller, Judge Advocate.
Benton Simpson, Judge Advocate.

NATO 88
1st Ind.
Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
19 May 1943.

To: Commanding General, NATOUS, APO 534, U. S. Army.

1. In the case of Private George Johnson (34139890), Company C, 398th Port Battalion, 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 $\frac{1}{2}$, you now have the authority to order the execution of the sentence.

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NATO 88, 1st Ind.
19 May 1943 (Cont.)

2. After publication of the general court-martial order in the case, five 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 88)

Adam Richmond
ADAM RICHMOND
Brigadier General, USA
Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 7, NATO, 20 May 1943)

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

APO 534, U. S. Army
19 May 1943

Board of Review

NATO 92

UNITED STATES)	2ND ARMORED DIVISION
v.)	Trial by G.C.M., convened at
Second Lieutenant Seymour (NMI))	Headquarters, 2nd Armored Di-
Hirschel (O-1294840), Infantry)	vision, APO 252, 23 April
Headquarters Company, 2nd Armored)	1943. Dismissal.
Division.)	

HOLDING of the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

2. The accused was tried upon the following Charges and specifications:

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

Specification: In that 2nd Lieutenant Seymour Hirschel, Headquarters Company, 2d Armored Division, did, without proper leave, absent himself from his organization and station at APO 252, c/o The Postmaster, New York, N.Y., from about April 1, 1943 to about April 2, 1943.

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

Specification 1: In that 2nd Lieutenant Seymour Hirschel, Headquarters Company, 2d Armored Division did, at the station of his organization, on or about April 1, 1943, wrongfully take and drive away without proper authority, one $\frac{1}{4}$ -ton Ford Command and Reconnaissance

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Board of Review, NATO 92
19 May 1943 (Continued)

car #W-20103819, value about \$850.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that 2nd Lieutenant Seymour Hirschel, Headquarters Company, 2d Armored Division did, at the station of his organization, on or about April 1, 1943 violate standing orders of the Commanding General, I Armored Corps, that no commissioned officer will drive any government owned vehicle except in combat, in training or in extreme emergency, by dismissing the regularly assigned driver of $\frac{1}{4}$ -ton command and Reconnaissance car #W-20103819, and by driving said vehicle to Casablanca, French Morocco, he not being in combat, or upon a training mission, and there being no emergency requiring him to drive.

Specification 3: In that 2nd Lieutenant Seymour Hirschel, Headquarters Company, 2d Armored Division did, at Casablanca, French Morocco, on or about April 1, 1943, wrongfully leave one $\frac{1}{4}$ -ton Command and Reconnaissance car #W-20103819, property of the United States, parked and unattended upon the public street of said city, from which place said vehicle was taken by a person or persons unknown, and damaged by wrecking.

Specification 4: In that 2nd Lieutenant Seymour Hirschel, Headquarters Company, 2d Armored Division did, at Casablanca, French Morocco, on or about April 1, 1943, wrongfully take and drive away without proper authority one $\frac{1}{4}$ -ton Command and Reconnaissance car #W-20221829, value about \$850.00, property of the United States, furnished and intended for the military service thereof.

Specification 5: In that 2nd Lieutenant Seymour Hirschel, Headquarters Company, 2d Armored Division, (then a member of the 41st Armored Infantry Regiment), did, at the 11th Evacuation Hospital, Rabat, French Morocco, on or about January 27, 1943, agree with Private Irving Goldstein, 11th Evacuation Hospital, to violate censorship regulations, the said Lieutenant Hirschel agreeing to stamp and pass as censored and to forward through the United States Mails, under his own name as sender, a letter written by the said Private Goldstein, addressed

Board of Review, NATO 92
19 May 1943 (Continued)

to a person in the United States, and containing minute description of locale and other matters violative of censorship regulations, and did, at said 11th Evacuation Hospital, on or about January 27, 1943, in furtherance of such agreement deposit in the United States Mails, under his own name as sender, stamped and signed by him as having been properly censored, a letter written by the said Private Goldstein, addressed to Mrs. Irving Goldstein, c/o Kabak, 1915 Billingsly Terrace, Bronx, New York, and containing minute description of locale and other matters violative of censorship regulations.

He pleaded not guilty to Charge I and the specification thereunder, and guilty to Charge II and all the specifications thereunder except specification 1, to which he pleaded not guilty. He was found guilty of all Charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War. The confirming authority disapproved the findings of guilty of Charge I and the specification thereunder and confirmed the sentence, but the order directing the execution of the sentence is withheld pending review of the record of trial pursuant to Article of War 50 $\frac{1}{2}$.

3. Defense counsel stated that he had advised the accused of the meaning and effect of his pleas of guilty and that he fully understood them (R. 6). The prosecution thereupon announced that, having had previous knowledge that such pleas would be made, no effort had been made to contact the witnesses concerned because they would have had to come a considerable distance. Accordingly, no evidence relating to these particular specifications was introduced. While the legal effect of pleas of guilty is that of a confession of the offense or admission of the acts as charged, it is appropriate to note that the generally approved practice calls for the prosecution to introduce at least some evidence. However, the desirability, if not the necessity, for such evidence, is to be found in a case where a specification is not sufficiently full and precise to disclose the facts and circumstances of the offense and where explanatory testimony is needed in order to fix the extent of the punishment. This is not the situation in the instant case. The specifications, to which the accused pleaded guilty, are such as to apprise the court of the nature and scope of the offenses charged and the authorized punishment therefor is not necessarily affected by other details.

The first three specifications under the 96th Article of War concern a certain specified government motor vehicle. The first specification, to which the accused pleaded not guilty, is for wrongfully taking and driving this car without proper authority and the second, to which he

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19 May 1943 (Continued)

pleaded guilty, appears to be based upon certain standing orders that no commissioned officer will drive any government owned vehicle except in combat, in training or in extreme emergency; the violation thereof by the accused being that he dismissed the regularly assigned driver of the vehicle and drove it himself to Casablanca. While certain aspects of these two specifications are similar and hence may appear to indicate an inconsistency in the pleas thereto, they set forth essentially different acts of violation. Moreover, there is nothing to show that the accused was misled or failed to understand the full purport of his pleas to these two specifications.

4. The evidence presented by the prosecution shows that on the 1st of April, 1943, the Headquarters Company, 2nd Armored Division, commanded by a Captain Thomas, was located in a bivouac area about 18 miles east of Rabat, French Morocco (R. 7). The accused was one of three other officers assigned to this company, performing duties as agent finance and supply officer (R. 13, 14). At about 5:30 in the afternoon, the accused inquired of a Lieutenant Spalding whether it was possible to get in touch with Captain Thomas, stating that it concerned "a matter of extreme importance to him" (R. 7, 8). Lieutenant Spalding replied by saying that Captain Thomas would be difficult to find because at the time the latter, with another lieutenant, was out on a problem, the exact location of which he was not certain (R. 7). Lieutenant Spalding was the senior officer left with the detachment and was acting Company Commander (R. 7). It does not appear that the accused was aware of this but it definitely is shown that the latter made no request of Lieutenant Spalding (R. 8, 9). Later in the evening the Captain's peep happened to be driven into the company area and Lieutenant Spalding, recalling the accused's inquiry, looked for him but without success. He did not see the accused until about 7:00 o'clock the next morning, when the accused awoke Captain Thomas and asked for his permission "to go to recover a peep which had been stolen in Casablanca", which was about 72 miles distant (R. 7). While the customary procedure was to ask permission to leave the bivouac area, this rule applied principally to pleasure; "if an officer has to go to town on official business he usually takes off....On personal trips to town we ask the Company Commander's permission to leave for an evening." (R. 8).

It is further shown that at approximately 7:00 o'clock, April 1, 1943, the accused, with another lieutenant of the company, had made a request of Technician 5th Grade Lake, a witness for the prosecution, for the use of a peep. Lake was the motor vehicle dispatcher for the division command post and had no authority to dispatch vehicles to any place other than to Rabat, unless he first obtained permission from the Headquarters Commandant. When asked as to his proposed destination the accused told witness that he was going to Rabat (R. 9, 11). No trip ticket was issued to the accused for the

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19 May 1943 (Continued)

reason that the driver assigned to the peep already has one. The dispatcher told him "to contact the driver and the driver would take him to Rabat....They went away from there together, sir. I don't know whether they went away in the peep together or not I only heard they did." (R. 11). Witness did not see the peep again until about 10:00 o'clock the following evening, when accused told him it was back and "asked if I would give it back to the driver the next morning." (R. 10).

It was also established, by stipulation, that on the night of April 1, 1943, the accused drove the peep in question "from the bivouac area of his organization to Casablanca, French Morocco." (R. 12).

5. The accused chose to remain silent and no evidence was submitted in his behalf.

6. The above evidence explains, in measure, the situation regarding the acts of violation set forth in specifications 2, 3 and 4, and also fully supports specification 1, to which the accused had pleaded not guilty. He had acquired the peep for a trip to Rabat and wrongfully drove it to Casablanca.

7. The 5th specification, under Article of War 96, sets forth in ample sufficiency the acts the accused committed in violation of the censorship regulations. His plea of guilty thereto establishes full responsibility and no comment is necessary.

8. The remaining question to be considered concerns the alleged violation of the 61st Article of War. The circumstances indicate, at best, a mere possibility that the accused's absence was without authority. But this would be pure speculation. It was incumbent upon the prosecution to prove this allegation by some evidence, direct or indirect, and mere surmises cannot take the place of such proof. The other acts of the accused, set forth as violations under the 96th Article of War, do not exclude the hypothesis that the accused had permission to go to Casablanca; they may well concern the manner in which he made the trip. It is noted, moreover, that at about 5:30 o'clock the accused was most urgent in his desire to see Captain Thomas and that his departure in the peep was not until after 7:00 o'clock. There is no reasonable justification for holding that he had not obtained permission to be absent for the night (Dig. Op. JAG, 1912-40, Sec. 419(2)). It is therefore the opinion of the Board of Review that with respect to this Charge and specification the evidence is not legally sufficient to support the findings of guilty.

9. The accused is 22 years old. Entries on the Charge Sheet show that he was appointed September 27, 1942, with previous enlisted service since March 3, 1941.

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

11. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and the specifications thereunder; not legally sufficient to support the finding of guilty of Charge I, and the specification thereunder, and legally sufficient to support the sentence. Dismissal is authorized upon conviction of violation of Article of War 96.

/S/. Samuel T. Holmgren....., Judge Advocate.

/S/. O. Z. Ide....., Judge Advocate.

/S/. Gordon Simpson....., Judge Advocate.

NATO 92

1st Ind.

Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
19 May 1943.

To: Commanding General, NATOUS, APO 534, U. S. Army.

1. In the case of Second Lieutenant Seymour Hirschel (O-1294840), Infantry, Headquarters Company, 2nd Armored Division, 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 $\frac{1}{2}$, you now have the authority to order the execution of the sentence.

2. After publication of the general court-martial order in the case, five 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 92)

ADAM RICHMOND
Brigadier General, USA
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 6, NATO, 20 May 1943)

APO 534, U. S. Army
8 May 1943

Board of Review

NATO 93

UNITED STATES)	HEADQUARTERS 1ST ARMORED DIV.
v.)	Trial by G.C.M., convened at APO 251, 13-14 April 1943.
Private Delmar (NMI) Combs (15056574), Company C, 81st Armored Reconnaissance Battalion.)	Dishonorable discharge, total forfeitures and confinement at hard labor for eight (8) years. Federal Reformatory at Chillicothe, Ohio, designated as place of confinement.

HOLDING 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. The only question requiring consideration is the propriety of the designation of a Federal reformatory as the place of confinement. Paragraph 90b, Manual for Courts-Martial, 1928, provides:

"Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated February 26, 1941 (A.G. (2-6-41) E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorized confinement in a Federal reformatory only when confinement in a penitentiary is authorized by law (CM 120093, Unckel). Penitentiary confinement is not authorized in this case inasmuch as the offense of which accused was convicted, a violation of Article of War 75, is not an offense of a civil nature, and so punishable by peniten-

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Board of Review, NATO 93
8 May 1943 (Continued)

tiary confinement for more than one year by some statute of the United States of general application in the United States, or by the law of the District of Columbia (AW 42; Dig. Op. JAG, 1912-40, Sec. 399(5); MCM, 1928, par. 90).

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

/S/..... Samuel T. Holmgren....., Judge Advocate.

/S/..... O.Z. Ide....., Judge Advocate.

/S/..... Gordon Simpson....., Judge Advocate.

NATO 93

1st Ind.

Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
14 May 1943.

TO: Commanding General, Hq, 1st Armored Division, APO 251, U. S. Army.

1. In the case of Private Delmar Combs (15056574), Company C, 81st Armored Reconnaissance Battalion, 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 sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for eight years in a place other than a penitentiary, Federal correctional institution or reformatory, 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 sentence.

2. After publication of the general court-martial order in this case five copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facili-

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Board of Review, NATO 93
1st Ind., 14 May 1943
(Continued)

tate 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 93)

ADAM RICHMOND
Brigadier General, USA
Assistant Judge Advocate General

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

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APO 534, U. S. Army,
21 August 1943.

Board of Review

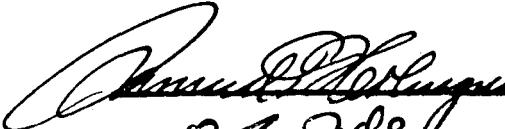
NATO 107

U N I T E D S T A T E S)	NINTH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private ROBERT BURKE)	Tebessa, Algeria, 5 March 1943.
(32304732), Battery B, 60th)	Dishonorable discharge and
Field Artillery Battalion.)	confinement for three years.
)	United States Disciplinary
)	Training Center, Number 1,
)	Oran, Algeria.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

The record of trial in the case of the soldier named above, having been examined in the Branch Office of The Judge Advocate General, NATOUS, and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review. The Board of Review holds the record of trial legally sufficient to support the sentence.


Arnold P. Holmgren, Judge Advocate.
O. Z. Ide, Judge Advocate.
Gordon Simpson, Judge Advocate.

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NATO 107

MEMORANDUM.

SUBJECT: Record of trial in the case of Private Robert (NMI) Burke, Battery "B", 60th Field Artillery Battalion.

1. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Robert Burke, Battery "B", 60th Field Artillery Battalion did at sea aboard the U. S. S. George Clymer, on or about October 31, 1942, misbehave himself by avowing his intention to refuse to advance with his command which had then been ordered forward by the Commanding General, Western Task Force, to engage the French Moroccan Army, which forces the said command was then opposing, declaring before officers and enlisted men his, the said Private Robert Burke's intention not to fight against the forces in French Morocco, and that he would give himself up to the enemy if given the opportunity, and that he was not in accord with the general policies of the government of the United States.

Specification 2: In that Private Robert Burke, Battery "B", 60th Field Artillery Battalion did at sea aboard the U. S. S. George Clymer, on or about October 31, 1942, utter orally and publicly the following contemptuous, defamatory and disrespectful words against the United States, to wit: "that he wasn't in sympathy with the policies of the United States in general, and that he would not put up any kind of fight and would take no action, that he would give up and surrender rather than fight".

He pleaded not guilty to and was found guilty of the Charge and of Specification 1, except the words "and enlisted men", and not guilty of Specification 2. 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 three years. The reviewing authority approved the sentence and directed its execution but suspended the dishonorable discharge, and designated the United States Disciplinary Training Center, Number 1, Oran, Algeria, as the place of confinement. The sentence was published in General Court-Martial Orders No. 8, Headquarters, Ninth Infantry Division, April 30, 1943. The record of trial was examined in the Branch Office of The Judge Advocate General, NATOUS.A., and was there found legally insufficient to support the findings and

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the sentence. It was thereupon referred to the Board of Review.

2. While the court found the accused not guilty of Specification 2, which, in content, sets forth substantially the same statements as those in Specification 1, and alleges that they were uttered as "contemptuous, defamatory and disrespectful words against the United States", the apparent inconsistency in the findings is not of any legal consequence. It has been held that, "the better rule on principle and authority is that inconsistent verdicts of guilty and not guilty in the same criminal proceedings do not vitiate the former" (Dig. Op. JAG, 1912-40, sec. 395 (44)). But, in fact, the two specifications are different; the first charges accused with an offense the gravamen of which is that of a misbehavior under circumstances denoting imminent contact with the enemy, whereas the second charges him with the use of contemptuous and disrespectful words against the United States, similar only to a violation of Article of War 62.

3. The primary question is whether the remaining Specification sets forth an offense. Accused is charged with a misbehavior in uttering the alleged statements at a time when the command to which he belonged was on board a ship bound for the invasion of French Morocco. A misbehavior in such a situation, with the significant words that the command "had been ordered forward by the Commanding General, Western Task Force, to engage the French Moroccan Army, which forces the said command was then opposing", suggests at once the serious aspects of an offense under the 75th Article of War, though without the allegation in the specification that the misbehavior occurred "before the enemy" (Dig. Op. JAG, 1912-40, sec. 433 (1)). It is similarly conceivable that in the exigent moment of a military operation of the kind here described, the fullest unanimity of cooperation, good order and discipline must be required of all personnel. In short, the pleader seems here to have prospected a field of military activity, though falling short of actual contact with the enemy, wherein a soldier is compelled to conform with the special demands of an exigent situation. For present purposes, it seems sufficient to note that the statements attributed to the accused are in se indicative of wrongful deportment and under the circumstances of a defiant attitude toward his officers and military authority. The allegations of the Specification adequately import a departure on his part from the standard of soldierly conduct and reasonably excludes any hypothesis of good faith or conformability with the then existing military requirements. These observations clearly suggest a disorder within the purview of Article of War 96. It is, therefore, the opinion of the Board of Review that the Specification is legally sufficient under that article.

4. The evidence shows that on October 31, 1942, accused was brought to the stateroom of Captain (then Lieutenant) George S. Thurtle, his battery commander, aboard the U. S. S. Clymer, for questioning as to why he refused to "go to the nets" for drill in

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preparation for the approaching invasion of French Morocco by American troops, including those of his command. He responded to the inquiry by saying he was not in favor of fighting, that this was a world war and he was not going to participate in it (R. 5,6,8,10,11).

Lieutenant Colonel Clinton L. Adams, commanding the 60th Field Artillery Battalion, to which accused belonged, was present when the latter was brought in for questioning (R. 5,8). Colonel Adams testified:

"I questioned him as to whether he would be willing to fight if the coasts of the United States were invaded, and he said he would not be willing and that he would not fight. He asked the question as to what would happen to him if he refused to fight and I told him that he would probably be shot. I asked him what his beliefs were in regard to the policies of the United States Government, and he said he was not in favor of them. I asked him what he intended to do if asked to go over the nets. He said he would not do anything; said that he would give himself up to the enemy if faced with them." (R. 6)

When asked in cross-examination as to what policies the accused was not in favor of, the witness replied,

"The policy of invading the coast of Africa for the purpose of establishing bases for the prosecution of the war; also, the policy of the United States entering the war against Germany." (R. 6)

Captain Thurtle reported the same interview as follows:

"I called him in and, after questioning him considerably about his past, found out that he was not in accord with the United States Government and was not willing to fight in an aggressive manner against the enemies of the United States, and that he would give himself up if confronted by the enemy rather than fight." (R. 8)

Captain Ralph I. Williams was present when accused was brought to Captain Thurtle's stateroom for questioning as to "why he was missing from some formations" (R. 10). Captain Williams' report of the interview was as follows:

"He did make a statement to Captain Thurtle and myself. It came out that he had missed the Solomon's Island exercises because no one had told him to go over the side of the ship when he was supposed to. On further questioning I

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asked him what he was going to do when we came to French Morocco and he said he wasn't going over the side unless someone ordered him to. I then asked him what he thought he was in the Army for if it wasn't to fight; he said he was not willing to fight. When asked why he had not placed himself as a conscientious objector, he said no one had ever asked him about that. He said he did not agree with the policies of the United States, that we should not be fighting, that even after Pearl Harbor had been attacked that he didn't think we should fight. When asked that supposing he did get over the side at French Morocco, what would he do, he said it would depend on how large the opposition was as to what he would do. (R. 10,11) Part of his views were volunteered (R. 11).

The attitude of accused during the interviews was indifferent and contemptuous (R. 8), insolent, very disrespectful (R. 6) and discourteous (R. 7) and when his battalion commander, Colonel Adams, was in the room, "he showed no military courtesy although told to do so". (R. 11)

When questioned again, about an hour later, his attitude "was still the same". (R. 6)

Immediately after the first interview, accused was placed under arrest (R. 6) and remained on shipboard under the restraint of that arrest when the command "went out for the invasion; he was never ordered actually to advance, instead he was placed under arrest before such orders were given". (R. 7,10) Later, he was released to his battery at Thala where "he was forced to participate in the fighting". (R. 7) His participation was limited to working on odd jobs such as digging slit trenches because he had not been well enough trained to act as a gunner (R. 9). He had joined the 60th Field Artillery Battalion three weeks before the North African invasion and about two weeks before the interviews with his superior officers (R. 6).

Accused "did not indicate on questioning" that he had discussed his views with other men or had tried to persuade others to change their attitude". (R. 9,10)

Accused declined to testify or make an unsworn statement.

5. The questions to be considered concern the legal sufficiency of the evidence to support the findings and whether accused's alleged act of misbehavior was prejudicial to good order and military discipline or otherwise within the purview of Article of War 96. The evidence most unfavorable to the accused shows that upon his being asked in the presence of three officers why he had not

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participated in certain drills on board the ship bound for the invasion of French Morocco, he, in an insolent, disrespectful and discourteous manner, directed toward his commanding officer, stated that he was not going to participate in this war; that he would not fight and that he would surrender himself to the enemy at the first opportunity. These statements and avowals, it is noted, were expressed partly in reply to questions and partly on his own accord. It thus appears that having been brought before the officers because of a known failure to perform a prescribed military duty, accused, by his response, explained the reason for that failure and disclosed a recalcitrant and defiant state of mind. He was not brought before them inquisitorially and the evidence does not permit of a view that his statements before the officers were solely expressions of private opinion or prompted by conscience. To the contrary, there is substantial basis for the view, which the court apparently adopted, that the very nature of the statements, patently contemptuous and disrespectful in se, rendered their utterance an act of misbehavior as well as a wilful defiance of military authority. The attendant wrongful manner of accused is equally manifest and with respect to his words, "the animus of the accused in using them will be a circumstance material to the inquiry whether any offense, or what degree of offense, has been committed" (Winthrop, reprint, p. 566). They may be disrespectful and contemptuous merely because of the connection in which and the circumstances under which they are used. Moreover, his open declaration of an intention not to obey orders was in itself actionable disrespect (Winthrop, p. 567). His declaration that he was not in accord with the policies of the Government of the United States was not in itself an actionable utterance, it being his privilege as a citizen to express any personal dissent therefrom. But the declaration may well be considered an element of his general attitude toward constituted authority, specifically, in the instant situation, the authority projected by the military establishment. With all of its aspects, accused's conduct was untimely and clearly inimical to the interests of military discipline.

It is true that his avowed intentions were only prospective in character; that he had not yet gotten into a position where he could surrender to the enemy or to disobey an order to advance. But such an expressed intention, apart from the manner in which expressed, could not be ignored, especially where, as in this case, an imminent contact with the enemy necessitated unquestioned obedience and concert of action. It is unreasonable to hold that those entrusted with command must wait to see if expressed intentions are carried out--with all the dangers concomitant therewith--before action can be taken against the offender. His words were in the nature of threats and it is conceivable that any tolerance accorded their utterance alone could jeopardize the success of the military mission and impinge prejudicially upon good order and military discipline.

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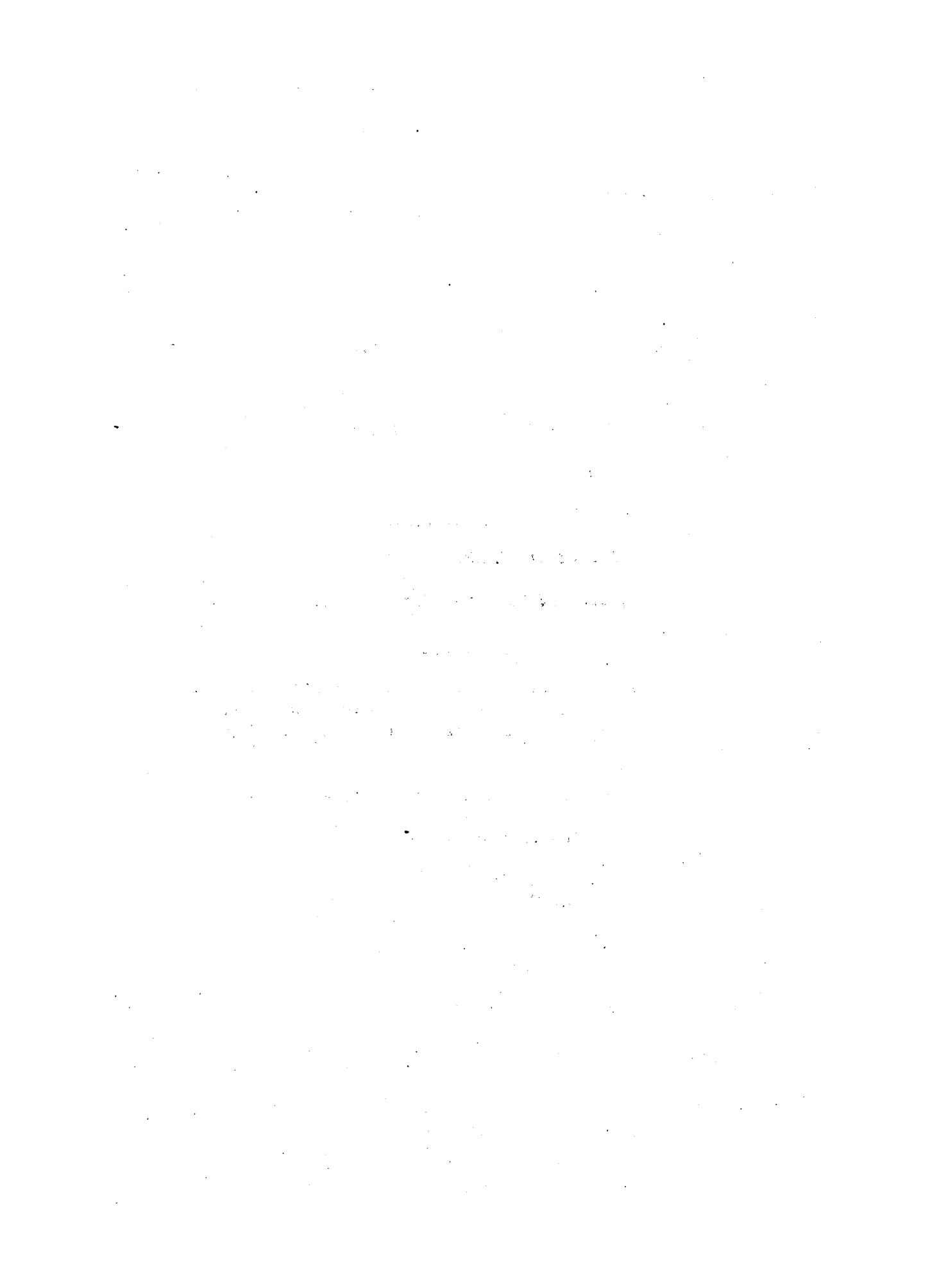
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The circumstances under which the utterances were here made, distinguish the misbehavior of accused from the conduct of a soldier who, without any reference to any particular military duty or mission, upon invitation or inducement by his superior officer, in order that his fitness for service may be determined, discloses his state of mind with respect to his intended conformity with his military commitments and obligations. In the latter case, although he entertains and discloses contemptuous or disloyal sentiments, the soldier is protected in his right of free speech and honest expression of opinion. It is to the interest of the government that it be advised of the present and potential usefulness of the soldier whom it has called for its defense. But the right of free speech does not extend to the right to make an avowal which under the circumstances of its utterance amounts to a palpable obstruction to or interference with a specific military duty or mission. The right of free speech may not obstruct the power of national self-preservation. It is appropriately stated that

"The Nation may raise armies and compel citizens to give military service. Selective Draft Law Cases (Arver v. United States), 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349, L.R.A. 1918C, 361, Ann. Cas. 1918B, 856. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life" (note 19, West Virginia State Board of Education v. Barnette, 63 S.Ct. Rep. 1178, 1787).

6. For the reason stated, the Board of Review is of the opinion that the accused's utterances and deportment constituted, under the circumstances, a disorder prejudicial to military discipline within the meaning of the 96th Article of War and that the record of trial is legally sufficient to support the findings and the sentence.

Paul Ellingus, Judge Advocate.
C. Z. F. De, Judge Advocate.
Gordon Simson, Judge Advocate.



12 May 1943

Board Of Review

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UNITED STATES)	NINTH INFANTRY DIVISION
v.		Trial by G.C.M., convened at
Second Lieutenant Jesse D. Scott (0-1288796), Company A, 60th Infantry, 9th Infantry Division		Tebessa, Algeria, 8 March 1943. Dismissal.

OPINION of the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General with the North African Theatre of Operations.
2. The accused was tried upon the following Charges and specifications:

CHARGE I: Violation of the 95th Article of War.

Specification: In that 2nd Lieutenant Jesse D. Scott, 60th Infantry, was at Tlemsen, Algeria, on or about February 17, 1943 in a public place, to wit: near La Favorite, a house of prostitution in the city of Tlemsen, Algeria, drunk while in uniform.

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

Specification: In that 2nd Lieutenant Jesse D. Scott, 60th Infantry, did on or about February 17, 1943, at Tlemsen, Algeria, unlawfully visit the off-limits section of said city of Tlemsen, Algeria, being the area east of the prison, by the boulevard Sidi El Haloui and R. Kaldoun, in violation and disobedience of standing orders, to wit: Administrative Order Number 5, Headquarters Ninth In-

Infantry Division, Advance Detachment, APO #9, February 6, 1943, and Paragraph 1, Daily Bulletin Number 43, Headquarters Ninth Infantry Division, February 15, 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 be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The alleged violation of standing orders as charged under Article of War 96 is but one aspect of the occurrence set forth in the alleged offense under Article of War 95.

The evidence of the prosecution shows that at about 8:35 o'clock in the evening of February 17, 1943, Sergeant Joseph R. Emery, Military Police Platoon, 9th Division, while on patrol duty in "the Red Light area in the off-limits section" of the city of Tlemcen, discovered two Lieutenants, one of whom was the accused, "at the rear entrance of a place called 'La Favorite,'" (R. 8), which is a "whore house... They were standing in the rear entrance talking to someone." (R. 5, 6, 7, 9). This entrance was in a public alley in the center of the off-limits area (R. 6). The sergeant, upon questioning these officers, discovered that "in my estimation Lt. Scott was intoxicated" (R. 5). He requested their names, rank and organization, which they refused to give, but willingly accompanied witness, upon request, to the Provost Marshal's office (R. 6, 8). The sergeant's "estimation" that the accused was intoxicated is based upon the ground that "he was talking incoherently and staggering" (R. 6). Under cross-examination, the witness testified that the accused was drunk because he was "unsteady on his feet, did not speak coherently and started to argue that he should be there" (R. 7). The other Lieutenant had been drinking but was not intoxicated (R. 8). He also pointed out to them the "off-limits" signs, which are written "in white paint against a black background" (R. 7). The locus is "strictly an Arab district", five blocks from the main line of traffic and in the opposite direction from the military camp (R. 7).

Major George R. Howard, the Provost Marshal, 9th Infantry Division, a witness for the prosecution, testified that at about 8:30 or 9:00 o'clock he questioned the two officers at the office and at "that time it appeared to me that Lieutenant Scott was intoxicated, and the other Lieutenant was not". In his opinion the accused "was more or less in a stupor, an intoxicated stupor", but to have it final he caused the Division Surgeon to examine them (R. 9). Major Howard further testified that only the Military Police and the Surgeon were permitted to enter the off-limits district; other personnel had to get permission from him.

and that these Lieutenant had not done so (R. 9). Asked if there was anyone else from whom they could obtain permission, witness replied "I think so" (R. 9). Asked if the accused could answer coherently the questions asked him, the witness replied, "Not very well. I asked him if he knew he was in an off-limits section and he said he didn't, and I asked him how could he tell his men where an off-limits section was when he didn't know himself, and he said he would tell his men that they could go anywhere where the M.P.'s wouldn't stop them." (R. 10). The "off-limits" section had signs "all over the place"; a previous organization had "off-limits" posted on the walls, but witness stated that he couldn't say for sure that anyone could see the signs (R. 10).

Lt. Colonel John R. Woodruff, the Division Surgeon, testified that at about 9:30 o'clock P.M. he examined the accused and found him "intoxicated as a result of over-indulgence in alcoholic beverages" (R. 11); "his eyes were bloodshot and his gait was unsteady" (R. 11). He tested him by having him walk a line. Under cross-examination witness stated that a person who had had intoxicating beverages may become suddenly intoxicated by coming into a warm place (R. 11).

Colonel F. J. de Bohan, Commanding, 66th Infantry, testified for the prosecution that the accused on February 17th was brought before him. "He was intoxicated, had a very strong odor of liquor, and his clothing indicated that he had fallen on the sidewalks; and his speech was not coherent" (R. 12). On cross-examination the witness stated that accused had never been reprimanded for "misbehavior in a public place or rowdiness or drunkenness" (R. 13). But he had been reprimanded once "for giving points to the French about our close order drill" (R. 13).

The prosecution also introduced Administrative Order No. 5, Headquarters, Ninth Infantry Division, Advance Section, dated February 6, 1943, paragraph 5a, which reads:

"Prohibited Areas"

(1) - The area east of the Prison between Boulevard SIDI EL HALOUY and R. KALDOUJI.

together with a map which shows the off-limits area and established, by a witness, that the place in question was within the area (R. 6, Exh. 1). There was also introduced Daily Bulletin No. 43, Headquarters, Ninth Infantry Division, dated February 15, 1943 (R. 12, 13, Exh. 2), which reads, in part, as follows:

"1. NOTICE FOR ALL TROOPS THIS COMMAND: - All troops of this command are to be informed that the curfew is 2030 at which time all enlisted men must be off the streets and out of town.

The "OFF LIMITS" section of the town of Tlemcen is all the

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section East of the Prison, boundaries of which are: East, the Prison, North Boulevard Sidi El Haloui and South, R. Kaldoun.
(Par. 5, a.b.c. Adm. Order #5, Nq. 9th Inf. Div., Adv Det,
dt'd 6 Feb. 1943).

All enlisted men must have passes to visit in the city."

4. For the defense, Second Lieutenant Richard E. Van Dyke, Company H, 6th Infantry, who was with the accused on February 17th, testified that, "We left our bivouac area, a little ways from Tlemcen, and our destination was the APO, where we arrived at 4:00 o'clock for the purpose of converting cash into money orders. We left there about 5:30, went into town, visited not over three bars. After visiting them, around that time it was pretty close to 8:00 o'clock and we thought we had better catch a truck. On the way back we got off the direction a little ways. It was pretty dark down there on the way back. Two M.P.s told us we were off-limits. We didn't put up no argument about it. They asked us for our names. We asked why we should give our names. Then he asked us to accompany him to the Provost Marshal's office, which we did." (R. 14, 15). "Immediately after the M.P. told us we were off-limits, we replied that we did not know we were off-limits". Each had had six drinks, did not see any off-limits sign. It was very dark (R. 15) and "it just happened that I, we were lost." (R. 16).

Major Otto R. Koch, Executive Officer, 1st Battalion, 60th Infantry, and formerly the accused's battalion commander, testified, "I classed Scott as one of my best officers then, and still do. He was conscientious, did all things willingly that were assigned to him, was always on the job, always on time, and I did consider him one of the better officers of the battalion." It was never necessary to reprimand him for rowdiness, drunkenness or conduct unbecoming an officer (R. 18).

It was agreed by stipulation that if a Chaplain Prost were present, his testimony would be to the effect that the accused "was a mild, sober individual who was very quiet, was never seen intoxicated, and his character as far as he knew in his relations with him in the barracks there as a Chaplain were excellent and that he knew of nothing that might be against his character", and that a Captain Lancaster, who saw the accused at about 11:00 o'clock that night, would testify to the effect that the latter "was not drunk, was not intoxicated, although he could recognize the fact that he had a few drinks" (R. 18, 19).

The accused testified in his own behalf. He enlisted in the Regular Army on September 10, 1936 and was discharged upon termination of such service on September 9, 1939. He re-enlisted September 29, 1939. His service included the grades of corporal and sergeant. On May 1, 1942, he entered Officers' Candidate School and was commissioned Second Lieutenant on July 24, 1942. During those years of service he had never been charged with any offense. He further testified that on December 1942 allegations were

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brought against him for giving information to the French about close order drill, disciplinary drill with the French, while he was being held as a prisoner of war. He was reprimanded under the 104th Article of War by his Commanding Officer, Colonel de Rohan. After he returned to his organization, orders were published that "I should be returned to the United States for so having been captured. After an investigation by a board of officers on the actual ground a letter of redress was published by General Truscott to the effect that even though I had been captured and some of the men with me, I did accomplish my mission." (R. 19, 20). He is married, had no intention of going to a house of prostitution and that Lieutenant Van Dyke said he had gotten off on a "wrong street and wound up in this area." They had had six drinks each, were not drunk, did not "cuss" the M.P. or question his request in any way and willingly accompanied the Military Police to the Provost Marshal's office (R. 20, 21). The warmth of the room did make him feel differently; "it made me sleepy and hesitant in answering questions" and that after he was inside the room he thinks he was "to an extent" intoxicated (R. 21). As an enlisted man he had never lost time under the 107th Article of War (R. 21). He had been in Toulon only on one previous occasion and was not familiar with its streets (R. 22).

5. The evidence thus shows that at the place and time alleged in the specifications of Charge I, the accused, with another Lieutenant, was found by a Military Police sergeant at the rear entrance of a house of prostitution, which entrance was in a public alley in the center of the off-limits area of the city; that they were standing in the entrance talking with someone. The sergeant, upon telling them they were off-limits, found in his "estimation" that the accused was intoxicated because he talked incoherently, staggered and started to argue that "he should be there". The Provost Marshal, who saw the accused shortly thereafter, testified that he was more or less in an intoxicated stupor and directed his examination by the Division Surgeon. The latter found him "intoxicated as a result of over-indulgence in alcoholic beverages". Colonel F. J. de Rohan testified that when brought before him, the accused was intoxicated, had a strong odor of liquor and his clothing indicated that he had fallen on the sidewalks; and his speech was not coherent. This evidence relating to the accused's condition, is contradicted by the defense, which appears to be based upon the theory that he was not drunk when he was found by the Military Police and that his stupor and difficulty were directly due to his coming from the outside into a warm room. That the accused was drunk, as charged, is proved beyond a reasonable doubt but there remains the question whether his conduct under the circumstances was properly found to be a violation of the 95th Article of War.

6. The Manual for Courts-Martial, 1923, paragraph 151, lists, as an instance of violation of the 95th Article of War, "being grossly drunk and conspicuously disorderly in a public place." Under this Article of War, "conduct unbecoming an officer and a gentleman" includes, "action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as

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an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms." In short, the test to be applied in this particular case appears to rest in a determination as to whether the conduct involved proves moral unfitness to continue as an officer (Winthrop, reprint, p. 712) in being grossly drunk or conspicuously disorderly in public (CM 196426, Fleming). This conclusion does not appear warranted in the instant case and it is the opinion of the Board that a violation of Article of War 95 is not, therefore, established. It is opined, however, that the evidence supports a charge of being drunk, as alleged, within the purview of Article of War 96.

7. With respect to the specification, Charge II, there appears to be some question whether the administrative order and bulletin mentioned therein, apply to commissioned officers. The bulletin is explicit in its reference to enlisted personnel and contains significantly the statement that "all enlisted men must have passes to visit in the city". However, it sets forth the "off-limits" section of the town of Tlemcen and the inclusion of this in the bulletins, with the administrative order, is a sufficient basis for the alleged violation. It is reasonably applicable, as such, to commissioned personnel. In the opinion of the board the evidence is sufficient to establish the allegations beyond a reasonable doubt, and that the offense charged is properly found to be violative of the 96th Article of War.

8. The reviewing authority, upon approving the sentence, states:

"Since this officer has shown outstanding qualities in battle I recommend that clemency be extended by commutation to a sentence of less serious import. I therefore recommend that the sentence be commuted to a reprimand to be administered by the Commanding General, 9th Infantry Division."

9. It appears that the accused is 25 years old. He served as an enlisted man from 1936 to 1942. Entered extended active duty July 24, 1942.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and the specifications thereunder as involves findings of guilty of the specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and the specification thereunder, and legally sufficient to support the sentence. Dismissal is authorized upon conviction of violation of Article of War 96.

.....Judge Advocate.

.....Judge Advocate.

.....Judge Advocate.

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

APO 534, U. S. Army.
12 June 1943.

Board of Review

NATO 122

UNITED STATES

v.
Private JOSEPH (NMI) VARNADO
(34230423), Company A, 244th
Quartermaster Battalion (Service).

MEDITERRANEAN BASE SECTION

) Trial by G.C.M., convened at Perregaux, Algeria, 27 April 1943.
Dishonorable discharge, total forfeiture and confinement at hard labor for life. Penitentiary.

REVIEW of 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. The accused was tried upon the following Charge and specification:

CHARGE I: Violation of the 92nd Article of War.

Specification: 1. In that Private Joseph Varnado, Company "A", 244th Quartermaster Battalion (Service) did, at Perregaux, Algeria, on or about 23 March 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Nimer Moul Djilali Bent Kaddour, a human being by shooting her with a rifle.

He pleaded guilty to the specification, except the words "with malice aforethought, willfully, deliberately, feloniously, and with premeditation", of the excepted words not guilty. He pleaded not guilty to the Charge but guilty of violation of the 93rd Article of War. He was found guilty of

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both the specification and the Charge and was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War. The confirming authority confirmed the sentence but commuted it to dishonorable discharge, total forfeiture and confinement at hard labor for the term of his natural life. The order directing execution of the sentence was withheld pending review of the record of trial pursuant to Article of War 50 $\frac{1}{2}$. The United States Penitentiary, Atlanta, Georgia, was designated as place of confinement.

3. The prosecution's evidence in pertinent part shows:

The accused was a truck driver with Company A, 244th Quartermaster Battalion, stationed near the town of Perregaux, Algeria, and on the afternoon of 23 March 1943 he, together with Private Clayton C. Hart, drove his truck into Perregaux to get some water (R. 6). In the town he became involved in a conversation with an Arab and a girl (the deceased) who appeared to be about 17 years old. Accused gave 160 francs to the Arab, who counted it, gave it to the girl, who again counted it, and returned it to the Arab. The girl then, at the Arab's direction, got into the truck and the accused, with Hart and the girl, drove about 3 miles out of town and parked the car on a side road under some trees. Hart got out of the truck and stood nearby. The accused got the girl into the cab with him and they were together about 5 minutes when a car came by and accused stepped out of the truck. The girl then got out of the truck and started up the road towards a house about 200 yards distant. Accused started after her, then returned to the truck and got his rifle and he and Hart followed her to the house (R. 6). Hart asked accused what he was going to do when he got his rifle but accused did not answer. The girl entered the house and accused and Hart went up to the door. Accused knocked on the door, which was opened by an Arab, to whom accused explained that the girl had taken his money. The Arab then put the girl out the back door and returned to accused and pointed around the house. Accused and Hart went around the house and saw the girl running (R. 7). Hart took the girl by the shoulders and then let her go. She ran, followed by accused (R. 19,20,21). Hart told accused not to shoot (R. 7). Accused told her to stop but she did not do so (R. 7,19,20). The accused shot the girl (R. 8) and they returned to the truck and accused went to the Depot Commander, Colonel Sedgwick, and reported what had happened (R. 10). The whole lower part of the girl's face, from her nose to the upper part of her neck, was wounded. The jaw bone was completely detached as well as a large part of her tongue. She died on the way to the hospital. Death was due to excessive loss of blood caused by her wounds (R. 21). There was some conflict of testimony between the prosecution's witnesses as to how accused held the rifle at the time he fired it. Hart testified that accused held his rifle with the butt some-

where near his arm and pointed in a horizontal direction (R.8). One Abdulkader testified that he saw accused aim the rifle at the girl as she was running away and fired at deceased (R. 20). No evidence of previous convictions was offered (R. 34).

The accused, after being duly advised as to his rights gave sworn testimony as a witness in his own behalf. There is no serious conflict between his testimony and that of the prosecution's witnesses, except that part which involved the actual shooting. He testified that he did not point his rifle directly at deceased but shot to scare her (R. 24). He testified that the money was paid to her for sexual intercourse (R. 29) and that he did not have intercourse with her during the time they were in the cab of the truck together. That he had only one bullet with him (R. 24) that he had brought from England (R. 25), that he had never had instruction in firing a rifle (R. 33).

4. Murder is defined as:

" * * * the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse * * *. Among the lesser offenses which may be included in a particular charge of murder are manslaughter, certain forms of assault and an attempt to commit murder * * *" (M.C.M., sec. 148, pg. 162).

"Murder, as defined at common law, and by statutes simply declaratory thereof, consists in the unlawful killing of a human being with malice aforethought." (29 C.J., sec. 59, pg. 1083).

"Murder, at common law, is the unlawful killing, by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, with malice aforethought, either express or implied." (Winthrop's Military Law and Precedents (2nd Ed.) sec. 1041, pg. 672).

The important element of murder, to-wit "malice aforethought" has been analyzed by authorities as follows:

"The term malice, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the wrongful intent essential to the commission of crime. When used, however, in connection with the word 'aforethought' or 'prepense', in defining the particular crime of murder, it signified the same evil intent, as the result of a determined purpose, pre-meditation, deliberation, or brooding, and therefore as indicating, in the view of the law, a malignant or depraved nature, or, as the early writer, Foster, has expressed it, ' a heart regardless of social duty, and fatally bent upon mischief.' The deliberate purpose need

not have been long entertained; it is sufficient if it exists at the moment of the act. Malice aforethought is either 'express' or 'implied'; express, where the intent, - as manifested by previous enmity, threats, the absence of any or sufficient provocation, etc., - is to take the life of the particular person killed, or, since a specific purpose to kill is not essential to constitute murder, to inflict upon him some excessive bodily injury which may naturally result in death; implied, where the intent is to commit a felonious or unlawful act but not to kill or injure the particular person * * * ; " (Winthrop's Military Law and Precedents (2nd Ed.) sec. 1041, pg. 673).

"In its popular sense, the term 'malice' conveys the meaning of hatred, ill-will, or hostility toward another. In its legal sense, however, as it is employed in the description of murder, it does not of necessity import ill-will towards the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief; in other words, a malicious killing is where the act is done without legal justification, excuse, or extenuation and malice has been frequently, substantially so defined as consisting of the intentional doing of a wrongful act towards another without legal justification or excuse. *** " (29 C.J., sec. 61, pg. 1085).

"Malice aforethought or malice prepense, which are the terms usually applied to the malice requisite in murder, is malice existing before the killing and acting as a cause of the killing. The term 'malice aforethought' imports premeditation. It has also been held to involve deliberation, although as to this there is contrary 'authority' but it does not involve deliberation or premeditation in the sense that it is required to exist for any appreciable length of time prior to the killing; it is sufficient that it exists before and at the time of the act. The courts frequently define malice aforethought in the same terms as are employed by other courts in defining malice, or use the terms inter-changeably, and some statutory definitions of murder entirely omit the expression. **** (29 C.J. sec. 62, pg. 1087).

* * * * Malice aforethought may exist when the act is unpremeditated. It may mean anyone or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person whether such person is the person actually killed or not (except when death is inflicted in the heat of sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed.

or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not by a wish that it may not be caused; intent to commit any felony." (M.C.M., sec. 148, pg. 163).

The accused in this case, according to his own testimony, tried to scare the deceased, who had taken 160 francs of his money in consideration of submitting to sexual intercourse and which he had not yet consummated. In doing so he employed a service rifle which he fired in her direction while she was running from him at a distance of 20 yards, in utter disregard of the consequences. His conduct in taking his rifle from the truck and pursuing the girl to the house prior to the shooting, evidences an ill will towards the girl which presupposes an imagined provocation to do her injury. Whether or not accused actually intended to kill her or do her bodily harm is immaterial. Viewing the facts in the light most favorable to accused his discharging a rifle in her direction, was, under the circumstances, an unlawful act (C.M. 138870-1920), from which malice may be implied.

The corpus delicti and the fact that accused killed deceased were established by substantial evidence independent of accused's own testimony.

5. The accused is 22 years old. He was inducted into the military service on 31 January 1942.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the 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. Death or imprisonment for life is mandatory upon conviction of violation of 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 sections 452 and 454, title 18 of the Criminal Code of the United States. The confirming authority was authorized to commute the sentence of death to dishonorable discharge, total forfeitures and confinement at hard labor for life.

James E. Colyer, Judge Advocate.

O. J. G. Jr., Judge Advocate.

Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army.
4 June 1943.

Board of Review

NATO 122

UNITED STATES

v.
Private JOSEPH (NMI) VARNADO
(34230423), Company A, 244th
Quartermaster Battalion
(Service).

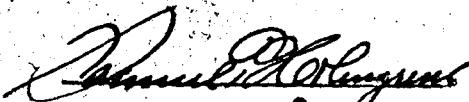
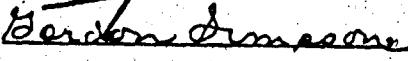
MEDITERRANEAN BASE SECTION

Trial by G.C.M., convened at Perre-
gaux, Algeria, 27 April 1943.
Dishonorable discharge, total forfeit-
ures and confinement at hard labor
for life. United States Penitentiary,
Atlanta, Georgia, designated as place
of confinement.

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 D. Holmgren, Judge Advocate.
 O. G. Ide, Judge Advocate.
 Gordon L. Simpson, Judge Advocate.

NATO 122

1st Ind.

Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army.
5 June 1943.

To: Commanding General, NATOUS, APO 534, U. S. Army.

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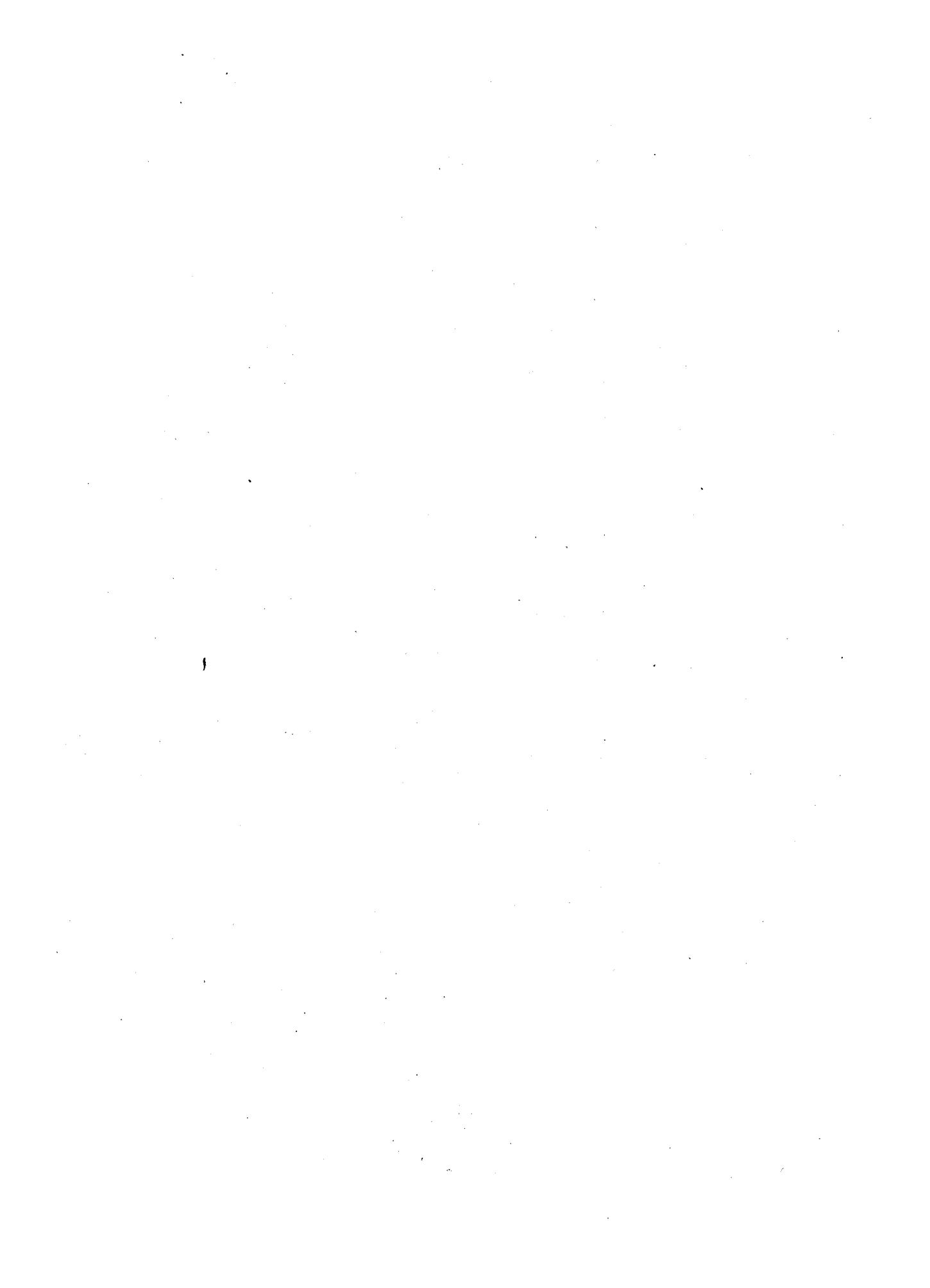
NATO 122, 1st Ind.
5 June 1943 (Cont.)

1. In the case of Private Joseph (NMI) Varnado (34230423), Company A, 244th Quartermaster Battalion (Service), 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 $\frac{1}{2}$, you now have the authority to order the execution of the sentence as commuted.
2. After publication of the general court-martial order in the case, six 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 122)

Adam Richmond
ADAM RICHMOND
Brigadier General, USA
Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 8, NATO, 5 Jun 1943)



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Board of Review

NATO 125

CONFIDENTIAL

APO 534
31 May 1943

UNITED STATES)

MEDITERRANEAN BASE SECTION

v.)
Private GEORGE L. WILSON)
(34269828), 576th Quartermaster)
Company (Railhead) and Private)
OSCAR F. BATES (34012795), 181st)
Quartermaster Company (Dep Sup).)

Trial by G.C.M., convened at Oran,
Algeria, 20 April 1943.
As to each: Dishonorable dis-
charge, total forfeitures and
confinement at hard labor for
five (5) years. United States
Disciplinary Barracks, Fort
Leavenworth, Kansas, designated
as place of confinement.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private George L. Wilson, 576th Quartermaster Company, (Railhead), and Private Oscar F. Bates, 181st Quartermaster Company, (Dep. Sup.), acting jointly, and in pursuance of a common intent, did, at Oran, Algeria, on or about 18 March 1943, feloniously take, steal and carry away sugar, in the amount of thirty-one (31) one hundred pound bags, value about one hundred fifty-five Dollars (\$155.00), the property of the United States.

They pleaded guilty to the Charge and its Specification, but Wilson's plea was changed by the court to one of not guilty. Each of the accused was found guilty of the Charge and its Specification. Evidence of one previous conviction in the case of Bates was introduced. No evidence of previous conviction was introduced as to Wilson. Each of the accused was sentenced to dishonorable discharge, forfeiture of

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all pay and allowances due and to become due, and confinement at hard labor for five (5) years. The reviewing authority approved the sentence, 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 March 18, 1943, the accused were assigned to the duty of transporting "Class One" supplies from QM Depot 160-Q-1-A (formerly 161-F) to the "mule barn", QM Depot 160-Q-C. On that date there were "one hundred pound bags of sugar at that depot" (Q-1-A), all of which were the property of the United States. The value of the sugar at Oran, Algeria, at that time, as established by the stipulated testimony of the Chief of Class One Supplies, QM Section MBS, was five cents a pound (R. 10).

During the day of March 18th, Wilson had several drinks of wine, some in the morning and some in the afternoon. He "had three loads to make that night" and it was his duty to ride in the back of the truck (R. 13) and "to see that the amount of stuff got down there that was supposed to get down there" (R. 15). He was required to ride on top of the load or in the back with the Arabs (R. 13) who had been assigned to work on the truck with Bates and Wilson (R. 11). They went to work about a quarter to eight o'clock that evening (R. 12) and on the first trip, "one of the Arabs" wanted to buy some sugar and Wilson asserted he told him "Hell, no" (R. 13,14). On that trip, Wilson and Bates drove the loaded truck by the home of Bates' "girl friend", where Bates took a sack of sugar and a case of milk into the house and returned with a bottle of wine which the two soldiers drank. Bates' version of what then happened, as contained in his sworn testimony, was that:

"We drove from there to the mule barn. He had charge of the Arabs and they unloaded the sugar. I was sitting in the truck during the time they were unloading the sugar off of the truck. In the meantime I had two more bottles of wine that was already in the truck. After unloading the sugar we came back to 161-F and got another load of sugar, and during the time we were drinking, and unloaded it at the mule barn. During that time we were unloading the sugar I remember that Wilson and these Arabs were arguing over some sugar and how much it was going to be, the amount of it. We came on back there to 161-F and there I was drinking. I was drinking pretty heavy and he got up in the seat and he drove the truck to the company after it was loaded. He drove the truck to the company area and during the time Wilson gave me 12,500 francs that he said was my part of the sugar. We drove to my company area for lunch. It was 11:30, around 11:30 at night, and we always ate lunch some place. I was asleep in the truck. From there the next thing I remember, we were passing the mule barn. Wilson was driving. I was asleep after we pulled

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out of the company area toward the mule barn with the third load of milk -- two loads of sugar and one load of milk. We got to the mule barn, unloaded and came back from the mule barn to 161-F. I don't know how much sugar or how much it was. It was around twenty-five or thirty sacks, I would say, that was loaded on. That was what I seen unloaded. And we drove from there and went past the mule barn. I asked Wilson 'Where are you going now?' He said, 'We are going to deliver the sugar.' I don't know where the sugar was delivered and so on but I remember going down a rough road from the mule barn.

"Wilson was driving the truck *** I was sitting on the seat *** and the Arab -- I don't know whether it was the one that bought the sugar or the one that told him where to put the sugar off at -- was sitting up in the cab with us. There were three of us at that time. The next I can remember was unloading in front of a barn-like storage place or something like that. Wilson drove back to the mule barn and from there he went on back to my company." (R. 24,25)

Bates also testified that "I didn't realize at that time the seriousness of the punishment and all in depriving the Government of the property that I did". (R. 23) He said that in operating the truck to make delivery of the thirty bags of sugar, Wilson was driving very well, that "he was not driving recklessly or at a fast speed". (R. 26,27)

The stipulated testimony of one of the Arabs who participated in the purchase of the sugar from the accused was in substance that on the evening of March 18, 1943, he and seven other civilians were assigned to work on a truck with the accused; on the first trip they stopped at a woman's house where Bates "dropped off" a hundred pound bag of sugar and a case of milk, and brought back from the house three bottles of wine; they proceeded to the "mule barn" and while unloading, the accused drank the wine, and got quite drunk; Bates and Wilson then made a proposition to the civilians, offering to give them thirty 100-pound sacks of sugar for the sum of 25000 francs which proposal was accepted; after making three trips, they loaded the thirty sacks of sugar on the truck and drove to a pre-arranged spot where the sugar was unloaded; the accused were paid the 25000 francs.

Wilson made a voluntary statement, after having been fairly apprised of his rights under Article of War 24 (R.6), during the afternoon of March 19, 1943 (R.5) some twelve or fifteen hours after he had been arrested (R. 5,19,20). The statement reads:

"I went on duty at about 2000 hrs. From my camp I went to 'A' lot and picked up seven (7) Arabs, and met my driver who was Oscar Bates. I told him we had

3 (three) loads to make, two (2) of sugar and one (1) of milk. We then loaded 125-sacs of 100 lbs. each, of sugar on the truck. While loading truck the Arab said: 'Me give you 25,000 francs for 30 bags of sugar'. This Arab was the foreman. We then went to Bates' girl friend's house where we stopped for a few minutes. We then went to the mule barn and unloaded. Then we returned to 161 F Dump 'B' lot, for another load of sugar. While loading the second load, I discussed the Arab's offer with Bates and the Arab, and we decided to do it, and agreed on a 50-50 basis. We loaded approximately 160 sacks of sugar on second load and took it to the mule barn. We then returned for a load of milk. While loading the milk the Arab payed me 25000 francs and I divided with Bates, 12500 each. The third load we had 210 cases of milk which we took to the mule barn. We returned to 'B' lot and picked up 30 sacks of sugar and we delivered them to the place directed by the Arab. After we unloaded I went to the mule barn and Bates took Arabs and left. I returned to my outfit about 0100 hrs." (Ex. A)

Wilson elected to testify under oath, defense counsel having announced to the court that "each of the accused desires to take advantage of his right to offer evidence in extenuation". (R. 11) Wilson testified he had been drinking wine during the day of March 18, 1943, and was feeling bad when he went on duty that night; "there was plenty of vino there" and he got to drinking and got drunk; he did not know what he was doing and would not have "done it" for anything if he had known what he was doing (R. 12,13,21). He admitted he had 12500 francs in his pocket when awakened the next morning and when asked what he thought when the money was found in his possession, said, "The only thing I could think, sir, is that I done it. I was bound to. I know nobody would give me that much". (R. 12,14,16) He said he did not remember giving 12500 francs to Bates (R. 12,14) and through extended cross-examination, maintained that he did not remember the transaction, did not know what he was doing, or would not have "done it" if he had known (R. 12-21). He explained giving the voluntary statement (Ex. A) by saying, "I didn't know what took place after I had taken the first load, but I knew what had to take place -- the way it had to go". (R. 18)

At the conclusion of Wilson's testimony, the court directed that a plea of not guilty be entered for him in consequence of the exculpatory statements he had made. (R. 21).

Bates made a written statement which was introduced without objection (R. 9., Ex. B). The statement reads:

"I started on shift about 8:00 P.M. I hauled 2 loads of sugar and one load of milk. The first load was sugar and a case of milk. I drove to the home of Frances Fernandes at #10 Rue Des Esparges and dropped off a case of milk and a sack of sugar. From there we went to the Mule Barn and unloaded and returned to 161F. There we

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loaded another load of sugar and took it to the Mule Barn. We returned to 161F for a load of milk. While Arabs were loading milk I overheard Wilson and Arab foreman arguing about amount of sugar they were going to deliver. When truck was loaded we went to the Company for lunch. After lunch we took load of milk to Mule Barn. While Arabs were unloading milk Wilson gave me 12500 francs. I asked him what it was for, he said it was for the sugar. Then we returned to 161F and loaded 25 or 30 sacks of sugar. Wilson drove this load. When he drove by the Mule Barn and did not stop I asked him where he was going, he said he was going to take the sugar to the Arab's house. We drove up a very rough road and dropped the sugar in what looked like a barn. Wilson then drove back to mule barn and got out. I went back to my Company."

Bates testified under oath. His testimony was consistent with his plea of guilty and with the written statement he had made (Re 22-27).

4. The evidence, together with his plea of guilty, establishes beyond a reasonable doubt, that Bates was guilty as charged. And also, the evidence shows that at the time alleged, Wilson, acting jointly with Bates, committed larceny of the sugar in the amount and of the ownership and value alleged.

5. The proof required to support a conviction of larceny is laid down in Manual for Courts-Martial 1928 (par. 149g, p. 173, MCM 1928) as follows:

"(a) The taking by the accused of the property as alleged; (b) the carrying away by the accused of such property; (c) that such property belonged to a certain other person named or described; (d) that such property was of the value alleged, or of some value; and (e) the facts and circumstances of the case indicating that the taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property or interest in the goods or of their value or a part of their value."

It is indisputably shown that the two accused took thirty one 100-pound sacks of sugar from QM Depot 160-Q-1-A, formerly known as 161F, on the night of March 18, 1943, and transported the sugar to a pre-arranged spot indicated by one of the civilians who had engaged themselves to buy the stolen property.

It affirmatively appears that sugar in 100 pound bags was stored at Depot Q-1-A (formerly 161-F), and that all of the sugar was the property

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of the United States. Bates admitted in his testimony that he knew he was depriving the Government of the property when he and Wilson committed the larceny. Even had there not been this direct testimony that the sugar was the property of Government, the evidence shows that it was taken from a place of storage of Government property and from this circumstance alone, the court would have been justified in finding that the ownership of the stolen sugar was in United States, as alleged. (Sec. 452 (13) Dig. Op. JAG 1912-40).

The value of the stolen sugar was fixed by the stipulated testimony of a competent witness at \$155.00, which was the value alleged and the conclusion of the court that this value was fairly established is amply supported by the undisputed fact that the accused sold thirty of the thirty one sacks of stolen sugar for 25000 francs, or \$500.00 in terms of the then prevailing rate of foreign exchange.

That each of the accused entertained the fraudulent intent of depriving the Government permanently of its property is a conclusion which the court most reasonably embraced. This property was wrongfully appropriated by the accused for the very purpose of selling it and "proof of a subsequent sale of stolen property goes to show intent to steal". (par. 149g, p. 173, M.C.M. 1928)

The statement made by Wilson might be considered a confession upon the unsupported basis of which he could not be legally convicted (par. 114, p. 115, M.C.M. 1928). However, there is supporting testimony establishing all the elements of the offense charged. The proof adduced goes even further than that required by law. In a case of alleged larceny it is only necessary to introduce, in addition to the confession, evidence that the property in question was missing under circumstances indicating "that it was probably stolen". (par. 114, p. 115, M.C.M. 1928). While no one testified directly that the stolen sugar was missing, Bates' testimony was that he saw the sugar which was later delivered to the Arabs, loaded at "161-F", a Quartermaster depot area where Government property was stored. Proof that the property in question was missing is thus supplied and all the circumstances indicate, they even compel, the conclusion that it was "probably stolen". And that this proof was supplied in part by the testimony of Wilson's accomplice is no objection to its admissibility (par. 114g, p. 117, M.C.M. 1928).

The incriminating admissions contained in the statement voluntarily made by Wilson are but weakly negatived by his testimony that he was drunk and did not know what he was doing. He nowhere denied the commission of the offense except to say he did not intend to steal the sugar and would not have done it had he been sober. The testimony shows he was sober enough to negotiate with the Arab helpers for a sale of the sugar and to strike a bargain with them; to complete three trips hauling Government property in keeping with his duties and then to return with his co-principal and the Arab helpers to a Government storage area where 30 sacks of sugar

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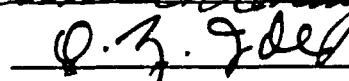
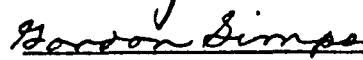
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he had bargained to sell were taken and loaded on the truck; to drive slowly and carefully to the spot pre-arranged between himself and the Arabs for the delivery of the stolen property and there to accomplish its delivery; to collect the agreed price of 25000 francs and to give one-half of the sum to Bates.

Wilson was present when the one sack of sugar was taken off the truck he was supposed to guard and was given by Bates to his "girl friend". The evidence to support his guilt of larceny of this sack of sugar is not in all details satisfactory but the want of adequate proof in respect of so small a part of the total property stolen is immaterial and not prejudicial to the substantial rights of this accused. His guilt of larceny of the thirty sacks of sugar sold and delivered to the Arabs is established beyond a reasonable doubt by the proof, which amply supports the findings and sentence.

6. The failure of the proof to show clearly where the offense was committed is not material here. Inferentially, the proof is supplied in that each accused gave his Army Post Office Number as 700 (R. 11,22), which War Department records show is Oran, Algeria, where the larceny was alleged to have been committed and where the court might reasonably, even necessarily, infer the accused were on duty at the time of the commission of the offense. But the irregularity, if so considered, in failing to prove directly the place of the wrongful taking, is not here material (sec. 428 (12) Dig. Op. JAG 1912-1940).

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the 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.

 Edmund D. Bolingue, Judge Advocate.
 Q. J. Ide, Judge Advocate.
 Gordon Simpson, Judge Advocate.

Board of Review

(93)

NATO 136.

31 May 1943

U N I T E D S T A T E S)	ATLANTIC BASE SECTION
v.)	
Private HARRELL D. BROWN (36165530), 608th Ordnance Company (AM).)	Trial by G.C.M. convened at Casablanca, French Morocco, 14 April 1943. Dishonorable discharge, total forfeitures and confinement at hard labor for ten (10) years. United States Disciplinary Barracks, Fort Leavenworth, Kansas, designated as place of confine- ment.

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. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 64th Article of War.

Specification 1: In that Private Harrell D. Brown 608th Ordnance Company (Ammunition) did, at Ammunition Depot Number 1, Ain Harrouda, French Morocco, on or about March 26, 1943, strike Lieutenant Stanley E. Southern, Jr. 608th Ordnance Company (Ammunition), his superior officer, who was then in execution of his office.

Specification 2: In that Private Harrell D. Brown 608th Ordnance Company (Ammunition) did, at Ammunition Depot Number 1, Ain Harrouda, French Morocco, on or about March 26, 1943, offer violence against Lieutenant Stanley E. Southern, Jr. 608th Ordnance Company (Ammunition), his superior officer, who was then in the execution of his office, in that he, the said Private Harrell D. Brown, did attempt to strike the said Lieutenant Stanley E. Southern, Jr.

CHARGE II: Violation of the 65th Article of War.

Specification: In that Private Harrell D. Brown 608th Ordnance Company (Ammunition) did, at Ammunition Depot Number 1, Ain Harrouda, French Morocco, on or about March 26, 1943, attempt to strike Sergeant Arthur Buchanan 608th Ordnance Company (Ammunition), a noncommissioned officer in the face with his fist, while said Sergeant Arthur Buchanan was in the execution of his office.

He pleaded guilty to, and was found guilty of the charges and specifications. The prosecution introduced evidence of three previous convictions; the first and second, by special court-martial, for absence without leave in violation of Article of War 61, and the third, by summary court-martial, for refusing to obey an order of a noncommissioned officer in violation of Article of War 96. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. The reviewing authority approved the sentence but remitted ten years of the confinement, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. It is shown by the testimony of Second Lieutenant Stanley E. Southern, Jr., 608th Ordnance Company (Ammunition), that at noon on the date alleged, while proceeding towards the officers' mess, he was accosted by the accused, who, without saluting, said, "Sir, can I speak to you?" Witness replied, "Private Brown, don't you salute officers?" Accused ignored the question and continued by saying "This morning you told me ..." At this point the Lieutenant stopped and asked again, "Brown, don't you salute officers?" Again the accused disregarded the question and said, "This morning you told me ..." With this, the witness started to walk away. The accused got in front of him and with one hand grabbed the Lieutenant's jacket. The latter put up his hands to push the accused aside and at the same time called to enlisted personnel standing nearby in the mess line that they had better "get Brown away from here before he gets himself into trouble." (R. 7,8,11,12,13) "At this point Brown, with his other hand, swung at me. His arm went around my neck and hit me in back of the neck. Brown and I were struggling. I was still holding him away from me and Brown had me in a sort of headlock." (R.8) Sergeant Arthur Buchanan, of the same organization, rushed over and pulled the accused away. The accused resisted the sergeant and tried to hit him. The latter struck back and knocked the accused to the ground (R. 8,9,14,16,18,24).

Sergeant Buchanan's testimony shows that he was nearby when he saw "Private Brown and Lieutenant Southern in a struggle". It looked as though the accused "was going to throw him on the ground". Witness rushed forward and said, "Break it up". This was repeated but Brown

held on. Witness thereupon grabbed the accused by his shoulder and pulled him away from the Lieutenant. The accused then turned upon the witness, grabbed him on the collar and with the other hand swung and hit him across the shoulder (R. 20,23,24,25).

The incident was also witnessed by Captain William A. Snellgrove, Jr., 608th Ordnance Company (Ammunition), who saw the accused with his arm around Lieutenant Southern's neck. The latter appeared to be pushing him away. He next saw Sergeant Buchanan and the accused. Brown was on the ground and Sergeant Buchanan was helping him to arise (R. 26,27).

It was brought out in the cross-examination of Lieutenant Southern that, on the morning of that day, witness had ordered the accused to perform a certain duty on a conveyor line. The accused started to argue and it was only after he had been ordered a second time that he obeyed (R. 9).

4. The accused, upon being advised of his rights, chose to make an unsworn statement. He stated that in the morning he had been working on the conveyor line and Lieutenant Southern came up to him and said "I want you to get your thumb out of your ass and get down to the belt line with the rest of the fellows". He meant to say something to him about an officer cussing a man and at lunch time stopped the Lieutenant and said, "Lieutenant, I would like to speak to you". He said, "Don't you salute officers?", and "I couldn't exactly give him a salute because I had lost my respect for him, so I couldn't give him that salute. So at that time he tried to walk away from me and I tried to stop him, and put my hands on him, so he grabbed me at that time. I put my hands on him and so I thought he was going to hit me, and so I grabbed him ... somebody grabbed me on the shoulder and turned me around and hit me on the jaw". (R. 28,29)

5. The evidence supports the charges and the specifications thereunder. The specifications of Charge I set forth two distinct offences, under that article, striking and offering violence against the Lieutenant. The circumstances warranted this pleading. The actions of the accused in accosting and blocking the way of the Lieutenant, grabbing the latter's jacket, and otherwise displaying an intent to exert physical force constitute an act of offering violence within the meaning of that article (MCM, 1928, page 148). The evidence shows an intent to inflict physical violence on the officer and an attempt to carry it out (Dig. Op. JAG 1912-40, sec. 422 (1)). There is also evidence that the accused struck the Lieutenant.

As to the specification of Charge II, the evidence is sufficient to show that the accused attempted to hit the sergeant as alleged, it being inferable that he missed his face and hit him over the shoulder. The findings of guilty are warranted.

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6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings and sentence.

Ronald Holzgen, Judge Advocate.
D. J. T. De, Judge Advocate.
Gordon Simpson, Judge Advocate.

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WAR DEPARTMENT

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

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APO 534, U. S. Army,
13 September 1943.

Board of Review

NATO 154

U N I T E D S T A T E S

EASTERN BASE SECTION

v.
Private First Class THOMAS E. ARMSTRONG (34305096), Company L, 46th Quartermaster Regiment.

Trial by G.C.M., convened at Constantine, Algeria, 22 April 1943. Dishonorable discharge and confinement for three years. United States Disciplinary Barracks Number 1, Oran, Algeria.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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, in part, has been examined by the Board of Review. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and its Specification and of the Specification, Charge I, in violation of Article of War 96, and legally sufficient to support the sentence.

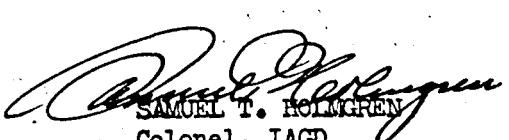
 SAMUEL T. HOLMGREN, Judge Advocate.

O. J. Ide, Judge Advocate.

Gordon Simpson, Judge Advocate.

Branch Office, JAG, NATOUSA, Board of Review, 13 September 1943.
TO: The Assistant Judge Advocate General, NATOUSA.

For his information.


SAMUEL T. HOLMGREN
Colonel, JAGD
Chairman, Board of Review

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12 September 1943

NATO 154

MEMORANDUM:

SUBJECT: Record of trial in the case of Private First Class Thomas E. Armstrong (34305096), Company L, 46th Quartermaster Regiment.

1. Accused was found guilty of being drunk and disorderly in violation of Article of War 96 (Charge II, Specification 1), and guilty also of the following Charge and Specification:

CHARGE I: Violation of the 93rd Article of War.

Specification: In that Thomas E. Armstrong, Private 1st class, Company L, 46th Quartermaster Regiment, having taken an oath in the course of a duly ordered investigation then and there conducted by Lt. Col. I. L. Peterson, I.G.D., an officer authorized to administer oaths and take testimony thereunder, that he, the said Pvt lcl Thomas E. Armstrong, would testify truly, did, at Phillipville, Algeria, on or about the 29th day of March 1943, willfully, corruptly, and contrary to such oath, testify in substance that he was struck and kicked by American Military Policemen at Phillipville, Algeria, on the 27th of March 1943 at about 8:30 P.M., which testimony was a material matter and which he did not then believe to be true.

2. The offense of perjury under Article of War 93, is governed by the common law definition of that crime. As such it is

"the willful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry" (underscoring supplied) (MCM, 1928, par. 1491).

Since the above specification does not allege that the testimony was given "in a judicial proceeding or course of justice" it fails to set forth the offense of perjury under that Article of War (Dig. Op. JAG, 1912-40, sec. 451 (52); MCM, 1928, par. 1491).

It is noted however that the oath was allegedly administered by an officer of the Inspector General's Department in the course of a duly ordered investigation of the facts concerning the alleged acts of the military policemen.

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Section 125, of the Criminal Code (35 Stat. 1111; 18 U. S. C. A. 231) provides:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than \$2,000 and imprisoned not more than five years."

This statute is thus applicable if the oath is permitted or required by some law of the United States and is administered by some tribunal, officer, or person authorized by law of the United States to administer oaths in respect of the particular matters to which it relates.

Aposite therefore are the provisions of the statute governing oaths to witnesses that

"Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps or Coast Guard, detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Coast Guard board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation" (R. S. 183; 5 U. S. C. A. 93).

Since the oath in the instant case was thus authorizedly administered in the course of an investigation by a duly detailed officer of the Army, the false testimony constitutes perjury within the purview of the above quoted section of the penal code. As such, it is embraced in those crimes, not capital and not made punishable by another Article of War, which are denounced by Article of War 96 (Dig. Op. JAG, 1912-40, sec. 451 (52); MCM, 1928, par. 152). The fact that the specification is laid under Article of War 93 is immaterial (Dig. Op. JAG, 1912-40, sec. 394 (2)).

3. The evidence, adequately summarized in the review of the Staff Judge Advocate, fully supports the allegations of the specification. The alleged false testimony was given on the first day of the investigation and on the following day when confronted with questions denoting that the investigating officer had superior knowledge of the true facts, accused admitted its falsity and gave a correct version of the incident (R. 22).

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There can be no doubt that his initial testimony was a deliberate lie, designed for a corrupt and reprehensible purpose.

The only remaining question for consideration is whether his retraction of the false testimony had the effect, as is seemingly indicated by certain views, of exculpating him from the charge. For it has thus been held that perjury cannot be predicated upon false statements corrected before submission of the case in which they were made, for the reason that

"A judicial investigation or trial has for its sole object the ascertainment of the truth that justice may be done. It holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted for perjury" (Peo. v. Gillette, 126 App. Div. 665, 673; 111 N.Y.S. 133 (cited in 48 C.J. 828)).

This rule was evidently embodied in the holding in CM 220746 (1942) (Bull. JAG, January-June 1942, sec. 451 (53)), that

"a witness who before the end of the trial corrects his earlier and false testimony purges himself of his false testimony and cannot be convicted of perjury".

Similarly, in a case under Article of War 95, where accused in his original answer failed to reveal certain information, it was held that the record was insufficient to support the findings for the reason that,

"As in the case of perjury, correction of a false statement before the interview during which it is made is completed 'purges' the falsity and precludes prosecution for it" (CM 231119 (1943); Bull. JAG, April 1943, sec. 453 (18)).

Then, in another prosecution under Article of War 95, the record of trial was held legally sufficient upon facts where, in an interview, accused who had at first denied he had initialed and transmitted certain messages later admitted that he had done so with the explanation that his conduct was meant to be a joke. It was held that the

"false statement was made willfully and with intent to deceive. The accused did break down under cross-questioning and admit the truth, but this does not condone or purge the offense" (CM 231445 (1943); Bull. JAG, May 1943, sec. 453 (18)).

The digest of that case thereupon states

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"This case is to be distinguished from CM 231119 (1943) (2 Bull. JAG 143, April 1943) where the allegedly false answer was caused by a reasonable misunderstanding of the question and was corrected when the exact purport of the question was understood".

The apparent conflict indicated by the aforementioned holdings may be explained by the presence of the issue whether the allegedly false statement was made innocently and without a willful intent to deceive. Since the crime of perjury requires a willful and corrupt intent, the resultant issue is susceptible to a showing by facts and circumstances that the false statement was due to an honest mistake, misunderstanding, incompleteness, or, by the weight of authority, absolvatory recklessness (48 C.J. 830). Such issues may properly become questions of fact for a jury. Thus, in the exercise of the right to weigh evidence, the holding in CM 231119, *supra*, is appropriately founded upon a determination that accused had misunderstood the question upon which the allegedly false statement was based. But it seems that such consideration can be properly entertained only when some substantial basis exists for the submission of the issue, for there is significant authority for the view that where false material testimony has been knowingly given, it is not error for a court even to refuse to charge the jury that a bona fide but incomplete attempt to correct false testimony may show absence of criminal intent (*Seymour v. U. S. (C.C.A. Nebr.) 77 F. 2d 577*).

Whatever the explanation that may be given for any holding to the contrary, it must be laid down as a recognized principle, consistently with a decision of the United States Supreme Court (*U.S. v. Norris*, 300 U.S. 564, 81 L.Ed. 808), that the crime of perjury is complete when a deliberate material false statement is made and that nothing thereafter done can alter the situation. In that case, which involved a prosecution for perjury allegedly committed before a Senate subcommittee, the defendant at first denied that he had received financial support in his campaign for senator and on the next day, before the conclusion of the hearing, admitted having received such money. It was held by the Court that the telling under oath of the deliberate lie constituted the crime of perjury and that it was therefore proper for the trial judge properly to refuse defendant's requested charge that he could not be found guilty of perjury if, while the hearing was still in progress, he corrected statements that may have been incorrect or even intentionally false (*U.S. v. Norris*, *supra*). The pronouncement is aptly made therein that the oath that is administered to a witness calls upon him to disclose the truth in the first instance and not to put the court and parties to disadvantage, hindrance, and delay of ultimately extracting the truth by cross-examination, by extraneous investigations, or other collateral means (*U.S. v. Norris*, *supra*).

The foregoing principles must be regarded as controlling in the instant case where the initially given false statement was so obviously

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deliberate, willful and corrupt as to foreclose any consideration of accused's subsequent retraction. The conclusion is compelling that he cannot escape the consequences of that false statement.

For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence.

Paul O'Hanlon, Judge Advocate.
O. H. Fiske, Judge Advocate.
Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army.
7 June 1943.

NATO 155

UNITED STATES)	EASTERN BASE SECTION
v.)	Trial by G.C.M., convened at
Technicien Fourth Grade)	Constantine, Algeria, 20 April
JAKE (N.M.) EBARB (34231893).)	1943. Confinement at hard labor
Company A, 713th Railway)	for three (3) months, forfeiture
Operation Battalion.)	of \$25.00 for three (3) months
)	and reduction to the grade of
)	private.

OPINION 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 in the Branch Office of The Judge Advocate General, in the North African Theatre of Operations, and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General.

1. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that T/4 Jake Ebarb (N.M.) ASN 34231893, Company A, 713th Ry. Opn. En., did at Setif, French, Algeria, on or about March 15, 1943, with intent to do him bodily harm, commit an assault upon Sergeant Delbert A. Smith, ASN 37115485, Company "C", 713th Ry. Opn. En., by shooting at him with a dangerous weapon, to wit, a rifle.

Specification 2: (Finding of not guilty.)

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He pleaded not guilty to both Specifications and the Charge and was found, of Specification 1, guilty, except of the words "with intent to do him bodily harm, commit an assault upon Sergeant Delbert A. Smith, ASN 37115485, Company C, 713th Ry. Opn. Bn., by shooting at him with a dangerous weapon, to wit, a rifle" and substituting therefor the words "through carelessness, discharge a service rifle in his company area"; of the excepted words, not guilty and of the substituted words guilty. He was found not guilty of Specification 2, and guilty of violation of Article of War 96.

He was sentenced to confinement at hard labor for three months and forfeiture of "\$25.00 of his pay for three months" and to be reduced to the grade of private. The reviewing authority approved the sentence, directed its execution and designated the Eastern Base Section Stockade as the place of confinement. The sentence was published in General Court-Martial Order No. 3, Headquarters, Eastern Base Section, May 11, 1943.

2. The only question requiring consideration is the legal sufficiency of the record of trial to support the findings of guilty. A court-martial may make findings with exceptions and substitutions where they concern figures, dates, amounts, or other details "provided that such action does not change the nature or identity of any offense charged", or where the evidence fails to prove the commission of the offense charged but proves the commission of a lesser offense included within it (CM, 1928, par. 78c). In the latter situation a finding, by exceptions and substitutions, is only authorized where all the elements in the offense, of which the accused is found guilty, are included in the offense charged. Any foreign element renders it a separate and distinct offense (CM 144811 (1921); Dig. Op. JAG, 1912-1940, sec. 452 (16); 182393 (1928)).

3. The exceptions and substitutions made by the court in the present case do not relate merely to details. They go to the substance and change the identity of the offense. The gravamen of the offense charged is an assault upon a certain individual with a dangerous weapon accompanied by an intent to do him bodily harm, whereas the substitution charges the accused with the careless discharge of a service rifle in his company area. It is obvious that this action introduced elements not necessarily included in the offense charged. "That a court may not legally find an accused guilty of an offense with which he has not been charged in the arraignment and which does not comprise a lesser included offense therein, is deemed too elementary a question of law to require discussion" (CM 211377, Short). Consistently with these principles, the Board is of the opinion that, in the instant case, a fatal variance exists between the findings and the offense as charged.

4. It is noted that the court sentenced the accused "to forfeit \$25.00 of his pay for three months" and that the Staff Judge Advocate, in stating the terms of the sentence in his review, adds the words

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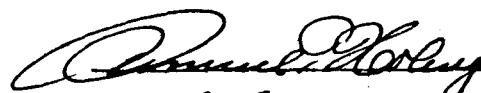
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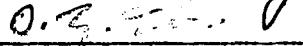
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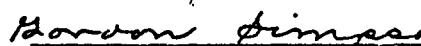
"per month". A forfeiture, as imposed by this sentence, is construed to mean a forfeiture of twenty-five dollars (\$25.00) only. Pay cannot be forfeited by implication. For instance, a sentence to be confined for two months "and to forfeit \$14.00 of his pay for a like period" may not, therefore, be interpreted "to forfeit \$14.00 of the pay of accused per month for two months, or a total of \$28.00" (Dig. Op. JAG, 1912-1940, sec. 402 (9)).

5. The court was legally constituted and had jurisdiction of the person and offense involved.

6. For reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence.

 Donald O'Leary, Judge Advocate.

 O. F. Johnson, Judge Advocate.

 Gordon Sinson, Judge Advocate.

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NATO 155

1st Ind.

Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army,
26 July 1943.

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

1. Herewith transmitted to you are the record of trial and the opinion of the Board of Review based upon its examination thereof, in the case of Technician Fourth Grade Jake (MMI) Ebarb (34231893), Company A, 713th Railway Operation Battalion, who was tried by General Court-Martial convened at Constantine, Algeria, 20 April 1943. He was charged with assault with intent to do bodily harm with a dangerous weapon, in violation of Article of War 93, and by exceptions and substitutions was found guilty of the careless discharge of a service rifle, in violation of Article of War 96. He was sentenced to confinement at hard labor for three months and forfeiture of "\$25.00 of his pay for three months". The reviewing authority approved the sentence, directed its execution and designated the Eastern Base Section Stockade as the place of confinement. The sentence was published in General Court-Martial Order 3, Headquarters, Eastern Base Section, 11 May 1943.

2. The offense of which the court found the accused guilty involves elements not included in the offense with which he was charged and hence a fatal variance exists between the findings and the Charge.

3. The record of trial, after preliminary examination in this office, was re-examined by the Board of Review as provided by Article of War 50 $\frac{1}{2}$. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings and the sentence. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be disapproved and that all rights, privileges and property of which he has been deprived by virtue of said sentence, be restored.

4. I enclose herewith a form of action designed to carry this recommendation into effect should it meet with your approval.



HUBERT D. HOOVER

Colonel, J.A.G.D.

Assistant Judge Advocate General

3 Inclosures --

Incl. 1 - Record of Trial

Incl. 2 - Opinion of Board of Review

Incl. 3 - Form of Action

(Findings and sentence vacated. GCMO 18, NATO, 29 Jul 1943)

COPY

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

Board of Review
NATO 169

APO 534, U. S. Army.
15 June 1943.

UNITED STATES

v.
Private WILLIAM H. BAKER
(16095270), Company "C",
561st Signal BN Battalion,
La Senia Airdrome, Algeria.

NORTHWEST AFRICAN AIR FORCES

Trial by G.C.M., convened at La
Senia Airbase, Algeria, 30 April 1943.
Dishonorable discharge (suspended),
total forfeitures and confinement for
one (1) Disciplinary Training
Center Number

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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 in-
sufficient to support the findings and sentence, in part, has been
examined by the Board of Review. The Board of Review holds the record
of trial legally sufficient to support the sentence.

S/ Samuel T. Holmgren, Judge Advocate.

S/ O. Z. Ide, Judge Advocate.

S/ Gordon Simpson, Judge Advocate.

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MEMORANDUM.

SUBJECT: Record of trial in the case of Private William H. Baker (16095270), Company "C", 561st Signal AW Battalion, La Senia Airdrome, Algeria.

1. It was charged that accused, being on guard and posted as sentinel, was found drunk on his post on or about 22 February 1943.

Under an Additional Charge and Specification, it was alleged that accused, having been placed in arrest in his quarters on or about 23 February 1943, did on or about 2 April 1943, break his arrest before he was set at liberty by proper authority.

The record of trial has been examined in the Branch Office of The Judge Advocate General and there found legally sufficient to support the findings of guilty which were made by the court in respect to the charge of having been found drunk on post, but legally insufficient to support the findings of guilty made by the court in respect to the offense of breach of arrest. The record of trial was found legally sufficient to support the sentence.

The record of trial having thus been found legally insufficient to support the findings in part, has now been examined by the Board of Review, and the Board is of the opinion that the record of trial is legally sufficient to support both the findings and the sentence.

2. As respects the offense of breach of arrest, laid under the Additional Charge and its Specification, the evidence shows that on 22 February 1943, when the officer of the day, accompanied by the sergeant of the guard (R. 5), came to the area where accused had been posted as a sentinel, he found him drunk and placed him under arrest. He then took accused to the guard house for questioning, turned him over to the first sergeant and gave orders "that the man was under arrest and court martial charges be filed" (R. 24,25). Accused, who testified under oath, said after the officer of the day approached his post and said, "you're drunk", accused was sent to base headquarters, and there "they took my name, serial number and post and told me I was confined to camp area under arrest" (R. 21). He was also told that he was "confined to quarters" (R. 23). He admitted in a voluntary statement that he knew that he had been placed under arrest and was not supposed to leave but that "he went into town to get some more wine or something more to drink" (R.12).

The first sergeant of accused's company told him the next morning he was confined to the company area, but did not tell him of his arrest in quarters. The sergeant also testified that accused was not in

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arrest in quarters but was confined to the company area. He never saw a written order signed by the company commander stating accused was placed in arrest in quarters (R. 13). After a week, accused asked the sergeant for a pass and was told he was still confined in the area (R. 14). On March 2nd or 3rd, the first sergeant looked for accused and could not find him. A search showed he was absent without leave and he did not return until the next morning (R. 15).

3. The evidence thus shows that at the place and time alleged, accused having been found drunk on post and placed in arrest in quarters by the officer of the day, breached that arrest by leaving his quarters and the company area before he was set at liberty by proper authority. This sufficiently proves the offense of breach of arrest, violative of Article of War 69 (par. 139, MCN, 1928).

4. Any commissioned officer has the power to order a soldier into arrest whenever in his judgment, restraint is necessary. The power of arrest and confinement has its source and authority, not only in the Manual for Courts-Martial (par. 20, MCN, 1928) and in the Articles of War (Articles of War 71, 72), but also in long standing customs of the military service (par. 427 (1), Dig. Op. JAG, 1912-40). The arrest may be effected by either oral or written orders or communications (par. 20, MCN, 1928).

If the arrest is made under the provisions of Article of War 69, that is, by an officer in whose judgment restraint of an enlisted man is necessary, the soldier arrested shall be restricted to his barracks, quarters or tent, unless such limits be enlarged by proper authority (par. 21, MCN, 1928; Article of War 69).

5. In this case, the officer of the day found accused, a sentinel, drunk on his post and deeming immediate restraint necessary, verbally ordered him under arrest. The testimony of the officer of the day, that he ordered accused placed in arrest, is unequivocal and is nowhere contradicted. The admissions of accused himself show that he knew he had been ordered in arrest. This arrest operated to restrict him to his barracks, quarters or tent, there being no evidence that the limits of his arrest had been enlarged by proper authority. The testimony of the first sergeant, that accused was not arrested but only confined to his company area, is incompetent, being the sergeant's interpretation of the law and his conclusion respecting facts of which he had no direct knowledge, it affirmatively appearing that he was not present when the officer of the day placed accused under arrest. A clear case of breach of arrest was established and the court was fully justified in making findings of guilty accordingly.

S/ Samuel T. Holmgren, Judge Advocate.

S/ O. Z. Ide, Judge Advocate.

S/ Gordon Simpson, Judge Advocate.

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WAR DEPARTMENT
Branch Office of The Judge Advocate General
With the
North African Theater of Operations

APO 534, U. S. Army,
30 June 1943.

Board of Review.

NATO 183

UNITED STATES)

MEDITERRANEAN BASE SECTION

v..)

Trial by G.C.M., convened at Oran,
Algeria, 18 May 1943.

First Lieutenant GALLIE MOORE, .)

Dismissal.

C.P (O-194761), 424th Escort)

Guard Company, USS BORINGEN.)

HOLDING of the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to the Assistant Judge Advocate General, North African Theater of Operations.

2. The accused was tried on the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant GALLIE MOORE, C.P., 379th Escort Guard Company, United States Ship BORINGEN, was, at Oran, Algeria, on or about 11 May 1943, in a public place, to-wit, a public street, Rue Alsace-Lorraine and Rue Laromiere, drunk and disorderly while in uniform.

Specification 2: In that First Lieutenant GALLIE MOORE, C.P., 379th Escort Guard Company, United States Ship BORINGEN, did at Military Police Headquarters, Oran, Algeria, on or about 11 May 1943, wrongfully behave himself in a disrespectful and insolent manner toward Major ROY F. WALKER.

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his superior officer, by saying to him, "You are farn right pal", or words to that effect, and by using the words "Bastard", "Cocksucker", or similar terms in his presence.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and transmitted the record of trial to the confirming authority who confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that accused arrived in Oran, Algeria, by boat on the afternoon of May 11, 1942 (R. 19) and in company with Captain Roy C. Loepke and some other officers, left the boat about seven o'clock that evening and went to an officers' club where accused and Captain Loepke, according to their testimony, had three glasses of red wine (R. 20,25,28) before the bar closed at eight o'clock, when they left and had nothing more to drink that evening (R. 20,25).

Some two hours later, accused was observed by a member of the American Military Police standing on the corner of Rue Alsace Lorraine and Rue Lamoniere in the city of Oran, drunk, with his hand on the shoulder of an enlisted man, arguing and talking in a loud voice. (R. 5,7). The enlisted man had his hand on the shoulder of accused who "seemed like he wanted to fight the private" (R. 9). The latter said he respected the officer and did not want to fight him, whereupon accused "said he was just a son-of-a-bitch from Virginia or something like that" (R. 10).

The military policeman, who had first observed the disturbance, immediately reported the affair to two of his superior officers and returned with them in a weapons carrier type truck and found accused still talking to the enlisted man (R. 5,6,7). One of the officers took accused by the arm and placed him in the back of the vehicle. The truck had no tail board and accused sat with his feet hanging outside--someone suggested he might fall off and "the captain who was on the truck helped him on the seat in the back". They then proceeded to Military Police Headquarters and entered Major Roy F. Walker's room. Besides Major Walker, Second Lieutenants Alexander C. Wood, Lester J. Zucker, E. J. MacNamara, a Major Klein and another lieutenant were present (R. 6). Captain Loepke who had been brought to the headquarters in the same truck with accused was also there (R. 26).

Upon entering the room accused was "unsteady, staggered a bit, (and) sat down heavily in a chair that was nearby" (R. 13). He sat quietly for a while but he took offense at the manner in which the examination of a prisoner, an enlisted man, was being conducted by Lieutenant MacNamara (R. 33) and "suddenly began to use loud and very abusive language toward everybody in the room, directing them

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(his remarks) in general to the other officers in the room and one senior officer, Major Walker" (R. 11,15,16). He called Lieutenant MacNamara a "louse" and when Major Walker asked him questions, his answer was "fuck you". A lieutenant asked him a question and his answer to that was "bull-shit". Then Major Walker asked accused if he ever had any training in military courtesy and he replied, according to one witness, "You're God damned right" (R. 6) and according to others, "you're damned right, pal" or words to that effect (R. 12,14,16,18). He characterized the officers in the room generally as "cocksuckers", "bastards", and "lousy sons-of-bitches" (R. 12). When Major Walker and Lieutenant Zucker questioned him as to his identity he either did not remember or would not tell (R. 15,17) and in a truculent manner called them several names, including "yellow bellied non-combatant soldiers", called Major Walker and Major Klein "cocksuckers" and called all the officers "bastards" (R. 15,16,18). He said "I am a hell of a lot more patriotic than most of you guys", that he was an enlisted man for some time and probably "had more time in" than all the other officers. He constantly drooled out his patriotism and what he thought of military police in Oran and several other remarks about what was going on and my (Lieutenant MacNamara's) treatment of the prisoners". Accused was wearing Military Police insignia at the time (R. 16).

Upon refusing to identify himself, Lieutenant Zucker looked in accused's pocket and got his identification card. He refused to give the name of his organization, responding to this inquiry with abusive language and it was not until the following morning that this information was obtained (R. 14,18,19).

Accused continued his use of abusive language in the presence of Major Walker and the other officers then in the room for about twenty minutes (R. 12). He had difficulty speaking, his voice was incoherent and "on one occasion he tried to say a particularly long word and couldn't get it out" (R. 6). His face was extremely flushed, his nose was red, his eyes "very heavy lidded", "he sat with a very truculent look on his face, his speech was extremely thick, his answers to questions quite incoherent, when they did not consist of abuse they consisted of irrelevancies" (R. 12). Lieutenant MacNamara described accused as being "quite drunk" (R. 15).

From Major Walker's office accused was taken into an adjoining room where Captain Loepke found him, five or ten minutes later, asleep on a bench (R. 27) where he slept until about 5:30 o'clock the next morning (R. 21).

Accused elected to testify under oath (R. 19). He said he went into town about seven o'clock on the evening of May 11, 1943, with Captain Loepke and two other officers and had three glasses of red wine at an officers' club before it closed at 8 o'clock; that they walked around for about an hour and a half when they started back to the boat.

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but stopped at the

"corner of some street and were discussing which way the steps were leading back to the docks. I was talking to an enlisted man I didn't know. Captain Loepke walked down I would say about 60 yards and ** while I was standing there talking to the enlisted man the MP's came up ** and told me I was under arrest I walked over to the weapons carrier there ** and sat down with my feet hanging on the outside next to the curb. So one of the MP officers went down and asked Captain Loepke if he wanted a ride. He came up before the truck moved and made me sit inside ** They took us to Military Police Headquarters. ** We went into a room where there were several officers. They told us to sit down. It seemed to be stuffy in the room and there was a lot of smoke ** and I began to feel drowsy and sleepy. ** I was asked some questions but don't remember just what they were. ** Major Walker asked me some questions. One in particular I remember was, what organization I belonged to and the name of the boat I came over on. I didn't reply to that because I was instructed not to give any names of the organization or my boat until 24 hours after the boat was docked---** I do not remember all what did happen. I was taken out of the room to another room ** there was a cot and a bench. The cot was folded up and I laid down on the bench and went to sleep." (R. 20)

Accused testified he did not believe he used the words "you're damn right pal" to Major Walker, or words like that, that he did not "use those words commonly every day", that he did not use the words "cocksucker", "bastard", "yellow bellied bastard", or similar words (R. 21).

He stated the three glasses of wine he drank that night was the first intoxicating beverage he had had in two years; that he did not offer to fight the enlisted man to whom he was talking on the street just prior to his arrest, but had only stopped and asked him the way back to the docks and had some conversation about the enlisted man having been in Virginia and asked him what city he was from (R. 22).

Accused said it seemed to be stuffy in the room at Military Police Headquarters and he felt drowsy and sleepy (R. 20); that he did not remember making the remarks attributed to him, did remember an enlisted man was brought in the room but did not remember what went on and did not remember Major Walker asking whether he had any instructions in military courtesy. (R. 23, 24).

Captain Loepke testified for the defense. He corroborated accused

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as to their activities and movements up to the time of the arrest (R. 25,26,28). He was not interrogated about the encounter between accused and the enlisted man. He said he could not remember distinctly what happened, but claimed he had complete control of his faculties (R. 29). His impression was that accused was sober before he was arrested (R. 26) but at Military Police Headquarters, he seemed more irrational, "he seemed to talk a lot and his words weren't as coherent as they could have been" (R. 27). He remembered Major Walker interrogating accused but could not get the "exact drift" of the questions asked (R. 26,27). He would not say he heard it but accused might have used the word "bastard" and did use some profanity; accused might have said "yellow bellied bastard" and did say that "that was a God damn hell of a way to treat an American soldier" (R. 27,32).

The treatment accorded the American soldier in the presence of accused which apparently started him on his tirade of abuse, consisted of the forcible restraint of a "very drunk" enlisted man who had been arrested wearing a second lieutenant's bars and whom Lieutenant Mac-Namara seized "by the hair and pulled his head back in order to prevent him from striking a blow" (R. 33,34).

4. Accused was shown to have been drunk and disorderly while in uniform at the place and time alleged. He was found bullying an enlisted man on a street corner in the city of Oran, Algeria, abusing and insulting him and trying to provoke a fight, the occurrence of which was only prevented by the discipline and self-restraint of the soldier who declined to engage with a street brawl with an officer. His assertion that he was simply standing on the street talking to the enlisted man when the military police came up and told him he was under arrest is quite incredible. That he was drunk, boisterous and profane is established by clear and convincing testimony.

The inexcusable misconduct of accused in the presence of Major Walker was established by the testimony of all the witnesses except accused and his denials were unconvincing, equivocal and weak. Even Captain Loepke, whom the defense called to the stand, admitted that accused used profanity in the presence of Major Walker and the other officers. It clearly appears that when Major Walker asked if he had ever been instructed in military courtesy, accused impertinently responded "you're damned right, pal", or words to that effect. Accused officially interfered with the interrogation of the enlisted man charged with impersonating an officer. His vulgar, obscene and abusive language, his drunken boasting of his own patriotism, his extremely disrespectful behavior toward Major Walker and the other officers engaged in the proper performance of their duties warranted the findings and the sentence imposed by the court.

The evidence thus shows, beyond a reasonable doubt, that at the places and times alleged, accused was grossly drunk and conspicuously

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disorderly and that he used insulting and defamatory language to his superior officer and in his presence. These acts on the part of accused amounted to conduct unbecoming an officer and gentleman, in violation of Article of War 95 (par. 151, MCM, 1928).

5. Letters from accused, dated 23 May 1943 and 5 June 1943, requesting clemency are appended to the record of trial. He expressed deep regret for his actions which resulted in his trial, accounted for his misconduct by saying he was "unaware of the effect and potency of Algerian wine" and also based his plea on his thirteen years of service as a noncommissioned and commissioned officer in the United States Army which he says was served without any "question as to character". He expressed his personal desire to serve his country in any capacity as an officer or an enlisted man.

Colonel John H. Manning, defense counsel, wrote a letter which is also appended to the record, dated 3 June 1943, to the "Commanding General, M.B.S." in which he recommended clemency. He stated in part:

"I do not condone his conduct, but I do think his record over a number of years in the Regular Army as an enlisted man merits some consideration by the reviewing authority. The offenses of which the officer was found guilty occurred on his first day in North Africa and as the result of his first acquaintance with Algerian Wine."

A written statement based on two and one-half years' acquaintance with accused was made by Major Loy J. Baxter and is appended to the record. It reads in part as follows:

"To my best knowledge and belief Lt. Moore was attentive to duty and performed his duties in an excellent manner, and was a particularly competent soldier. During my contact with him he was never the subject of disciplinary action of any kind. To my best knowledge Lt. Moore was not given to over indulgence in intoxicating liquors."

Captain Charles E. Hartman also made a written statement, which is included in the record, based on twenty-one months' service with accused, which contains the following:

"Lt. Moore was 1st. Sgt. during this period and many opportunities were furnished to observe his personal habits, character and efficiency."

"Lt. Moore, then 1st. Sgt. Moore, was industrious, capable, and was never seen drinking

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or under the influence of drink during this period. He was held in high regard by all officers with whom he was associated at this Station. As En. Adjutant of Lt. Moore's Battalion the undersigned Officer knows that character and efficiency ratings were excellent."

Chaplain Irvin Askine wrote a plea for clemency which is also appended to the record. It reads as follows:

"1. Undersigned pleads for clemency for First Lieutenant Gallie Moore, C.M.P., convicted by Court Martial under the 95th Article of War on 18 May 1943, and offers the following reasons for his plea:

- a. Lieut. Moore served in the Regular Army establishment as an enlisted man for thirteen years and four months prior to October 7, 1942, at which time he was commissioned from the ranks. He was a non-commissioned officer for more than twelve years, serving as Corporal, Sergeant, Staff Sergeant and First Sergeant. He thus has a rich background of valuable experience which would be saved to his country if clemency can be extended permitting him to remain in the Army.
- b. Undersigned has personally interviewed Major Loy J. Baxter, A.G.D., Major William C. Kassen, Inf., and Captain Charles E. Hartman, Inf., all of M.B.S. Headquarters, each of whom have known Lt. Moore for well over two years, both as an enlisted man and as an officer. Each of them said they would do anything possible to enable Lt. Moore to stay in the Army. Each of them said, without any reservation, that Lt. Moore had been an exemplary soldier and officer, to their positive knowledge, until his recent unfortunate experience. Major Kassen said of Lt. Moore, 'Exemplary soldier', 'One of the best enlisted men', 'Never saw or heard of him being addicted to the use of intoxicants'. Major Baxter said, 'Excellent soldier', 'Above reproach'. Captain Hartman said, 'Solid, worthwhile soldier', 'Never knew or had even heard of a single mis-step by Lt. Moore'.
- c. Lt. Moore is a family man, setting great store by his wife and children. He has passed thru

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the chairs of a fraternity known to have nothing to do with roisterers or fast living men. His steady rise in the Army, together with his having been commissioned from the ranks and again promoted within seven months, attest to his solid worth and responsibility.

- d. Lt. Moore evidences a great, even a passionate desire, to serve his country in this emergency. This desire is real and deep.
- e. Lt. Moore swears that this is his first and only experience of this kind, in the Army or out of the Army, and testimony of his friends tends to bear him out. His Army record would seem to attest to it, also.

"2. Undersigned submits that Lt. Moore, being the solid, worthwhile soldier his friends and his record attest him to be, will never expose himself to a like experience again. That Lt. Moore's soldierly background has created in him a rich, soldier-like personality it will be well to save for the Army if that be possible. His afore mentioned friends and this Chaplain believe that if this officer be retained in the Army he will serve faithfully, and be a credit to his calling."

6. The record of trial shows that accused is 37 years old, had fourteen years of service in the Army, serving in an infantry unit until 1 February 1941 when he was assigned to Detached Enlisted Man's List. He was commissioned from the ranks 7 October 1942 without having attended an Officers' Candidate School. He was first sergeant of his company when commissioned. He was tried for being absent without leave about fourteen years ago and had never been tried for any other offense nor punished under Article of War 104 (R. 21,35).

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review holds that the record of trial is legally sufficient to support the findings and sentence. Dismissal is mandatory upon conviction of violation of Article of War 95.

Samuel D. Kellgren, Judge Advocate.

O. J. T. D., Judge Advocate.

Sardon Simpson, Judge Advocate.

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NATO 183

1st En.

Date of Office of The Judge Advocate General, MACUSA, APO 534, U. S. Army,
1 July 1943.

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

1. In the case of First Lieutenant Gallie Moore, CIP (O-481761),
424th Escort Guard Company, USS Boringen, 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
the authority to order the execution of the sentence.

2. After publication of the general court-martial order in the case,
six copies thereof should be forwarded to this office with the foregoing
holding and this endorsement. 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 183).

Adam Richmond
ADAM RICHMOND
Brigadier General, USA
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 9, NATO, 1 Jul 1943)

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

APO 534, U. S. Army.
18 June 1943.

Board of Review

NATO 191

UNITED STATES

v.
Private CHARLES W. GENT
(34145783), 22nd Quartermaster
Car Company.

HEADQUARTERS 5TH ARMY

Trial by G.C.M., convened at APO
464, U. S. Army, 29 May 1943.
Dishonorable discharge, total for-
feitures and confinement at hard
labor for ten (10) years.
Federal Reformatory, Chillicothe,
Ohio, designated as place of
confinement.

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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Pvt. Charles Gent, 22nd Quartermaster Car Company, did at about 2 miles Southeast of Special Troops Camp Area, in the vicinity of Oujda, French Morocco, on or about May 19th 1943, forcibly and feloniously, against her will, have carnal knowledge of one Bertha AZIZA, residing at 22 Route Casablanca, Oujda, French Morocco.

He pleaded not guilty to both the specification and the Charge and was found of the specification, guilty, except the words, "forcibly" and "feloniously against her will have carnal knowledge of Bertha

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Aziza, residing at 22 Route Casablanca, Oujda, French Morocco", substituting therefor the words, "with intent to commit a felony, viz., rape, commit an assault upon one Bertha Aziza, by willfully and feloniously twisting the hand of and choking the said Bertha Aziza"; of the excepted words not guilty, of the substituted words guilty. He was found not guilty of the Charge but guilty of violation of Article of War 93. Evidence of two previous convictions was introduced.

He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for eleven (11) years. The reviewing authority approved the sentence but reduced the period of confinement to ten (10) years. He designated the Federal Reformatory at Chillicothe, Ohio, as the place of confinement and forwarded the record pursuant to Article of War 50½.

3. The prosecution submitted evidence tending to prove that accused was a driver for the 22nd Quartermaster Car Company of the 5th Army. That Bertha Aziza, an Arab woman, approximately 26 years of age (R. 18), was accustomed to doing laundry work for the soldiers at 5th Army Headquarters. That about 1125 o'clock on 19 May 1943, accused spoke to her on the road near the gate and that she, understanding that he wanted to give her some laundry, got into his car (R. 20) and that accused drove her some distance away from the camp in spite of her request to be let out of the car. That he turned off the main road and finally stopped at an isolated spot (R. 21,26). Accused then unbuttoned his pants and said, "Fucky, fucky?" She said, "No, let us go" (R. 21) and tried to open the car door (R. 27). The accused then went around to the other side of the car, opened the door and started strangling her, pressing his hands against her throat and repeating, "fucky, fucky". She tried to push him away saying, "No, no" (R. 21). He told her to remove her pants but she refused. Accused then seized her hand and forced her fingers back. The girl shouted with all her strength and was afraid accused would kill her (R. 21). She grew tired and asked him to let her rest for five minutes. He left her alone for 15 minutes and she started to run away. Accused seized her, took her pants off, laid her down on a cushion and she allowed him to spread her legs apart because she was afraid he would kill her. He inserted his fingers into her vagina causing her much pain and she screamed. Accused started strangling her again and put his penis into her "very far", causing her much pain (R. 23). Accused said, "Finished". She got out of the car, put on her pants and started walking back. She bled a little and there was blood on accused's fingers (R. 24). Accused indicated that he would take her to Oujda and she got in the car and rode with him to within about 1 kilometer from the camp. Scratches upon the girl's throat and the swollen hand were observed by the military police to whom she told the story (R. 10), also by Captain Kossack, a medical officer who examined her at the hospital (R. 12). The latter officer also testified of discoloration, scratches and bruises on her neck, breasts and abdomen, and a little blood after a digital examination of the vagina. His examination

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indicated recent manipulation either by fingers or penis or both (R. 14), but found no blood or sperm around the entrance of the vagina. He could not examine the vaginal interior with a speculum because she was too tender (R. 13).

The defense consisted of a flat denial of the allegations. Accused was sworn as a witness in his own behalf and testified that he had never left the area with his car around the time of the alleged offense. That he was in the area all of the time, putting water in the radiator, "fooling around, and straightening up a few things here and there" (R. 41,42). That the first time he saw Bertha Aziza that day was when she picked him out of a line-up in the company area (R. 42). His alibi was vaguely supported by the testimony of Private Blagman who "thought he saw" accused at about 1155 that day, gassing up his car, but did not see him at lunch that day (R. 32,34). However, prosecution's rebuttal witness, Private First Class Slodsky, testified that he rode to the area with accused to have noon mess; that he did not see accused at mess and that after finishing mess they looked for accused's car to ride back to their station and it was not there (R. 51). Another prosecution rebuttal witness, Private Henry Nichols, testified that he saw accused sitting in his car beside the road near the camp gate talking with Bertha Aziza at 1125 o'clock (R.55).

There was considerable testimony adduced, relative to the complaining witness' chastity and her reputation for morality in the camp area and the community--all of which was immaterial to the issue involved in the instant case.

5. If an attempt is included in the offense charged it may be found as a lesser included offense in violation of Article of War 96. However, if such attempt is denounced by some specific article, it should be found under that article (par. 152 (c), MCM, 1923). The proofs were ample to support a finding of guilty on the original charge and specification and the court's finding of guilty of the lesser included offense is, a fortiori, amply supported by the testimony. The sentence is within the maximum prescribed for this type of crime by the Table of Maximum Punishments (par. 104, MCM, 1923).

6. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence.

Charles H. Blagman, Judge Advocate.
C. J. [illegible], Judge Advocate.
Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army,
28 June 1943.

Board of Review

NATO 192

UNITED STATES)	1ST U. S. INFANTRY DIVISION
v.)	Trial by G.C.M., convened at Valmy,
Corporal FRANK P. CAVALERI)	Algeria, 27 May 1943. Dishonorable
(20227879), Company H, 18th)	discharge, total forfeitures and
Infantry.)	confinement at hard labor for twelve
)	(12) years. Disciplinary Training
)	Center Number 1, Oran, Algeria,
)	designated as place of confinement.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

2. The accused was tried on the following Charge and Specifications:

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Corporal Frank P. Cavaleri, Company H, 18th Infantry, being present with his organization while it was engaged with the enemy, did, at or near El Guettar, Tunisia, on or about March 24, 1943, shamefully abandon the said organization and seek safety in the rear and did fail to rejoin it until several hours later.

Specification 2: In that Corporal Frank P. Cavaleri, Company H, 18th Infantry, did at or near El Guettar, Tunisia, on or about March 25, 1943, run away from his organization which was then engaged with the enemy, and did not return thereto until the organization withdrew to the rear several hours later.

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Specification 3: In that Corporal Frank P. Cavaleri, Company H, 18th Infantry, being present with his organization while it was engaged with the enemy, did, at or near El Guettar, Tunisia, on or about March 27, 1943, shamefully abandon the said organization and seek safety in the rear, and did fail to rejoin it until several hours later.

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, total forfeitures and confinement at hard labor for twelve (12) years.

The reviewing authority took action as follows:

In the foregoing case of Corporal Frank P. Cavaleri, 20227879, Company H, 18th Infantry, the sentence is approved and will be duly executed. Disciplinary Training Center Number 1, Oran, Algeria, is designated as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the order directing the execution of the sentence is withheld.

3. The evidence shows that accused was a squad leader in a machine gun platoon of Company H, 18th Infantry (R. 9) and on March 22, 1943, his company received orders to attack along Djebel Berda in Tunisia the following morning. The company attacked, took its objective and organized a defense against counter-attack. During all the day of March 23rd, the shelling as well as the small arms fire was very heavy. The enemy approached to within eight hundred yards of the company's position and unloaded from half tracks. On the morning of March 24th, the enemy increased his fire and shelled the position held by Company G with direct fire from tanks and howitzers all day, attacked the company that night and forced it back (R. 7). The first and mortar platoons of Company H were "badly shot up". During the day of March 25th, the company exchanged mortar and rifle fire with the Germans who were about four hundred yards away on another ridge. That night Company H withdrew to El Guettar. On March 27th it was ordered back to the front (R. 8).

During the action on March 24th, accused's company commander, Captain Robert E. Murphy, received reports that ammunition was running low and went back to the command post to see what was being done about it. He found accused sitting there. Accused told the captain he had come back for spare parts for his gun. This answer was not satisfactory because a member of his crew should have gone on the errand. Captain Murphy ordered accused back to his gun (R. 8). His platoon commander testified that on the same day accused left his machine gun squad and went back into a wadi, saying "it was too hot for him there", and did not return to his squad until three or four hours later (R. 9). A sergeant of the company testified respecting these matters substantially to the same effect as the officers (R. 10,11).

Captain Murphy testified that on March 25th

"We were in slit trenches and Cavaleri got up and said he was going back and that it was getting too hot for him. He said he wasn't going to stay there and get killed. I told him to stay with his squad. He said I could go ahead and shoot him." (R. 9)

When ordered by the captain to stay with his squad, accused went back down into a wadi towards the rear.

The first sergeant of Company H gave the following account of the conduct of accused on March 25th:

"We were engaged with the enemy and the Germans were shelling the 81 platoon of D Company which was left in position near us. Cavaleri was in a foxhole a little to the left of mine and near me. He climbed out of his foxhole and started to go to the rear. He said he wouldn't stay there and get killed. He said he was going back" (R. 12).

With respect to what happened on March 27th, Captain Murphy testified accused "left the truck column and went again toward the rear, saying it was too hot for him. At the time we were advancing forward, and he went to the rear". (R. 9,10) The same day, accused said to one of the sergeants of his company that "he was going to see the company commander and that he couldn't stand going up to the front any more". As his company was going into position on March 27th, the enemy laid an artillery barrage on the area and accused got unnerved, said he could not stay and get killed and left to go to the rear (R. 11).

Accused elected to testify under oath. He had been in the army a little more than two and a half years and had never been arrested nor previously convicted of any offense (R. 16). He had been a machine gun squad leader since January 27, 1942. He said he could not account for his actions during the shelling on the 24th and 25th of March, that "It's just one of those things that when it happens makes me do the thing I don't want to do **. I went back from El Guettar hill for an extractor. I went back once again to see Captain Murphy. He told me to return to my squad and Lieutenant Lucas said to return up front. I went up and the shelling was going on yet, and I went back to the rear". He did not know why he went back to the rear the second time (R. 17).

One witness, a corporal, was offered by the defense. He told of the severe shelling on March 24th and 25th and of accused going back for spare parts for his gun. The condition of accused's nerves was "very bad" at that time. The witness had served in the same section with accused and would say he had been conscientious in the past in his attention to duty.

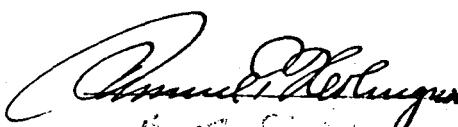
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and always "took care of his squad pretty good" (R. 13,14). The witness recalled accused going to the rear on March 25th and again on March 27th (R. 15).

4. The uncontradicted evidence thus establishes that near El Guettar, Tunisia, on March 24, 1943, accused shamefully abandoned his company while it was engaging the enemy and sought safety in the rear and did not rejoin it until three or four hours later; that on March 25, 1943, he left his company which was in battle position and in defiance of the orders of his company commander to stay with his squad, fled to the rear; that on March 27, 1943, when the enemy laid a barrage on the area through which his company was advancing, accused shamefully abandoned the organization and sought safety in the rear. The testimony of accused corroborates the evidence establishing his guilt of the offenses laid under Specifications 1 and 2 and inferentially supports the testimony establishing his guilt of the offense laid under Specification 3. Accordingly, the court was fully warranted in finding accused guilty as charged (par. 141, MCM, 1928; par. 433 (1) (2) (4) Dig. Op. JAG, 1912-1940; p. 623, 624, Winthrop, reprint).

5. 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.

 Paul E. Hertel, Judge Advocate.
_____, Judge Advocate.

 Gordon Simpson, Judge Advocate.

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WAR DEPARTMENT

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

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APO 534, U. S. Army,
26 June 1942.

Board of Review

NATO 195

UNITED STATES

FIRST U. S. ARMORED DIVISION

Private JAMES R. McCANN
(14015492), and Private CALIFF
L. MAINE (14038638), both of
Company "H", 6th Armored
Infantry.

Trial by G.C.M., convened at APO
251, 17 May 1943.

As to each: Dishonorable discharge, total forfeitures and confinement at hard labor for the rest of his natural life. United States Disciplinary Barracks, Fort Leavenworth, Kansas, designated as place of confinement.

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.

The cases of the two accused, with their consent, were consolidated and tried in one proceeding.

The accused were tried each respectively upon the following Charges and Specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private James R. McCann, Company "H", Sixth Armored Infantry did near Taknassey, Tunisia, North Africa, on or about March 23, 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: when his organization, Company "H", Sixth Armored Infantry, made an attack on Djebel Naemia, Private McCann deserted the company, and did remain absent in desertion

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until he surrendered at Mostagnon, Algeria, North Africa on or about April 13, 1943.

Specification 2: In that Private James R. McCann, Company "H", did, near Oued Zarga, Tunisia, North Africa on or about May 1, 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 was apprehended near Oued Zarga, Tunisia, North Africa on or about May 2, 1943.

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Califf L. Maine, Company "H", Sixth Armored Infantry, did near Maknassy, Tunisia, North Africa on or about March 23, 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: when his organization, Company "H", 6th Armored Infantry, made an attack on Djebel, Naemia. Private Maine deserted the company, and did remain absent in desertion until he surrendered at Mostagnon, Algeria, North Africa on or about April 13, 1943.

Specification 2: In that Private Califf L. Maine, Company "H", Sixth Armored Infantry, did, near Oued Zarga, Tunisia, North Africa on or about May 1, 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 was apprehended near Oued Zarga, Tunisia, North Africa on or about May 2, 1943.

Each pleaded not guilty to and was found guilty of the respective Charge and its Specifications. Evidence was introduced of one previous conviction of McCann for absenting himself from maneuvers at Fort Bragg, North Carolina, from about October 2, 1942 to about October 25, 1942, in violation of Article of War 96; and of one previous conviction of Maine, absence without leave from July 2, 1942 to July 19, 1942, in violation of Article of War 61. Each accused was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the rest of his natural life. The reviewing authority approved the sentence as to each accused, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial under Article of War 50½.

3. The evidence shows that at 0700 hours on the 23rd of March,

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the 3rd Battalion of the 6th Armored Infantry was ordered to attack the enemy on the high ground called Djebel Naeria, east of Elmessey, Tunisia, North Africa. The action continued until 1300 hours, 24 March, but due to heavy machine gun and mortar fire, the battalion failed to reach its objective (R. 30,33). Between 800 hours, 30 April and 1800 hours, 1 May, the battalion was engaged in an attack on Hill 299, in the vicinity of "Oued" (elsewhere spelled "Qued") Zarga, Tunisia (R. 9,11,20).

The accused were members of Company "H" of the 3rd Battalion; Maine of the Headquarters Squad of Headquarters Platoon (R. 28) and McCann of another platoon. Morning reports for the months of March, April and May, 1943, were read and introduced (R. 14,15). They show the following entries respecting the accused: March 21st "Maine from duty to M.I.A." (Ex. A); March 25th "Pvt McCann fr duty to M.I.A. as of Mar 21st" (Ex. B); May 1st "Pvts McCann & Maine fr M.I.A. to duty 1600 hours. Pvts McCann & Maine fr duty to Des. 1800 hrs." (Ex. C); May 2nd "Pvts McCann & Maine fr des. to conf 1800 hrs." (Ex. D). It appears however that both accused were present at the beginning of the attack on March 23rd (R. 26,27,28). A Corporal William Joseph Ash, Company "H", testified that, on that date, he was with Maine near a railroad track which had to be crossed in the advance against the enemy and that they were the last two to go forward. Witness testified that he ordered Maine to follow him and that, "He stayed behind. I left and proceeded up the hill where the company was. I crossed back to Private Maine and ordered him to cross the tracks. I repeated the order several times and he still wouldn't do it, so I left him and proceeded on up the hill" (R. 28,29).

Sergeant John Rusnak, M.P., Service Company, 1st Armored Division, testified that on the afternoon of May 1, both accused were turned over to him by a Corporal Hilberman, with instructions to return them to their organization. While witness was taking them to the regimental headquarters, both accused made comments that they had no intention of "staying up there" (R. 22,23). They were turned over to the adjutant and were not seen again by witness until the following day, May 2nd. Witness then found them at a place almost seven miles north of Oued Zarga, traveling away from the front (R. 23,24,25). He stopped and disarmed them. Both accused told witness that they couldn't "stand it up there" (R. 24,25).

Captain Jack D. Paul, 3rd Battalion, Headquarters, 6th Armored Infantry, testified that when he was at the battalion CP, while the battalion was on Hill 299, the two accused came to him and reported that they were, "supposed to go back to the company". When asked where they had been, the accused said, "they had been over the hill" (R. 9). They had only a part of their equipment. Witness thereupon sent them to the aid collection station. When they returned, a sergeant of the Medical Corps gave them directions as to how they could reach the advance post (R. 10,11,12,32,33).

After being duly warned, each of the accused made two sworn statements, one to Captain Carl E. Hudson, Personnel Officer, 6th Armored Infantry (R. 15-18, Exhibits E & F), and the other to Captain Walter J. Richard, 6th

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Armored Infantry, the investigating officer (R. 19, 20, 21, Exhibits G & H). They were offered and introduced in evidence. These statements, referred to herein for detailed particulars, are consistent with the other evidence in the case. Each accused admits that on the 23rd of March, he, in company with the other accused, left his company near Maknassey, Tunisia; that they went to various towns and cities and finally turned themselves over to the military police. One statement indicates they turned themselves in at "Mostagmen" on April 9th and were sent to the Military Police Headquarters on April 13th (Exhibits E & F). They also admit that, on May 1st, they were returned in custody to the 3rd Battalion Headquarters, where they were equipped and given instructions as to how they could reach their company. They were to follow a gully around the base of the mountain, cross a small patch of open ground and find the company in the trenches. When they reached this open ground, with shells firing overhead, they couldn't go any further and proceeded to the rear. They were later recognized and returned to the regimental headquarters.

Upon being advised of their rights, the accused chose to remain silent.

4. The entries in the morning report were competent only in so far as they indicate a state of absence during the period of time between March 23, 1943, and April 13, 1943; the period alleged in the specifications and which is more favorable to each accused than indicated by Exhibits A, B & C. It is also more favorable to them that the termination of that first absence was by surrender and that it occurred on or about April 13, a date prior to May 1, 1943.

5. The evidence is sufficient, in each instance, to support the findings that the accused quit his organization with the intention of avoiding hazardous duty within the purview of Article of War 28.

6. 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.

Charles P. Collier, Judge Advocate.
O. J. Dale, Judge Advocate.
Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army.
26 June 1943.

Board of Review

NATO 209

UNITED STATES)
v.)
Technician 5th Grade ROBERT)
S. WILLIAMS (34200872),)
Company B, 28th Quartermaster)
Regiment (Truck).)

HEADQUARTERS COMMAND ALLIED FORCE

Trial by G.C.M., convened at Algiers,
Algeria, 18 May 1943. Dishonorable
discharge, total forfeitures, and
confinement at hard labor for ten
(10) years.
Federal Reformatory, Chillicothe,
Ohio, designated as place of confinement.

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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Robert S. Williams, Company "B", 28th Quartermaster Regiment (Trk) did, at Birkadem, Algeria, on or about 20 April 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with pre-meditation kill one Private First Class Johnnie Moore, Company "B", 28th Quartermaster Regiment (Trk), a human being by shooting him with a rifle.

pleaded not guilty to both the Charge and Specification. He was found

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not guilty of the Charge but guilty of violation of Article of War 93. Of the Specification he was found guilty, except the words "with malice aforethought" and "and with premeditation", of the excepted words not guilty.

No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten (10) years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 20 April 1943 accused was a Technician Fifth Grade and a member of Company B, 28th Quartermaster Regiment (Truck), then bivouacked about 1 $\frac{1}{2}$ miles from Birkadem, Algeria (R. 42). Between 1730 and 1800 hours on that date accused was seen to leave the vicinity of the pots and mess tables in the bivouac area and walk down the road to the barracks, at which time he was not carrying anything in his hands (R. 12). About 15 minutes later he was observed by witnesses returning from his barracks carrying a rifle over his right shoulder (R. 12,15,48). The accused passed and spoke to Private Goodson and other witnesses who were standing around the supply room (R. 18,48,49). He proceeded to a point about 15 feet from where Private First Class Johnny Moore was standing, made a left face and fired one shot from the rifle (R. 12,27,61). At that time he was heard to say, "You don't believe I'll shoot" (R. 67); "I told you I would kill you; I told you about putting me in the dozens" (72,73).

Corporal Bruel Lewis, who was standing nearby, went over and asked accused what the matter was (R. 27,30). Accused did not reply and Corporal Lewis knocked the rifle from his hands, took possession of it, extracted an empty cartridge from the rifle and delivered the rifle immediately into the hands of Second Lieutenant Morton Bloom who heard the shot and went to investigate (R. 36). Lieutenant Bloom found two live .30 caliber shells in the receiver of the rifle, and noted from an inspection of the bore and the smell of burnt powder that the rifle had been fired (R. 37).

The shot that accused fired struck Private First Class Johnny Moore, causing him to fall (R. 12,36,49). His coveralls had been torn and he was bleeding copiously from the chest (R. 40). He was taken to the 29th Station Hospital, where he was admitted between 1800 and 1830 hours, 20 April 1943 (R. 77). He died at 2345 hours, 23 April 1943, as a result of gunshot wound (R. 78,79,81).

The prosecution offered in evidence a written voluntary statement made by the accused to the investigating officer which was received in evidence without objection by the defense. In this statement the accused admitted shooting the deceased under the circumstances described by the prosecution's witnesses (R. 85).

The accused elected to remain silent but offered one witness in defense. This witness, First Sergeant William Jeter, explained to the court the intricacies of the so-called game of "Dozens", which had been referred to in previous testimony and in the voluntary statement of accused. From his testimony it appears that about 75 percent of the men of this company were given to the lewd pastime of jolting with each other by casting vulgar aspersions upon the character, chastity and legitimacy of not only the participant but upon his mother and other members of his family--That to one who "plays the Dozens", such indignities are not considered as insulting and retaliation is made by trying to out-do the opponent by the employment of words and terms of even greater vulgarity regarding himself and his immediate family.

This practice had lead to frequent serious trouble in the company. Those who did not play it resented the remarks as insults and the company commander had ordered the pastime discontinued under penalty of company punishment. Accused was one of the company members who did not play the "Dozens" (R. 80,89,90).

4. The court by exceptions found accused guilty of manslaughter under Article of War 93. Manslaughter is a lesser offense which may be included in a particular charge of murder (MCM, 1928, par. 148 (a)). It was properly within the purview of the court to find accused guilty of the lesser included offense. The sentence is the maximum that could be imposed upon the findings. The evidence supports the findings and the sentence. The court was legally constituted and had jurisdiction of the accused and the offense. No error affecting the substantial rights of the accused was committed during the trial. The accused is 20 years of age and had served in the Army since January 23, 1942.

5. The record of trial was authenticated by "Mastin G. White, Colonel, JAGD, Law Member" and the trial judge advocate. Article of War 33 provides that such record "shall be authenticated by the signature of the president and the trial judge advocate". It appears by the record that the president named in the convening order, Colonel Harold G. Hayes, was challenged peremptorily by the defense and withdrew from the trial (R. 4). Colonel White's name appears second on the list of officers present at the trial. The presumption is that he was senior in a rank (C.M. 128736-1919) and therefore president of the court (MCM, 1928, par. 39). The designation of the president as "law member" underneath his signature does not affect the validity of the authentication.

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

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James P. McNamee, Judge Advocate.
D. T. G. O., Judge Advocate.

Harold Simpson, Judge Advocate.

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

APO 534, U. S. Army,
2 August 1943.

Board of Review

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UNITED STATES)	MEDITERRANEAN BASE SECTION
v.)	Trial by G.C.M., convened at
Private CHARLES H. SMITH)	Oran, Algeria, 21 May 1943.
(36337437), 540th Engineer)	Death.
Regiment (C).)	

HOLDING 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Charles H. Smith, 540th Engineer Regiment (C), did, at Oran, Algeria, on or about 7 May 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Corporal William L. Tackett, a human being by cutting him with a knife.

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. The reviewing authority approved the sentence and transmitted the record of trial to the confirming authority who confirmed the sentence and forwarded the record of trial for action under Article 50½.

3. The evidence shows that accused and two other enlisted men

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began drinking in Oran, Algeria, about one o'clock on the afternoon of 7 May 1943, and continued drinking "in different saloons up around Villa de Roses" until "a quarter until six". During this time accused had ten or twelve drinks of red wine (R. 44,45,46,47). About six-thirty ten or twelve o'clock that evening, he was observed inside the Villa de Roses, a house of prostitution (R. 6), by Private Sephus Joe Stinnett (R. 12), a military policeman, who testified that accused

"was back there raising Cain when I first saw him, sir. He stood in two different lines and when he got up to the lines neither one would take him in, so he got in front of the first line and almost started a fight because the fellows behind him did not want him to be in front of the line and I took him out and placed him in the rear of the line and he commenced raising Cain *** cursing me because I put him back there and he cursed the MP Corporal and then I was forced to put him outside. *** I took him to the front entrance and told him it was time he was going home" (R. 13).

Corporal William Tackett, a member of the 281st Military Police Company, who at the time was on duty in an area which included the Villa de Roses (R. 5), came to the door and started to let accused back in the house, but according to Stinnett, accused

"started to curse me again and told me if I would come outside he would cut my throat and then I started outside to arrest him and the corporal who was just outside told me to let him alone *** that he would take care of him" (R. 13).

Tackett tapped accused on the shoulder and started to take him away, but after they had gone about eight steps, accused told Tackett he would cut his throat and "with that he swung a razor or knife at his throat" and blood gushed from the wound. Tackett "wasn't able to stagger, he just fell". Accused started to run but a soldier tripped him and Stinnett "covered" him and took him inside the house (R. 13). He called Headquarters for an ambulance and a jeep and then searched accused and took a knife from his right hand, lower blouse pocket. The knife was closed and the pocket buttoned. Stinnett said there was no blood on the blade (R. 14,16,18,19).

Although Stinnett had not put his hands on accused in evicting him from the house, accused became very abusive toward him, saying, "you God damn military pricks don't give a man a chance to have a good time" and calling him "sons-a-bitches, things like that" (R. 17).

Private David B. Anderson was standing in the line at the Villa de Roses and observed accused "mumbling and arguing" with a military policeman in the doorway, saying, "I will cut your damn throat, or God damn throat". Anderson went in the house, "didn't like the looks of the

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girls", and went outside where he was waiting for some friends. He noticed accused in line again, "still threatening and he had his knife out in his hand, raking his thumb across the blade, showing the other soldiers how sharp his knife was". These two soldiers got tired of his threatening and talking and told him "to put his damn knife up and shut up". Accused dropped his hands and Anderson thought he put the knife in his pocket because he went through "a motion like he was putting the knife up" (R. 6). Tackett approached accused, as Anderson described it, "in a very nice, easy manner. He didn't jerk him or any thing, just reached out, like that (indicating), very easy, he didn't give him no shove or treat him rough or anything like that" (R. 7). Tackett had just told accused in a natural, normal voice (R. 11), "buddy, you have had a little too much to drink", when, as Anderson described it,

"This fellow Smith, he came up overhead and cut him across the neck. I seen the flash of the knife blade. The MP was standing sideways to me and I seen the flash of the knife across his neck" (R. 7).

Accused had been talking "pretty loud" when he said he would cut the military policeman's throat; he had declared that "I keep my knife sharp". Anderson described the knife as being a "boy scout" type with a blade about three inches long (R. 9). The knife itself was identified, marked as "Defense's Exhibit A" and introduced in evidence. It is attached to the record of trial (R. 10,11; Defense's Exhibit A).

John F. Brookmeyer, a pharmacist's mate, United States Navy, was present when Stinnett told accused "to go to the end of the line and stay there". Brookmeyer said, "The MP on duty inside the villa came out and told this soldier that if he ever heard him talk that way about an MP again he would beat hell out of him". Brookmeyer went in the house and about ten minutes later, heard some women screaming and rushed outside where he saw Tackett, lying face down in the road, bleeding profusely from a wound in the left side of his neck. Brookmeyer applied first aid, undertaking to stop the bleeding by tying off the jugular vein with the hem of a handkerchief. He assisted in placing the wounded man in a jeep which took him away (R. 20).

The evidence does not show exactly when Tackett died, but First Lieutenant Louis M. Pavletich, Medical Corps, examined his corpse in the morgue of the 7th Station Hospital on the seventh or eighth of May and found "a knife slash beginning at the mastoid process, which is the prominence behind the left ear, extending down to the tracheal line; it was deep enough to sever his sterno-claideo mastoid muscles, also, the common carotid artery, both the interior and exterior jugular veins and the vagus and hypoglossal nerves" (R. 26).

Accused was taken to the office of the Counter Intelligence Department about seven-thirty o'clock on the night of the fatal assault. There it was observed that he had a bruise over his left eye, was bleed-

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ing from the nose and had a brush burn on his left ear. A sergeant then on duty at that office said his locomotion appeared to be normal, he stood straight and talked clearly. Asked if he wanted to make a statement, accused replied, "No" (R. 21,22).

Lieutenant Pavletich examined and tested the knife identified as "Defense's Exhibit A". He found the blade had been wiped clean but in the slot or "groove where you open the knife", there was some dark reddish brown material. Applying what is known as the "Benzidine" test, the lieutenant found the knife blade was "positive for blood.*** The whole blade was covered with a bluish reaction which indicates that there was blood over the entire blade". He did not have laboratory facilities to determine if the blood was from a human being or an animal (R. 26,28).

At seven fifty-five o'clock on the night of 7 May, a sample of accused's blood was taken and examined by a laboratory technician who found three and seventy-five hundredths milligrams of alcohol for each cubic centimeter of blood (R. 30,31,32,33,34).

Lieutenant Colonel A. M. Kraut, Medical Corps, testified there was a rough connection between the alcoholic content of blood and the degree of intoxication but he placed more reliance on the physical aspects of the individual. In his opinion, "there are individuals who can have less alcohol in the blood or urine and present a greater degree of intoxication physically, and vice versa. A man may have a higher percentage of alcohol in the blood or urine and still not be intoxicated from a medical point of view". (R. 36,37)

Captain Oswald B. Todd testified that "Simmons Laboratory of Medicine for the United States Army" sets forth a recognized standard for determining degrees of intoxication by the alcoholic content in the blood of an individual. "Two milligrams per cent is considered by this text as anyone with two milligrams is drunk; three milligrams per cent is drunk and disorderly and four per cent dead drunk or one hundred per cent drunk **. The standard set up does not take into consideration any tolerance at all. It just states definitely that the individual is drunk or drunk and disorderly or dead drunk according to the quantity of alcohol found in his blood" (R. 39,40).

A Private Howard W. Wiggins, one of the enlisted men who had been with him until shortly before accused went to the Villa de Roses, testified that in his opinion, accused was not sober at that time (R. 45). He previously testified that, from observing the walk of accused, "he was alright" and "well, he was a little shaky I guess", and as to his talk, "he was kind of loud" (R. 44,45).

Accused elected to testify under oath (R. 46). He said he was in Oran on 7 May 1943, with two other privates and they got a few drinks, went to a barber shop about two o'clock in the afternoon, remained there about an hour and fifteen minutes and then "just went around town looking the town over, drinking" (R. 46). He said he had ten or twelve drinks of

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red wine (R. 46,47). He first said he did not know whether he was at the Villa de Roses, but later testified,

"I remember of being in this place Villa de Roses as they call it and being in the place and I seen some people in there and I don't know whether there was a line or how many soldiers there was and I remember somebody telling me to get outside. I remember going outside, somebody opened the door for me" (R. 47).

He testified he did not know whether he struck or cut a corporal of the military police or not and did not recall leaving the Villa de Roses. He said he did not recall the details of what occurred that evening because he was "very heavily intoxicated" (R. 47).

Cross-examined, accused testified he drank "ten or twelve wines" and did not know what he drank after that; he might have had more. He remembered being at the Villa de Roses "just for a few minutes". At the same time, he testified he did not know whether he went there or not. He then testified he had been inside the house but he did not remember how long nor where he went when he left. All he remembered was that he was in the house and the next thing "I remember is when they were jumping on me out in the street when I was down" (R. 48,49). He remembered going part of the way to the military police station and part of the way he did not remember. He did remember that Major Leidenheimer, who was investigating the case, examined only one witness in his presence; that the Major addressed the following statement to accused in the course of that investigation:

"You have the right to cross examine any witness that may appear against you or you have the right to call in any witnesses for you, that is your perfect right, but any testimony given by either witness may be used against you. Do you understand? In other words, if you bring in a witness and wish to cross examine him and in your cross examination of him he says something which is something that could be used against you, then that evidence will also be admitted into the court the same as any testimony that might be for you. Do you understand that?" (R. 50)

To the foregoing, accused admitted he answered, "Yes, sir, from those statements already made I don't think anything could be added to them or taken from them" (R. 50).

Regarding other matters arising at the investigation, accused was asked the following questions and gave the following answers:

"Q. Did you put the following question to Pfc. Tremblay:
It is a fact we went in the place and got in the line

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and we got in the line and was in line for sometime and' -- apparently he was interrupted by Major Leidenheimer, who said 'Smith, are you making a statement or just asking him something', answer, 'I am just telling him what happened, sir'. Was that question put by you to Tremblay in that form and did you reply to Major Leidenheimer as just read by me?

"A. Yes sir.

"Q. Question by Major Leidenheimer - 'Allright go ahead' and then you continued as follows: 'And the MP told you and another fellow - the line had moved up a little ways - and he told us we had to clear that door and he told us to get on the outside and get in line again' Major Leidenheimer 'He, meaning the MP', you continuing 'Yes sir, and I went on outside and I didn't see Tremblay and don't know whether he came out or not and the other fellow - I don't know whether he come out, or not - the line had moved up a little piece passed the door there, is that right Tremblay', answer 'The MP didn't tell me to get out'. Did you put those questions to Pfc Tremblay and did he make those answers?

"A. Yes sir." (R. 52)

An officer of accused's company, First Lieutenant Donald D. Casey, testified he had known accused for about ten months and that his reputation for military efficiency was good; that he knew of one or two occasions when accused probably took a drink or two, but "his reputation as a whole is above the average" (R. 42).

Sergeant Raymond McCoy, of the same company, testified he had known accused for about nine months and that his reputation for sobriety and military efficiency was good and accused had never had any different reputation for either sobriety or military efficiency since the witness joined the company in August, 1942 (R. 43).

4. It thus appears from the uncontradicted evidence that at the place and time alleged, accused mortally wounded Corporal William Tackett by cutting him along the left side of his neck with a knife; that Tackett died in consequence of these injuries and his death occurred within a year and a day of the fatal assault. The conclusion is inescapable that this killing was with malice aforethought. Accused had his knife open; boasted that he kept it sharp and showed other soldiers how keen the blade was; he accompanied this boasting with imprecations and threatened to cut the throat of the military policeman who ejected him from the Villa de Roses. Outside the house, when Tackett had started to lead accused away from the scene where he was making such a disturbance, accused threatened to cut Tackett's throat and immediately carried the threat into execution. The accuracy, and force of the blow and the depth and severity of the wound inflicted, demonstrate the criminal intent and fatal design of accused in

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this unprovoked attack on the corporal. Malice is to be inferred, and necessarily so, from all the circumstances attendant on this killing. Although a malignant attitude toward deceased may fairly be said to have characterized the conduct of accused in this case, legal malice does not necessarily mean hatred or personal ill-will toward the person killed. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (MCM, 1928, par. 148a, p. 163).

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused:
*** An intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace, or dispersing an unlawful assembly, provided the offender has notice that the person killed is such officer or other person so employed" (MCM, 1928, par. 148a, p. 163, 164).

Tackett was properly performing his duty as a military policeman when he took accused in custody, this being a necessary measure for keeping the peace which accused was so persistently disturbing. Tackett's demeanor toward accused was placatory, proper and entirely inoffensive. Without the slightest provocation, accused reacted to the corporal's performance of his duty with a malevolent and fatal violence.

There is no direct testimony that Tackett's death was caused by the wound accused inflicted. The evidence shows, however, that the blow with the knife was so violent that deceased immediately collapsed; that his sterno-claeido mastoid muscles, the common carotid artery, the interior and exterior jugular veins and the vagus and hypoglossal nerves were severed; that he bled profusely from the wound and was dead when examined by a medical officer, that or the following day. There is no factual basis for any other inference than that Tackett died solely as a result of these wounds inflicted on him by accused.

The only defense interposed was that accused was drunk and did not remember what he did. A laboratory test showed that immediately after the fatal attack, accused had three and seventy-five hundredths milligrams of alcohol to each cubic centimeter of blood. By some standards accepted by the medical profession, this alcoholic content indicates a state of advanced drunkenness. Those standards, however, allow no tolerance for the individual and there is expert testimony that there is only a rough connection between the alcoholic content of blood and the degree of intoxication; that more reliance is to be placed on the physical aspects of the individual.

It is shown that accused had been drinking considerably but when taken to the police station shortly after the killing, his locomotion

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appeared to be normal; he stood erect and talked clearly. While he denied any recollection of cutting the deceased, it appears during the formal investigation of the case that he had a more detailed memory of the events of that fatal afternoon than he was willing to admit at the trial. Drunkenness, attended by a pretended loss of memory, is easily simulated and it was the duty of the court to scrutinize this evidence carefully (MCM, 1928, par. 126). In order for drunkenness to effect the nature of accused's intent, it must be such as to cause him to lose control of his mental faculties (Bull. JAG, August, 1942, sec. 422 (5)). The conduct of accused, from the time he entered the house of prostitution, indicated he had control of his mental faculties. He was sober enough to try to get in front of other soldiers waiting in the line; to express resentment toward and threaten to cut the throat of the military policeman, who properly put him out of the house; to take out his knife and boast about its sharp blade; to pretend to put the knife away and surreptitiously keep it with an obviously calculated intent to resist further interference by the military police with his disorderly conduct; to cut deceased unerringly and viciously along the neck just as he had threatened to do; immediately to flee; to close the knife, put it in his pocket and to button the pocket flap in the short interval between the assault and the time he was searched for the weapon. It is indicated, moreover, that, in the same interval, he had wiped the blood of his victim from the blade of the knife. The court was justified in concluding, indeed the conclusion appears inescapable, that while alcohol may have had some effect on the mental processes of accused, it did not render him incapable of distinguishing between right and wrong, nor impair substantially his ability to conform his actions to his calculated intent. Accused was properly found guilty of murder, as charged.

5. Consideration has been given to the rulings of the president, who was in fact the law member, in excluding certain opinion testimony. Colonel Kraut was asked whether a person would be drunk if, in a cubic centimeter of his blood, he was found to have three and seventy-five hundredths milligrams of alcohol (R. 36); Captain Todd, "Would you expect an individual who had three and seventy-five hundredths milligrams per cubic centimeter of alcohol in his blood to be intoxicated?" (R. 40), and Private Wiggins, whether, upon his observation of the accused prior to 1745 hours, the latter was drunk (R. 44,45).

The opinion sought of Colonel Kraut was to be predicated solely upon his having had some experience with blood alcohol tests and having read the accepted test set forth in Sirmors' work. The specific reason for excluding the question was the belief of the law member that the witness was not "qualified to testify from any laboratory tests you may have made that the subject of these tests was in fact drunk" (R. 36). There was justifiable reason for holding that background as too small a foundation for generalizing (Wharton's Criminal Evidence, p. 1691) and the aptness of this ruling is shown by the subsequently adduced evidence that this witness placed more reliance upon the physical aspects of the individual; that there was only a rough connection between the alcoholic content in the blood and the degree of intoxication (R. 36,37). An opinion based upon conjecture is not proper (22 Corpus Juris, 640).

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But aside from this objectionable aspect of the desired opinion, it was quite within the province of the court to question the qualification of the witness. A court has a broad legal discretion in deciding whether an expert possesses the requisite qualifications and its ruling in the exercise thereof cannot be held error unless it is palpably unreasonable (Wharton's Criminal Evidence, sec. 968).

The court was similarly alert with respect to the proposed opinion testimony of Captain Todd and there is nothing to indicate any impropriety in its rulings. Furthermore, the particular question quoted above is patently objectionable in both form and substance and its exclusion on the ground that it was irrelevant and incompetent was warranted.

Private Wiggins was competent to express an opinion as to whether or not accused was drunk. It was shown that he had been with accused up to within a short time before the latter went to the Villa de Roses; that he had been drinking with him and that accused was "kind of loud". It is well settled, where he has been in a position to observe the facts upon which he bases his opinion, a witness not an expert may give his opinion as to whether or not a person is intoxicated (Wharton's Criminal Evidence, sec. 1000; LCM, 1928, par. 112b). But the error of this ruling was removed by the subsequently permitted testimony of this witness that accused was, in his opinion, not sober (R. 45). Nevertheless, in justification of the ruling of the law member, the testimony of this defense witness signifies an element of speculation when consideration is given to his answers, respecting the walk of accused, that, "he was alright" or "well, he was a little shaky I guess" (R. 45).

It is also appropriate to note that the defense was permitted to introduce full and complete evidence concerning the blood tests, as well as the conclusions set forth in the work by Simmons. The record is replete with testimony as to the nature and significance of those tests and clearly shows that the defense suffered no injury by reason of any specifically excluded questions. Coincidentally, the court became fully apprised of the qualifying factors affecting the value of the tests and of the fact that, as applied to a particular individual, the recorded percentages are not conclusive on the degree of his intoxication. Whatever the view, it is the considered opinion of the Board of Review that the rulings referred to could not have injuriously affected the substantial rights of accused or could readily be passed under Article of War 37.

6. Accused is 39 years old and was inducted into the service 11 May 1942, at Camp Grant, Illinois. He had no prior service in the Army.♦

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. Death is authorized upon conviction of Article of War 92.

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8. The Board of Review holds the record of trial legally sufficient to support the findings and the sentence.

Hannibal O'Hanlon, Judge Advocate.
O. J. T. de, Judge Advocate.
Harold Dimon, Judge Advocate.

NATO 213 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army,
4 August 1943.

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

1. In the case of Private Charles H. Smith (36337437), 540th Engineer Regiment (C), 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 $\frac{1}{2}$, you now have the authority to order the execution of the sentence.

2. After publication of the general court-martial order in the case, six 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 213).

Hubert D. Hoover

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

(Sentence ordered executed. GCMO 20, NATO, 4 Aug 1943)

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

APO 534, U. S. Army,
29 June 1943.

Board of Review

NATO 217

U N I T E D S T A T E S) MEDITERRANEAN BASE SECTION

v.) Trial by G.C.M., convened at Oran,
Private KAISER BELL (14038964),) Algeria, 2 June 1943. Dishonorable
Company "C", 41st Engineers.) discharge, total forfeitures and
confinement at hard labor for forty
(40) years. United States Peniten-
tiary, Atlanta, Georgia, designated
as place of confinement.

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. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of Article of War 93.

Specification 1: In that Private Kaiser Bell, Company "C", 41st Engineers, did, at Oran, Algeria, on or about 4 May 1943, with intent to commit murder, commit an assault upon First Sergeant Coy Singleton by willfully and feloniously shooting him with a dangerous weapon, to wit, a rifle.

Specification 2: In that Private Kaiser Bell, Company "C", 41st Engineers, did, at Oran, Algeria, on or about 4 May 1943, with intent to commit murder, commit an assault upon Staff Sergeant Edgar Smith by attempting to shoot him with a dangerous weapon, to wit, a rifle.

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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, total forfeitures and confinement at hard labor for forty (40) years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The prosecution's testimony shows that on 4 May 1943 accused was a member of Company "C", 41st Engineers, which was then working at the docks at Oran, Algeria. At 1200 hours Staff Sergeant Edgar Smith commenced serving a turkey dinner to the men. When accused was served he threw the food back into the pot, claiming he was being discriminated against, and offered to fight Sergeant Smith (R. 7). That afternoon accused complained to Captain Jimmie G. Andros that he was not getting enough to eat (R. 5) and after supper that evening, at about 1830 hours, accused was taken to the company orderly room by First Sergeant Coy Singleton who reported to Captain Andros that accused had been abusing Sergeant Smith and calling him "dirty names" (R. 5,8. Pros. Ex. "B", p. 3); Captain Andros reprimanded accused and warned him against future misconduct (R. 5,8).

First Sergeant Singleton returned to his own tent around 1930 to 2000 hours and retired. He awoke a short time later finding accused standing inside his tent with a service rifle pointed at him. Accused stated he was going to blow Sergeant Singleton's brains out. Accused fired once, the bullet struck Singleton's right arm, grazed his chest and lodged in his left forearm (Pros. Ex. "B": p. 4,5).

Sergeant Smith was in his tent at about 2030 hours at which time accused came to the entrance and asked the time. Shortly thereafter Smith heard a shot fired and presently accused returned to his tent, raising the flap and pointing a rifle into the tent. Smith recognized accused, jumped up and grabbed the barrel of the rifle and struggled with the accused (R. 8,11). During the struggle accused repeatedly said he was going to shoot Smith. Smith took the rifle away from accused who then ran away. Smith examined the rifle, found that it was loaded and cocked and that the barrel smelled of gun powder (R. 8). Several other witnesses offered testimony tending to corroborate certain elements of that submitted by the two principal witnesses.

Accused did not take the stand in his own behalf but elected to make a sworn statement, which was received in evidence. He claimed an alibi; that he knew nothing whatever of the shooting and was asleep in bed at the time the shooting took place (R. 22). He was found there by the officer of the day at about 2045 hours, "covered up head and ears" (R. 16) and "sweating very profusely" (R. 17).

4. The specifications set forth two distinct offenses under the

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article, an assault upon First Sergeant Singleton, with intent to commit murder, by willfully and feloniously shooting him with a dangerous weapon, to wit, a rifle, and an assault upon Staff Sergeant Smith, with intent to commit murder, by attempting to shoot him with a dangerous weapon, to wit, a rifle. The circumstances warranted this pleading. The evidence amply supports the findings of guilty of the Charge and the Specifications.

5. The court was legally constituted and had jurisdiction of the accused and the offenses. No error affecting the substantial rights of the accused was committed during the trial. The sentence is the maximum that could be imposed upon the findings. The accused is 21 years of age and had served in the Army since 27 May 1941.

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

Russell Thompson, Judge Advocate.

O. T. F. A., Judge Advocate.

Gordon Simpson, Judge Advocate.

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

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APO 534, U. S. Army,
5 July 1943

Board of Review

IMTO 218

UNITED STATES)	HEADQUARTERS 2ND ARMORED DIVISION
v.)	Trial by G.C.M., convened at
Private JAMES E. KENDRICK)	AFO 252, 12 June 1943.
(14026995), Headquarters)	To be hanged by the neck until
Battery, 14th Armored Field)	dead.
Artillery Battalion.)	

HOLDING 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 92nd Article of War.

Specification 1: In that Private James E. Kendrick, Headquarters Battery, 14th Armored Field Artillery Battalion, did, near DeBrousseville, Algeria, on or about May 28, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Carmen Nunez, a human being, by suffocating her with his hands or by other means forcefully employed.

Specification 2: In that Private James E. Kendrick, Headquarters Battery, 14th Armored Field Artillery Battalion, did, near DeBrousseville, Algeria, on or about May 28, 1943, forcibly and feloniously, against her will, have carnal knowledge of Carmen Nunez, a female human being of about ten years of age.

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CHARGE II: Violation of the 93rd Article of War.
(Finding of Not Guilty).

Specification: (Finding of Not Guilty).

He pleaded not guilty to and was found guilty of Charge I and the Specifications thereunder and not guilty of Charge II and its Specification. No evidence of any previous conviction was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and transmitted the record of trial to the confirming authority who confirmed the sentence and forwarded the record of trial for action under Article of War 50%.

3. The uncontradicted evidence shows that about 4 o'clock on the afternoon of May 28, 1943, Carmen Nunez, a girl of delicate health, not quite ten years old, small for her age and afflicted with what is commonly called club feet, one of which had been injured and was bandaged; and her brother, Francois, age about eight years, left the Nunez home in Ferme Blanche, Algeria, in a three quarter ton Dodge army truck driven by accused (R. 9,16,17,19,20,21,52,80,84); after sending Francois back to buy a bottle of wine, accused drove off alone with the Carmen in the direction of De Brousseville, turned into a field, had sexual intercourse with her and abandoned her there where she was found dead five days later (R. 10,21,34,38,73,75,84,86,87,92).

Accused had known the Nunez family for about three weeks, visiting them frequently, giving the children chewing gum, candy and the like (R. 16,82). On the afternoon of May 28, 1943, he had driven from his camp into nearby Ferme Blanche in the Dodge truck, gone to the place of a Madame Ferrier and taken a glass of wine (R. 72,81,82). From there he went to the Nunez home where, according to Mrs. Nunez, he had another glass of wine (R. 18). Nunez, a barber by trade, got in the truck with accused and another soldier about three o'clock and went out to the bivouac area (R. 9,10,18,23,29,72) where accused left Nunez (R. 10,73,83) and returned alone to the Nunez house in Ferme Blanche. There, as Mrs. Nunez related it, he invited the children, Carmen and Francois, to go with him back to the camp to their father (R. 20). Mrs. Nunez testified she objected, but over her protest accused carried the two children to the truck and drove off with them towards De Brousseville (R. 20).

Staff Sergeant Elden V. Kietzman learned in Ferme Blanche later that evening that the little girl was missing and upon his return to the bivouac area asked accused if he had brought her to camp. Accused replied, "I don't know anything about it. I haven't been back to town" (R. 12). The next morning Carmen's mother saw accused at the camp and asked where the little girl was. He replied he did not know anything about the child, that he did not know where she was. When the mother insisted that accused must know, he grew white and pale and turned half way around as if trying to hide his face (R. 21,22,24,30). Mr. Nunez added that when his wife talked to accused "in an energetic manner, he

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bowed his head and said 'me no kill', 'I haven't seen the child'". (R. 30)

First Lieutenant Gerald B. Blakeman, as a part of his duties as provost marshal, interrogated accused on May 29, 1943 concerning his movements on the preceding afternoon. In response to the questioning, accused,

"***stated that on that afternoon about 1:00 o'clock he went into Ferme Blanche taking another soldier who was on pass and that he returned to the bivouac area where he was stationed about 3:15. From there he had gone to where the planes were which was about a mile away. He stated that he had to get his transfer case and his transmission greased. He stated that this was about 3:30 and upon questioning he said that it took him about an hour or a little more to do this. Then he went to the water point to fill two five-gallon cans up with water. From there he returned to where the planes were and from there he went to dinner, that is supper" (R. 100).

Asked the specific question whether he had returned to Ferme Blanche after three thirty, accused told Lieutenant Blakeman "he had not been in town since the first time" (R. 100).

Major Benjamin P. Brentz, who was assigned May 31, 1943 by the "Division G-1" to investigate the case of the missing child, (R. 27) testified:

"Well, at about 1:00 o'clock on June 2nd, 1943, I saw the accused, Fvt. Kendrick, for the first time in my handling of the case when he was brought into the tent of the Judge Advocate. Then Colonel Olmsted, Mr. McPherson and myself commenced an interrogation. At 7:10 o'clock the accused stated in the presence of the other two investigators, 'You come in here with me and I'll tell you the whole story', and at 7:10 o'clock he stated to me that the girl Carmen Nuncz had been injured in a fall from his truck on the 28th of May, 1943. That he had been to her home after he had taken the father to the 14th Field Artillery bivouac area. That he had been drinking and that he was driving at about forty-five miles per hour headed toward his bivouac area, when his truck struck a bump and the little girl was thrown out. He stated that after she was injured he didn't know what to do, so he picked her body up, laid it in the truck and drove to a place where it could be abandoned after he had seen that she was past all help. The accused then stated that he was willing to lead a search party to the spot where the body was to be found." (R. 47,48)

Accordingly a searching party was immediately organized by Major Brentz and led by accused to an open field about two miles northeast of the town of De Brousseville, Algeria, where the body of the little girl was found about two miles off the Fornaka-Perrigaux Road (R. 38,39,67). The party found tire tracks leading from the road to within a short

distance of a point where blood stained, torn underclothes, which appeared to have been the drawers of a small child and were identified by Mrs. Nunez as a part of her daughter's clothing, were discovered. At this location there were three or four spots on the ground which appeared to be bloodstains. These spots were within an area of not more than twelve inches in diameter and were four or five feet from the place where the underclothing was found; the grass and weeds around this area were pressed down to some extent, over a space of thirty to forty square feet, but because livestock were pastured in the field, Major Brentz thought it possible to find other spaces similar to this one and he found no evidence tending to show a struggle had taken place there; the end of an American type cigarette was found near the underclothing (R. 22,23, 39,41,46,48,51,68); some two hundred sixty-five feet further a spot was observed which had the appearance of a blood stain and approximately three hundred five feet further at a point approximately one-half mile from the nearest Arab home the corpse of the little girl was found (R. 40,51,67,68).

A picture of the victim was identified by the unsworn testimony of her brother (R. 32,35, Exhibit B) and Joseph Andrea, a resident of Ferme Blanche, testified he recognized the body of the little girl as the person who had been identified on the photograph as Carmen Nunez (R. 61,62).

Major Brentz sent for a photographer who took pictures of the body, the underclothing and the spots on the ground. These pictures were introduced in evidence and appended to the record of trial (R. 39,40,41, 42,43,58, Exhibits C,D,E,F,G,H,I,J and R).

Captain Theodore W. Plume, Medical Corps, who was with the searching party when the body was found (R. 51), described its appearance as follows:

"It was the body of a white female child lying face down on the ground and with the right arm under the body across the chest, extended beyond the left shoulder with the right hand clenched around a bunch of grass. The left forearm was flexed at the elbow about ninety degrees and the left wrist was completely flexed with its dorsal aspect resting on the ground and the fingers extended. She was partially dressed. She had on a woolen garment and a thin skirt on the upper part of her body leaving the rest of the body completely bare. In a neat pile about two feet from the body there was some clothing including a red dress, some bandage and a slipper.***** Her face was imbedded in a shallow depression in the ground, but the back of her head could be seen and it seemed to be normal. ***** Along the neck there were considerable soft and swollen parts. Across the back of the neck is a club-shaped depressed area approximately four inches in length, three-fourths of an inch wide at the smaller end with the depression about one and one-half inches wide at the larger portion to the left. This

area was more deeply discolored, presented a clear and palpable groove-like indentation below the surrounding skin surface and appeared to have been produced by pressure applied to this portion of the neck at the time or just prior to death. *** There was another depression clearly visible across the middle of the left deltoid muscle. It had the same discoloration, slightly deeper and the surrounding soft tissues as on the neck. This area was approximately three quarters of an inch wide and three inches long. A similar depression is visible across the axillary aspect of the left arm, but without the induration or contrasting discoloration. The markings appear to have been made by the pressure of some object at the time or immediately preceding death. *** Now the clothes we examined which had been found near the body. The lower posterior of the dress was covered with a dark brown stain which we assumed to be blood. *** Before we rolled the body over we could see directly under the genital organs a large brown stain on the ground which appeared to be old dried blood." (R. 52).

Captain Plume continued:

"First of all we had to cut the little group of grass in her right hand. *** We turned the body over before we attempted to remove the clothing that was on her and upon turning the body over found that the face muscles and the tissues of the face were entirely gone. That all you could see was the exposed facial bones and the lower teeth. The anterior incisors were found in a small depression out of which the face had been rolled. At the site which the face formerly occupied was a little depression and in that depression we found the remainder upper incisors. As far as we could tell in the field there was no indication of fracture, just the dislocation of the upper front teeth. Around the front of the neck the skin was very dark and swollen, moderately soft on pressure with advanced liquification and deterioration of subcutaneous structures. It was impossible to distinguish any definite marks or any definite points of pressure, or cuts.

"Q: What, in your opinion, had caused the dislocation of the upper teeth?

A: In my opinion that was the result of maggot action or secondly that they had been dislocated by sufficient pressure against the back of the head or neck to force the upper jaw into the ground. In my opinion that would require considerable force.

Q: What was the opinion you thought most logical?

A: I felt that the teeth had been lost due to a certain degree to a loosening of them by force of pressure on the back of the neck and aided by natural conditions surrounding loose teeth and the maggot action, and that when the body was rolled over the teeth had remained in the soil." (R. 54)

Captain Plume testified further that when heavy pressure is applied

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to an individual at the time of death, the depression remains in the flesh because the skin has no resilience as in the case of a living person. He said the thumb and right index finger fit very snugly in the indentation. There was a corresponding depression on the inner side of the left arm directly opposite that on the right. The index finger fit into that groove very snugly (R. 53).

The cause of the death of the child, in the opinion of Captain Plume, was asphyxiation due to compression of the face into the ground completely obstructing the air passages of the nose and mouth. It seemed to the Captain that the face had been imbedded in the soil by pressure applied to the ball of the neck. In this particular instance, suffocation and asphyxiation are inter-changeable terms (R. 53, 61). Captain Plume was of the opinion that the little bunch of grass clutched firmly in the child's right hand was grasped in the agony of death and that this circumstance, together with the way the face was imbedded in the soil, made it obvious that the girl had died on the spot where the body was found (R. 54).

From an autopsy performed by Captain Plume and a French physician (R. 55), it was determined that the muscles surrounding the anus of the child were considerably relaxed and the vagina unusually dilated for a child of that age and size. There was an absence of hymen which indicated the girl had been violated at some time before her death. The lungs were both completely collapsed and there was a total absence of air in them (R. 56, Ex. Q.).

Captain William C. Smith stood with accused in view of the body of the child, about thirty or forty yards away, immediately after it was found. Asked if he wanted to tell more fully everything that had happened, accused replied, "Yes, I think I can". After having been warned of his rights by Captain Smith, accused stated:

"That he and Sergeant Noe and another man referred to as Haapasaari went to town and while there had visited three families and drank quite a bit. One of these families were the Ferriers who used to wash for them and another family was Madame Des Bordes. They went back to town after visiting the Des Bordes family who lived near the old airport and drank some more. Then he and Haapasaari returned to camp. They picked up a civilian barber on the way out and when they got to camp he drank some more wine and went to work on his truck. Then he finished whatever he was doing on the truck and thought of Sergeant Noe in town and went back to town. That he remembered he got to town and didn't find Sergeant Noe so he drank some more. Then he remembers going to the Nunez home where he parked in front of the door. And a little girl was in the door. He left there with the little girl after some conversation with the mother and started back to the camp and made a statement that he was so drunk he couldn't remember seeing the road. They left the town and at the first bump they hit the

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little girl fell out. He stopped and saw that she was past help and drove off the road looking for a place to abandon her. After that he did not remember what had happened. He went back to camp and ate supper, or rather that he tried to eat supper, and then went out and laid down and went to sleep. I then asked him if he had seen the body and if it looked as if it had fallen off a truck. He said that the face might have been. He was pointed out that the body looked as if had been mutilated in the sexual organs and asked him if he wanted to tell us how that occurred. He answered that he wouldn't say whether he did or didn't because he had been too drunk to remember. He was asked even after the body and all the evidence on the ground had been discovered as to how the girl had died and he still insisted that the death was caused by her falling out of the truck" (R. 64, 65).

Following the discovery of the body of the missing child, accused was again interviewed, this time by Colonel Thomas A. Roberts, Jr., who had been appointed the investigating officer in the case. After being warned of his rights, accused made the following sworn statement to Colonel Roberts (R. 101,102, Exhibit "T"):

"I have no new statement to make reference to the death of the child, but the statement I made to Major Brentz on the morning of June 2, 1942, just prior to leading Major Brentz and a party to the body of the child, and which statement you have just read to me in this investigation, is correct, in that I remember the child being in my truck but I had been drinking very heavily and was very drunk. I was driving the truck on the highway going out to camp to take the child, since she had begged so hard to go and her mother had consented, out to camp where I had taken her father earlier. While driving recklessly in my drunken condition at a speed of about forty-five miles an hour I hit a bad bump in the road and the child fell out. I am not sure but I think the truck also run over her. When I stopped and picked her up and saw she was beyond help I became alarmed and frightened so I turned off the road at the next turn-off to the right and carried her body out into a large field there near DeBrousseville (Algeria) and laid her on the grass and left her there. I was so drunk I do not remember anything that occurred from there on. I take exception to testimony of Mr. and Mrs. Nunez that it was at my invitation that I carried Mr. Nunez to camp. Mr. Nunez came out of his house as me and Haapasaari passed and stopped us and asked for a ride up the road as he wanted to go to some town. I desire Corporal Haapasaari called as a witness at the time of the trial to substantiate that point." (Ex. T).

When accused left the Nunez house with the two children, Mrs. Nunez testified "he was not drunk, he was sober" (R. 21). Technician Fifth Grade George E. Haapasaari, who had gone to Ferme Blanche with accused on the afternoon of May 28th, testified that he and accused

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decided to go back to the camp area and "we left and on the way where this barier lives, he was standing outside by the road and he came along in the truck with us"; they arrived at the camp about three fifteen o'clock and at that time accused was not drunk, "He appeared normal". His condition was "no different" when he returned to the camp about five thirty o'clock (R. 72,73,75). According to another witness, he was sober at three o'clock, appeared "normal" about five thirty o'clock and "seemed sober enough" when he returned to get his mess kit about six forty o'clock that afternoon (R. 10,79). Still another witness who say accused about five thirty o'clock said the matter of going to a show came up and accused said, "What about me going?", that his condition as to sobriety then was "He was just like any other man. Just like any other sober man" (R. 76).

Accused elected to testify under oath (R. 82). He said he got acquainted with the Nunez family in Ferme Blanche and estimated he had visited them half a dozen times. On the afternoon of May 28, 1942, he and Maapasaari took Noe to town about one thirty o'clock, went to Mr. Ferrier's house, sat around, talked and had a drink. He found Mr. Des Bordes there and took him home, returned to the Ferrier place, sat a while and started back to camp. As he was passing by Nunez stepped out of the door of his house and waved. Accused said he stopped, picked Nunez up and carried him to camp. There he told Kietzman he had some work to do on the truck and went over to the maintenance area but so much work was ahead of him, he "thought about Sergeant Noe and took off" to Ferme Blanche but could not find him. Accused had "a glass or two of wine" and went "back to Mrs. Nunez's house" (R. 83) where he drank "a couple of glasses of wine". He said he stayed there about ten or fifteen minutes and

"had to be back in camp, I hadn't greased the truck and I had to get back before chow. ** I bade Mrs. Nunez good-bye and got in the truck. The children were in the truck and the little girl asked her mother if she could go to camp where her father was and she didn't say anything at first and the girl asked her again and I said, 'Okay', and she said, 'Okay', and we took off then. ** Going to Fornaka there is another little road that turns back ** approximately one hundred yards. After I had gotten about one hundred yards above that road, I thought about I wanted a bottle of wine, sir, so I sent the little boy back after it. ** I gave him a twenty franc note, sir (R. 84). ** Well I sat there, I don't know exactly, but approximately five minutes and he didn't come back so I turned around and went back to the house, and the mother met me at the door and I asked her where the little boy was and she said he had been there and gotten a bottle and went after some wine. Well I was in a rush to get back and I bade her good-bye. I said I had to go and get back." ** I went up the Fornaka highway, ** after we got up close to this next little town, ** the little girl

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started laughing and asked me if I wanted to 'zig-zig', so I did not think nothin' of it right then. Then she asked me again and started playing with me the same way and after I passed this little town I started to looking for a road to turn off and turned off and went out in the field -- about a mile and a half ** we stopped. We both got out of the truck and she pulled off her dress and laid down on the ground and pulled her pants off and we had intercourse". (R. 86)

Accused continued that the little girl appeared willing to have the intercourse and it was not hard to perform (R. 86). That after the act he got back in the truck and she got up and put her pants back on, got her dress and climbed upon the fender, started to put her dress on

"and she looked to me that she had a kind of a spell, something that looked like a spell on account of my sister at home had several of them. ** It looked to me like she reached for the side of the seat and then she then threw her arms out and her eyes rolled way back in her head and she turned and fell (R. 87) ** right off the running board ** face down. ** I got off the truck because it scared me, and I got around to where I could look at her. She was shaking so and wiggling around and I could see foam around her mouth and I got scared and jumped into the truck and sent straight back to Headquarters Battery just as fast as I could go" (R. 88).

On direct examination accused also testified that previously, at the solicitation of Carmen Nunez, he had had sexual intercourse with her in the home of her parents (R. 85).

On cross-examination, accused said he could not account for the fact that blood stains were on the victim's pants and dress. He did not recall stating that he was so drunk he did not remember what happened (R. 90). He admitted there were two blood spots at "that scene" but he could not account for them (R. 90). It seemed to him that he told someone the little girl had fallen out of the truck when it hit a bump; he did not remember "just who". He said it was not true that the girl fell out of the truck when it hit a bump and admitted the statement he made to Colonel Roberts (Ex. T) was not the truth (R. 93).

The defense called Captain W. L. Harris, Medical Corps, who testified that his estimate of the degree of intelligence possessed by accused was that "he appears to be about a dull normal" (R. 94, 95). The Captain had observed many cases of epilepsy. The outstanding acts during such an attack are that the patient first becomes rigid, then relaxed and jumping motions go through the body; there is some foaming of the mouth, a relaxation of the rectum and the vagina, and the eyes tend to roll upward. Sometimes epileptics are found dead from suffocation due to burying their

heads in pillows during a convulsion.' He expressed the opinion that it would be possible for suffocation to take place if the face was pushed down into the ground and the air passages sealed tightly to shut off oxygen (R. 95).

Captain Harris also testified sexual sensation has little to do with maturity and even children feel it (R. 95,97).

The prosecution recalled Captain Flume who testified that in his medical opinion he did not believe it possible or conceivable that Carmen Nunez could have buried her face in the ground as he found her and asphyxiated herself by reason of an epileptic fit (R. 103). He said, "I don't believe there is any question in my mind as to the death in this case and it wasn't the result of an epileptic seizure" (R. 104).

4. The evidence, including the statements and testimony of accused, leaves no doubt that at the place and time alleged, accused forcibly had carnal knowledge of Carmen Nunez, and that thereafter suffocated her to death by burying her face in the soil with such force and violence as to obstruct completely the passage of air to her lungs. This was rape and murder, as charged.

Accused denied the murder but admitted having sexual intercourse with the child who was not yet ten years of age. He testified at the trial that she removed her own clothing and voluntarily submitted to him and that after she had put on her drawers and was in the act of putting on her dress, she was seized with an attack which had the symptoms of epilepsy. He could not explain why these drawers were found torn and bloody near the scene of the rape, nor could he explain the spots having the appearance of blood stains on the ground some two hundred sixty-five feet from the scene.

His preparation for his criminal conduct was cunningly devised and deliberately executed. Design and premeditation characterized his every movement. He first contrived to carry the father of his victim to the bivouac area, no doubt for the double purpose of depriving the little girl of the protection the father might afford and of having a pretext for taking the children from their home to the camp to return with their parent. Then returning to the Nunez home, he carried the helpless children to his truck over the protest of their mother and very quickly rid himself of the little boy upon a flimsy pretext. He then drove to an isolated spot in an open field and accomplished the rape of the little girl by force and without her consent. What motivated him to slay his victim after raping her can only be conjectured but the circumstances compel the conclusion that the killing was deliberate and intentional. The manner in which her face was imbedded in the soil, the dislocation of her teeth, the indentations on the back of her neck and left arm, the fact that both lungs were completely collapsed and the violent grasping of a tuft of grass by her right hand in the agony of death, exclude any reasonable hypothesis other than accused murdered the child in the manner alleged.

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contend when he testified at the trial. A compelling array of evidence was marshalled showing he was sober and in full possession of his faculties throughout the afternoon he committed these crimes. The sober coolness and deliberation which characterized his entire conduct emphasize the gravity of the crimes accused has committed. The court was fully justified in its findings of guilty and in sentencing him to death.

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCI, 1928, p. 165). For the prosecution it is only necessary to prove that the accused had carnal knowledge of a certain female and that the act was done by force and without her consent. Any penetration, however slight, of a female's genitals is sufficient carnal knowledge. This may be proved by circumstantial evidence (Wharton's Crim. Law, p. 936). When there is no consent, the force involved in the act of penetration alone would suffice to establish the element of force.

The crime of rape may be committed on a female of any age. But at common law, which governs the definition of the offense in courts-martial cases, sexual intercourse with a female under ten years of age is punishable as rape, whether the act was accomplished against her will or not, or with or without her consent (52 C.J., p. 1010, sec. 15, note 43). A female under that age is considered incapable of consent (52 C.J., p. 1020, sec. 30), and her acquiescence in the act does not constitute consent (Wharton's Crim. Law, sec. 712).

Viewed in the light of the foregoing principles, the evidence is amply sufficient to show that the accused is guilty of the crime of rape. Upon his own admission that he had sexual intercourse with the child, who was shown to be under ten years of age, the accused's guilt is confirmed. Even though, as he claims, she voluntarily submitted, the fact of her being below the age of consent convicts him. But, irrespective of this legal presumption, the evidence is replete with facts and circumstances that are indicative of force and want of consent. It would be unnecessarily repetitious to point out the significance of the blood stained undergarment, the disclosures brought out by the autopsy and the presence of many other indications of a diabolical ingenuity and a cold and calculating malevolence.

6. "Murder is the unlawful killing of a human being with malice aforethought" (MCI, 1928, p. 162). It is for the prosecution to establish that the accused killed a certain person by certain means, as alleged, and that the killing was with malice aforethought. This involves proof that the person alleged to have been killed is dead, that the person died in consequence of an injury, that such injury was the result of the act of the accused and that the death took place within a year and a day of such act.

Murder is distinguished from manslaughter by this element of "malice aforethought". "Malice" in law is manifest by the intentional doing of a wrongful act to the injury of another (Wharton's Crim. Law, sec. 419 et seq.). It may be inferred from a deliberate intent to kill (Wharton's Crim. Law,

sec. 480) and does not necessarily mean hatred or a personal ill-will towards the person killed. The use of the word "aforethought" does not mean that the malice, so called, must exist for any particular period of time before the commission of the act or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act was committed (N.C., 1921, p. 410). Malice aforethought may thus be found when the act is not premeditated. It is also appropriate to note that even an unintentional homicide, committed by one who at the time is engaged in the commission of some other felony, as for instance, rape, is murder at common law (29 C.J., p. 1097, sec. 70).

It is clear that all the necessary elements of the crime of murder have been established in the present case. It is immaterial whether death ensued from an independent intentional act of suffocating the child or whether the suffocation was in concomitance with the perpetration of a collateral felonious act. Whatever the view, it constitutes murder under the common law, which is applicable to the instant case.

7. Consideration has been given to the use of the alternative pleading contained in Specification 1. It charges the accused with the killing "by suffocating her with his hands or by other means forceably employed". There is no doubt of the general impropriety of alternative pleading in criminal proceedings. It is free from fatal consequences only if the alternatives do not constitute separate and distinct offenses (Dig. Op. JAG, 1912, p. 487), are not inconsistent (Winthrop, reprint, p. 135) and do not render the charge uncertain (30 C.J., sec. 289; 31 C.J., sec. 131).

It is also appropriate to observe that where the pleader sets forth a description of the means by which an offense was committed, the proof must correspond with the averments in general character and operation. Thus a charge of killing by a particular means cannot be supported by proof of death by an entirely different means (Wharton's Crim. Ev., p. 1806). As said in an old case, "if a person be indicted, ...for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by showing starving or strangling" (1 East, P.C. 341; cited in Wharton's, supra).

In the present case, the unlawful killing was by suffocation. This at once is indicative of a particular mode of killing and a peculiar form of violence. As such, it is immaterial whether the suffocation was accomplished by the use of hands or by some other means. The nature of the violence and the kind of death inflicted by it are the same. It has accordingly been held that where death was charged by suffocation through defendant placing his hand on the mouth of the deceased, it was sufficient to show that any violent means were employed to stop deceased's breath (Rex v. Waters, 7 C. & P. 250, 32 ECL 597; cited in 30 C.J. p. 125). Moreover an allegation that the accused strangled and choked the deceased with his hands, has been held to be supported by proof that he strangled her by placing a scarf around her neck (Thomas v. Com., 20 SW 226, 14 KyL

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263; cited in 30 C.J., p. 125). These principles are obviously based upon the view that the accused in such cases could not have been misled by any difference between allegations and proof and that the mere statement of a particular mode of killing, such as by "suffocation", "strangulation", or "choking" (see cases cited in note 13, sec. 291, 30 C.J., title "Homicide"; Wharton's Crim. Law, p. 893), would be sufficiently descriptive to enable a person of ordinary understanding to know what is intended. Moreover, general averments are proper where the particular facts of the offense are peculiarly within the knowledge of the accused (Archbold, cited in Winthrop, reprint, p. 194; 31 C.J., p. 673). Neither is an indictment vitiated by an alternative statement in matter which may be rejected as surplusage (31 C.J., pgs. 663, 747; Winthrop's reprint, p. 195).

But in court-martial proceedings, a specification need not possess the technical nicety of an indictment (Dig. Op. JAG, 1912-1940, sec. 451 (26)). The prime requisite is that the specification apprise the accused of the offense charged against him with such definiteness and correctness as to enable him to prepare his defense thereto (Dig. Op. JAG, 1912-1940, sec. 432 (4)).

In view of the foregoing principles, the Board is satisfied that the accused in the instant case was fully apprised of a definite charge and upon allegations which cannot be considered uncertain, misleading or in any manner prejudicial to his rights. (And see ICM, 1928, par. 27b, p. 75).

8. While it is apparent that the court as well as the defense regarded Francois Nunez, the youthful brother of the accused, as a sworn witness in the case and while it is consistently significant that in answer to the question, "Do you know what it is to swear before God to tell the truth?", the boy responded, "Yes, I understand. I promise before God that I will tell you the truth" (R. 32), the record fails to disclose the formal administration of an oath to him. The importance thereof arises from the rule that unsworn, unaffirmed statements are not admissible in evidence before courts-martial, Article of War 19, even where the defense does not interpose any objection (Bull. 1, JAG, January-June, 1942, sec. 276 (2)).

However, his part in the proceedings, particularly his identification of his sister in Exhibit "B" is of no controlling importance. Moreover, inasmuch as this exhibit, purporting to represent a photograph of the deceased child, was admitted in evidence with the expressed consent of the defense (R. 32), no further proof of that pictorial fact was necessary (Dig. Op. JAG, 1912-1940, sec. 276 (3); CM 119657). It is also noted that the identity therein was later confirmed by another witness (R. 41, 52), as well as the accused (R. 32) (Dig. Op. JAG, 1912-1940, sec. 276 (3); CM 121536).

9. For the reasons stated the Board of Review holds the record.

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of trial legally sufficient to support the findings and sentence.

Paul H. Hansen, Judge Advocate.
O. J. T. Jr., Judge Advocate.
Borden Simpson, Judge Advocate.

NATO 218. 1st Ind.

Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
6 July 1943.

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

1. In the case of Private James E. Kendrick (14026995), Headquarters Battery, 14th Armored Field Artillery Battalion, 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 $\frac{1}{2}$, you now have the authority to order the execution of the sentence.

2. After publication of the general court-martial order in the case, six 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 218).

Adam Richmond
ADAM RICHMOND
Brigadier General, USA
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 10, NATO, 8 Jul 1943)

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

APO 534, U. S. Army,
1 July 1943.

Board of Review

NATO 219

U N I T E D S T A T E S)	NORTHWEST AFRICAN AIR FORCES
v.)	Trial by C.C.M., convened at
Private RAYMOND W. KEIR)	Casablanca, French Morocco, 26
(32306495), Headquarters and)	May 1942. Dishonorable Dis-
Service Company, 21st Engineer)	charge, total forfeitures and
Aviation Regiment, C.E.)	confinement at hard labor for
)	one (1) year. United States
)	Disciplinary Barracks, Fort
)	Leavenworth, Kansas, designated
)	as place of confinement.

HOLDING 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 Raymond W. Keir, Headquarters and Service Company, 21st Engineer Aviation Regiment did, at Mediouna Airbase, French Morocco on or about 2 February 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Casablanca, French Morocco on or about 4 March 1943.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification except the words "desert" and "in desertion".

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substituting therefor, respectively, the words "absent himself without proper leave from" and "without leave", of the excepted words not guilty and of the substituted words, guilty. He was found not guilty of the Charge but guilty of violation of Article of War 61. Evidence of five previous convictions was introduced. Three of these convictions were for absence without leave in violation of Article of War 61; one was for drunkenness and one for breach of restrictions, both in violation of Article of War 96. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for one (1) year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record for action under Article of War 50½.

3. The evidence shows that on February 2, 1943, accused absented himself from his organization without proper leave (R. 7, Exhibit "A") and on February 20, 1943, was brought into the military police station at Casablanca by two military policemen, where, upon being questioned by the provost marshal officer, he said "he was AWOL since November 20th" (R. 8,9).

After having been advised of his rights, accused told the investigating officer in an interview on March 26th that "he was picked up entering old Medina by the military policemen and at the time he had been drinking and he had no intention to desert at any time since he left his organization and that he was keeping in contact with members in the organization to know when his organization pulled out". The investigating officer testified that accused "admitted he had been absent without leave" (R. 12).

The Morning Report (Exhibit "A") contains the following entries:

Feb. 3 "Pvt. Keir duty to AWOL as of 2-2-43" JEL RF

Feb. 23 "Pvt. Keir fr AWOL to Desertion."----- JEL RF

Mar. 4 ----- "Pvt. Keir fr Des. to AB Conf. Casablanca,
Fr. Morocco, to conf Base G.H. 1600" JEL RF

Accused elected to make an unsworn statement through his counsel but the statement contained nothing germane to the matters at issue. (R. 12,13)

4. It thus appears from the evidence that accused absented himself from his organization without proper leave on February 2, 1943, and was apprehended by Military authorities and returned to military control February 20, 1943. The findings of guilty of absence without leave beyond February 20, 1943 are not supported by the record of trial since termination of the unauthorized absence on that date by arrest by military authorities is established by the uncontradicted evidence.

The sentence **244179** the court is legal.

5. Captain D. A. Cohen, Provoost Marshal Officer, Casablanca Milit

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Area, identified two exhibits bearing his signature, each captioned "Detention Record", which were admitted in evidence without objection (R. C. 10, Exhibits "B" and "C"). Except possibly for the limited purpose of showing the detention of accused by military authorities, these exhibits were incompetent, contained many hearsay and extraneous matters and should have been excluded by the court (par. 395 (18), Dig. Op. JAG, 1912-1940; par. 117a, p. 121, ICM, 1928). It is concluded, however, that the substantial rights of the accused were not injuriously affected by the erroneous admission of these documents.

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

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty as involve findings that accused absented himself from his organization without proper authority from February 2, 1943 to February 20, 1943, in violation of Article of War 61, and legally sufficient to support the sentence. United States Disciplinary Barracks, Fort Leavenworth, Kansas, is an authorized place of confinement under the facts obtaining in this case (par. 2b, AR 600-395, C 2, 11 January 1943).

James D. Thompson, Judge Advocate.
D. Z. Gold, Judge Advocate.
Gordon Simpson, Judge Advocate.

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NATO 219 1st Ind.
Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
1 July 1943.

TO: Commanding General, Northwest African Air Forces, APO 650, U. S. Army.

1. In the case of Private Raymond W. Keir (22306495), Headquarters and Service Company, 21st Engineer Aviation Regiment, C.E., 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 findings of guilty as involves a finding of guilty of absence without leave from February 2, 1943 to February 20, 1943, and legally sufficient to support the sentence. This holding is hereby approved. Upon taking the necessary corrective action, you will have authority to order the execution of the sentence (see ICA, 1928, pages 77 and 78).

2. After publication of the general court-martial order in the case, six 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 219).

Adam Richmond
ADAM RICHMOND
Brigadier General, USA
Assistant Judge Advocate General

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

APO 534, U. S. Army,
9 July 1943.

Board of Review

NATO 228

U N I T E D S T A T E S)
v.)
Private JAMES (NMI) TUCKER)
(32430845), Battery "I", 90th)
Coast Artillery (AA).)

HEADQUARTERS VI CORPS

Trial by G.C.M., convened at APO
306, 14 June 1943. Dishonorable
discharge, total forfeitures and
confinement at hard labor for
life. Disciplinary Training
Center, Atlantic Base Section,
designated as place of confine-
ment.

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. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private James (NMI) Tucker, Battery "I" Ninetieth Coast Artillery (AA), did, at Casablanca, French Morocco, on or about 11 May 1943, forcibly and feloniously, against her will, have carnal knowledge of Zahra Benit Mbarak.

CHARGE II: Violation of the 93rd Article of War.

Specification 1: In that Private James (NMI) Tucker, Battery "I" Ninetieth Coast Artillery, (AA), did, at Casablanca, French Morocco, on or about 11 May 1943, by force and violence and by putting her in fear, feloniously take, steal and carry

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away from the person of Zahra Benit Mbarak, money in the form of currency in the amount of fifty (50) francs, the property of Zahra Benit Mbarak, the value of fifty francs.

Specification 2: In that Private James (NMI) Tucker, Battery "I" Ninetieth Coast Artillery, (AA), did, at Casablanca, French Morocco, on or about 11 May 1943, with intent to do him bodily harm, commit an assault upon Hamad Ben Alie, by cutting him on the head, with a dangerous weapon, to wit, a bayonet.

CHARGE III: Violation of the 96th Article of War.

Specification: In that Private James (NMI) Tucker, Battery "I", Ninetieth Coast Artillery, (AA), did, at Casablanca, French Morocco, on or about 11 May 1943, wrongfully and knowingly fire a service rifle in violation of standing orders.

He pleaded not guilty to and was found guilty of the Charges and specifications. Evidence of two previous convictions was introduced, one for absence without leave, and the other for failure to obey a lawful order. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due and to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated Disciplinary Training Center, Atlantic Base Section as place of confinement and forwarded the record of trial for action under Article of War 50½.

Accused and Private Thomas L. Holloway (NATO 230) were tried by agreement upon the same evidence in a common trial but the case of each accused was considered separately by the court (R. 4).

3. The evidence shows without contradiction that accused and a companion, both colored soldiers, went to the farm of Cherif Mohamad Touhami Elouazzani near Casablanca, French Morocco, after sunset, between the hours of nine and ten on the evening of May 11, 1943, while it was still "not too dark to recognize the person" (R. 7,12,14,16,19,22), and entered the hut of Mohamed Ben Homad looking for "a woman". There they set upon Mohamed's wife, Zahra Benit Mbarak, and when she fled, pursued and overtook her outside where they forcibly had sexual intercourse with her three times, accused twice and his companion once (R. 9,13,15,20,21,22). Zahra, thirty-five years old and the mother of five children (R. 10,20), was in her hut with a baby in her arms when the soldiers entered (R. 13,19). She testified that accused "did use force and hit me and took my belt off of me and did the intercourse" (R. 20); that they "have intercourse with me once near my tent and twice in the court of Cherif's house" (R. 22). She cried and shouted for help and tried to defend herself from both the soldiers (R. 12,17,18). She testified that they gave her "lots of punches and hits all over my teeth ** I start to shout and one of them put the rifle over my neck not to make me shout and hit me" (R. 19).

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Accused first had sexual intercourse with her while his companion stood guard with his rifle. When some of the villagers came near, he fired in the air to prevent them from coming closer. Accused then stood guard while the other soldier forced her to submit to him. Finally, accused again had intercourse with her while his companion again stood guard (R. 9).

Zahra also testified accused took from her belt ten Moroccan dollars, which the interpreter explained are equivalent in value to fifty francs. (R. 21.22,23)

On that evening, accused and his companion, armed with rifles and bayonets (R. 17), had approached one Hachami near the "house of Cherif" and made known their desire to have sexual intercourse. When Hachami told them there were no women around "they" struck him with the butt of a rifle (R. 24) and, compelling him to accompany them (R. 15), went to the hut of Hamad Ben Alie where accused hit Hamad over the head three or four times with the flat side of his bayonet, drawing blood, and the other soldier struck him once over the eye with his hand (R. 17,18). As the two soldiers had approached the Cherif farm, shots had been heard. When they began searching the huts in the place, they saw Cherif on the roof of his house and one of them fired his rifle in the air, as Cherif put it, "to scare me" (R. 7,8). The soldiers were "shooting in the air"; much firing was heard (R. 11,17),--between twenty and thirty shots (R. 13).

As accused and his companion had entered Mohamed Ben Homed's hut, he tried to protect his wife from them. The intruders hit him twice over the head with the rifle and accused stuck him in the buttocks with the bayonet (R. 8,9,13,14,16,20).

The prosecution asked the court to take judicial notice of paragraphs 1 and 2 of Circular #13, Headquarters Fifth Army, dated 17 February 1943, which provides:

HEADQUARTERS, FIFTH ARMY
A. P. O. #464, U. S. Army

17 February 1943

CIRCULAR)

NUMBER 13.)

E X T R A C T

X

X

X

I. UNAUTHORIZED FIRING OF WEAPONS

1. It has been brought to the attention of this headquarters that there have been cases of soldiers firing rifles from trains and of pilots firing their machine guns without reason in inhabited areas, thereby causing fear and distrust among the natives.

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2. All units under this command are directed to take all steps possible to prevent any repetition of these, or similar acts. There must be no un-authorized firing of weapons.

X

X

X

By command of Lieutenant General CLARK:

A. M. GRUENTHER,
Major General, G.S.C.,
Chief of Staff.

OFFICIAL:

/s/ CHENEY L. BERTHOLF,
/t/ CHENEY L. BERTHOLF,
Colonel, A. G. D.,
Adjutant General.

A True Copy, I certify:

/s/ JOHN M. STAFFORD
1st Lt., J.A.G.D.

(R. 23, Exhibit 1).

Accused having been advised of his rights, elected to remain silent (R. 25).

4. It thus appears from the evidence beyond a reasonable doubt that at the place and time alleged, accused, forcibly and against her will, had carnal knowledge of Zahra Benit Mbarak; that he not only committed rape on his helpless victim but also robbed her of fifty francs in the course of his criminal assault; that he struck Hamad Ben Alie over the head with the flat side of his bayonet, drawing blood; that he and his companion fired their rifles indiscriminately and repeatedly in order to terrorize the natives.

The misconduct of accused and his companion was especially reprehensible. These soldiers invaded the privacy of an Arab's home and tore their unfortunate victim from her infant child. When the husband tried to protect her, they assaulted him with rifle and bayonet. Accused forcibly had carnal knowledge of the woman twice and his companion once. While one rapist forced her to submit to him, the other stood guard, firing his rifle and holding the villagers at bay when they approached to give help to the screaming victim.

The court was abundantly warranted in finding accused guilty as charged.

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Force and want of consent are indispensable. The

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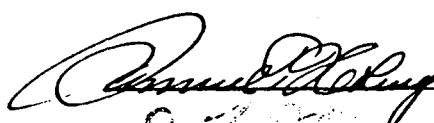
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elements of proof required are (a) that accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent (MCM, 1928, par. 148b).

Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will by violence or intimidation. The taking must be against the owner's will by means of violence or intimidation. The violence or intimidation must precede or accompany the taking. It is equally robbery where the robber by threats or menaces puts his victim in such fear that he is warranted in making no resistance. The elements of proof required are (a) the larceny of the property, (b) that the larceny was from the person or in the presence of the person alleged to have been robbed, and (c) that the taking was by force and violence, or putting in fear, as alleged (MCM, 1928, par. 149f).

The record of trial shows that the requirements as to proof in the case of rape and robbery, as laid down in the manual, are fully met. Likewise, the undisputed proof shows accused guilty of an assault with intent to do bodily harm with a dangerous weapon, as alleged, and of willfully and knowingly firing a service rifle in violation of standing orders as charged.

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 of guilty and the sentence. Death or life imprisonment is mandatory upon conviction of Article of War 92.

 Russell M. Chapman, Judge Advocate.
O. J. [unclear], Judge Advocate.
Harold Simpson, Judge Advocate.

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

APO 534, U. S. Army.
9 July 1943.

Board of Review

NATO 230

U N I T E D S T A T E S)	HEADQUARTERS VI CORPS
v.)	Trial by G.C.M., convened at
Private THOMAS L. HOLLOWAY)	APO 306, U. S. Army, 14 June
(35338400), Battery I, 90th)	1943. Dishonorable discharge,
Coast Artillery (AA).)	total forfeitures and confinement at hard labor for life.
)	Disciplinary Training Center,
)	Atlantic Base Section, designated as place of confinement.

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. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Thomas L. Holloway, Battery "I", Ninetieth Coast Artillery (AA), did, at Casablanca, French Morocco, on or about May 11, 1943, forcibly and feloniously, against her will, have carnal knowledge of Zahra Benit Mbarak.

CHARGE II: Violation of the 93rd Article of War.

Specification 1: In that Private Thomas L. Holloway, Battery "I", Ninetieth Coast Artillery (AA), did, at Casablanca, French Morocco, on or about 11 May 1943, by force and violence and by putting her in fear, feloniously take, steal and carry away from the person of Zahra Benit Mbarak, money in the form of

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currency in the amount of fifty (50) francs, the property of Zahra Benit Mbarak, the value of fifty francs.

Specification 2: In that Private Thomas L. Holloway, Battery "I", Ninetieth Coast Artillery, (AA), did, at Casablanca, French Morocco, on or about 11 May 1943, with intent to do him bodily harm, commit an assault upon Mohamed Ben Hamad, by stabbing him in the buttocks with a dangerous weapon, to wit, a bayonet.

CHARGE III: Violation of the 96th Article of War.

Specification: In that Private Thomas L. Holloway, Battery "I", Ninetieth Coast Artillery, (AA), did, at Casablanca, French Morocco, on or about 11 May 1943, wrongfully and knowingly fire a service rifle in violation of standing orders.

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Specification 2, Charge II, but guilty of all other Specifications and all the Charges. Evidence of one previous conviction, involving absence without leave, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for the term of his natural life. The reviewing authority disapproved the findings of guilty of Specification 1, Charge II and of Charge II. He approved the sentence, designated Disciplinary Training Center, Atlantic Base Section, and forwarded the record of trial under action of Article of War 50½.

Accused and Private James Tucker (NATO 228) were tried by agreement upon the same evidence in a common trial but the case of each accused was considered separately by the court (R. 4).

3. The evidence shows without contradiction that accused and a companion, both colored soldiers, went to the farm of Cherif Mohamed Touhami Elouazzani near Casablanca, French Morocco, after sunset, between the hours of nine and ten on the evening of May 11, 1943, while it was still "not too dark to recognize the person" (R. 7,12,14,16,19,22), and entered the hut of Mohamed Ben Homad, looking for "a woman". There they set upon Mohamed's wife, Zahra Benit Mbarak, and when she fled, pursued and overtook her outside where they forcibly had sexual intercourse with her three times, accused once and his companion twice (R. 9,13,15,20,21,22). Zahra, thirty-five years old and the mother of five children (R. 10,20), was in her hut with a baby in her arms when the soldiers entered (R. 13,19). She testified that the soldier accompanying accused "did use force and hit me and took my belt off of me and did the intercourse" (R. 20); that they "have intercourse with me once near my tent and twice in the court of Cherif's house" (R. 22). She cried and shouted for help and tried to defend herself from both the soldiers (R. 12,17,18). She testified that they gave her "lots of punches and hits all over my teeth ** I start to shout and one of them put the rifle over my neck not to make me shout and hit me" (R. 19).

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Accused first stood guard while his companion had sexual intercourse with her and when some of the villagers came near, he fired in the air to prevent them from coming closer. With his companion standing guard, accused then forced her to submit to him. Finally, accused resumed guard while the other soldier again had intercourse with her (R. 9).

Zahra also testified accused's companion took from her belt ten Moroccan dollars, which the interpreter explained are equivalent in value to fifty francs (R. 21,22,23).

On that evening, accused and the other soldier, armed with rifles and bayonets (R. 17), had approached one Hachami near the "house of Cherif" and made known their desire to have sexual intercourse. When Hachami told them there were no women around "they" struck him with the butt of a rifle (R. 24) and, compelling him to accompany them (R. 15), went to the hut of Hamad Ben Ali where accused's companion hit Hamad over the head three or four times with the flat side of his bayonet, drawing blood, and the accused struck him once over the eye with his hands (R. 17,18). As the two soldiers had approached the Cherif farm, shots were heard. When they began searching the huts in the place, they saw Cherif on the roof of his house and one of them fired his rifle in the air, as Cherif put it, "to scare me" (R. 7,8). The soldiers were "shooting in the air"; much firing was heard (R. 11,17),--between twenty and thirty shots (R. 13).

As accused and his companion had entered Mohamed Ben Hamad's hut, he tried to protect his wife from them. The intruders hit him twice over the head with the rifle and accused's companion stuck him in the buttocks with the bayonet (R. 8,9,13,14,16,20).

The prosecution asked the court to take judicial notice of paragraphs 1 and 2 of Circular #13, Headquarters Fifth Army, dated 17 February 1943, which provides:

HEADQUARTERS FIFTH ARMY
A. P. O. #464, U.S.Army

17 February 1943.

CIRCULAR)

;)
NUMBER 13.)

E X T R A C T
* * * * *

I. UNAUTHORIZED FIRING OF WEAPONS

1. It has been brought to the attention of this headquarters that there have been cases of soldiers firing rifles from trains and of pilots firing their machine guns

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without reason in inhabited areas, thereby causing fear and distrust among the natives.

2. All units of this command are directed to take all steps possible to prevent any repetition of these, or similar acts. There must be no unauthorized firing of weapons.

By command of Lieutenant General CLARK:

A. M. GRUENTHER,
Major General, G.S.C.,
Chief of Staff.

OFFICIAL:

s/ Cheney L. Bertholf
CHENEY L. BERTHOLF.
Colonel, A. G. D.,
Adjutant General.

A True Copy, I certify:

/s/ JOHN M. STAFFORD
/t/ JOHN M. STAFFORD
1st Lt., J.A.G.D.

(R. 23, Exhibit 1).

Accused, being advised of his rights, elected to remain silent (R. 25).

4. It thus appears from the evidence beyond a reasonable doubt that at the place and time alleged, accused forcibly and against her will, had carnal knowledge of Zahra Benit Mbarak, and that he and his companion fired their rifles indiscriminately and repeatedly in order to terrorize the natives.

The misconduct of accused and his companion was especially reprehensible. These soldiers invaded the privacy of an Arab's home and tore their unfortunate victim from her infant child. When her husband tried to protect her, they assaulted him with rifle and bayonet. Accused forcibly had carnal knowledge of the woman once and his companion twice.

While one rapist forced the assaulted woman to submit to him, the other stood guard, firing his rifle and holding the villagers at bay when

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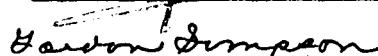
they approached to give help to the screaming victim.

The court was abundantly warranted in finding the accused guilty as charged in Specification and Charge I and Specification and Charge III.

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Force and want of consent are indispensable. The elements of proof required are (a) that accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent. (MCM, 1928, par. 148b).

The record of trial shows that the requirements as to proof laid down in the manual are satisfactorily met.

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 of guilty (except in respect of the findings of guilty of Specification 1, Charge II, and Charge III, which were disapproved by the reviewing authority) and the sentence. Death or life imprisonment is mandatory upon conviction of violation of Article of War 92.

 Paul O'Hara, Judge Advocate.
 O. J. Johnson, Judge Advocate.
 Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army,
14 July 1943.

Board of Review

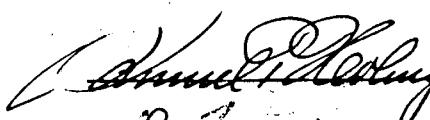
NATO 233

U N I T E D S T A T E S)	HEADQUARTERS ATLANTIC BASE SECTION
v.)	Trial by G.C.M., convened at
Private GILLUS D. ESTERS)	Casablanca, French Morocco, 2
(37133869), Company H,)	June 1943. Dishonorable dis-
22nd Quartermaster Regiment)	charge (suspended), total forfeit-
(Truck).)	ures and confinement at hard labor
)	for one year and nine months.
)	Disciplinary Training Center,
)	Atlantic Base Section, designated
)	as place of confinement.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

The record of trial in the case of the soldier named above, having been examined in the Branch Office of The Judge Advocate General and there found legally sufficient to support the findings but legally insufficient, in part, to support the sentence, has been examined by the Board of Review. The Board of Review holds the record of trial legally sufficient to support the sentence.

 Daniel J. Holmgren, Judge Advocate.
D. J. Holmgren, Judge Advocate.
Gordon Simpson, Judge Advocate.

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MEMORANDUM.

SUBJECT: Record of trial in the case of Private Gillus D. Esters (37133869), Company "H", 22nd Quartermaster Regiment (Truck).

1. The accused was found guilty of insubordinate and disrespectful behavior (Article of War 63), of failure to obey an order of a non-commissioned officer (Article of War 96) and of the wrongful cutting of a certain individual with a razor, described as a dangerous weapon (Article of War 96). He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year and nine months. The only question requiring consideration is whether or not the sentence as approved is in excess of the maximum limits fixed by paragraph 104, MCM, 1928. Consideration thereof leads to the conclusion that it is excessive if the offense set forth in specification 2 (Article of War 96), is only a common or simple assault and battery, which would authorize but a six months' sentence. If, on the other hand, the offense is of an aggravated character, an additional punishment might be imposed.

2. The specification alleges that accused at a certain time and place "wrongfully cut M. Claude Latuillere, in the back with a dangerous weapon, to wit, a razor". This sets forth both an assault and a battery, two separate and distinct offenses under the law (5 Corpus Juris 715), with the assault as a lesser included offense of the battery.

A mere assault may involve matters of aggravation. While, at common law, the term "aggravated assault" has no technical and definite meaning, it describes a species of assault which, for various reasons, has come to be regarded as more heinous than common assault (5 Corpus Juris 728). The practice is to set forth in an indictment such aggravations as would explain, if not justify, the sentence imposed by the court (Wharton's Criminal Law, sec. 840). State statutes, dividing assaults into various grades requiring distinctiveness of indictment and prescribing distinctiveness of punishment, are generally held to be merely declaratory of the common law. Appropriately, in Simpson v. State, 59 Ala. 1,8,31 Am. R. 1 (cited in 5 Corpus Juris 716, note 1), the court, in construing a statute punishing assaults with intent to murder, maim, etc., stated,

"It is apparent the statute was intended for the punishment of several distinct offenses, the elements of each being an act done, which of itself, though it may be an indictable offense, is aggravated by the intent attending it, and the higher offense contemplated. Each was an offense, known to the common law, indictable and punishable as a misdemeanor. We do not mean, of course, that each was at common law recognized as a separate, distinct, technical offense. An assault was

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a misdemeanor; if attended with a felonious intent, the intent was a matter of aggravation, justifying the imposition of severer punishment..."

Consistently therewith, an assault has been held to be of an aggravated kind where it is charged to have been made with a dangerous weapon and a battery, in turn, to be an aggravation of an assault (5 Corpus Juris 735, sec. 211). As stated, "The assault is still the original offense, and the means, the intent, and the extent to which it is carried, qualify only the aggravation of this original offense" (Cokely v. State, 4 Iowa 477, 479; cited in 5 Corpus Juris 716, note 92). Furthermore, where a complaint fails to charge a statutory offense, but charges assault and battery at common law, an allegation that the defendant was armed with a dangerous weapon has been held to be a matter of aggravation only and not descriptive of the offense (Com. v. O'Donnell, 150 Mass. 502, 23 N.E. 217; cited in 5 Corpus Juris 735, note 34).

It appearing, therefore, that aggravated common law assaults and batteries are determinable by allegation rather than by precise definition, the next inquiry is whether the specification is sufficient in setting forth such a case. The term "wrongfully" is connected with a definite allegation of cutting. In its legal signification and textual connection, it is obviously interchangeable with "unlawfully" (71 Corpus Juris 1642, 1644). The words of the specification thus import unlawful contact with the additional element of seriousness. The word "assault" alone, if it had been employed, would have carried with it this requisite idea of illegality and at common law such words as "unlawfully", "willfully", "knowingly", or the like, would not have been necessary (5 Corpus Juris 765). It may be otherwise by statute, but even in such a case it has been held (Moore v. State, 4 Okl. Cr. 212, 111, P. 822 (cited in 5 Corpus Juris 765)) that an information charging that accused did intentionally and wrongfully assault, beat, cut, stab and wound a certain person with a knife, sufficiently alleges a battery within a statutory definition of any wilful and unlawful use of force or violence upon the person of another.

It might be suggested that the term "willfully" should have been used instead of "wrongfully", for "willfully" denotes an intention to injure (68 Corpus Juris 291). But disregarding any question of their interchangeability, it is to be noted that, while intent to do injury is ordinarily an element of a common law offense of assault and battery, no specific intent is essential. The general criminal intent may be inferred from the act; it being presumed that a man intends the natural consequences of his conduct (5 Corpus Juris 776, 777). Thus where a person uses a deadly weapon with violence upon the person of another and the act has a direct tendency to do some great bodily harm to the one assailed, the intent to injure him may be inferred from the act (5 Corpus Juris 776, note 26). In short, an allegation of specific intent is only essential where it constitutes the gravamen of the offense, as in the distinctly defined cases under state statutes or in certain offenses under the article of war which are characterized by it.

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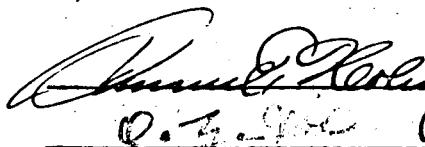
It is believed therefore that the specification is effective in setting forth a case of assault and battery with aggravating circumstances.

The absence of proof that the weapon used was, in fact, a razor, is immaterial (Dig. Op. JAG, 1912-1940, sec. 451 (12)).

In the light of the significance attached to the element of aggravation under the common law, it is appropriate that the punishment for this offense should be gauged by what is provided for in the most closely related specific offense under the Articles of War. It is certain that it warrants a greater punishment than that for an ordinary assault and battery under Article of War 96. The obvious element of aggravation, as recognized by the common law, should not be ignored.

In line with the foregoing, if not directly in point, is the case decided in CM 220396 (1942); (Bull. JAG, January-June 1942, page 20). In that case the accused did "with intent to commit a felony, viz., robbery, commit an assault upon ... by willfully and feloniously cutting the said ... in and upon the trunk of the body with a knife". The court, by exception and substitution, found him not guilty of assault with intent to commit robbery, but guilty of assault "with intent to do bodily harm with a dangerous weapon". The Board of Review held that the assault with intent to do bodily harm with a dangerous weapon is not included in an assault with intent to commit robbery, but "assault and battery is a lesser included offense where the allegation, as in this case, charges a battery". The Board accordingly held that the record of trial was legally sufficient to support only so much of the finding of guilty as involves findings of guilty of "assault and battery, aggravated by cutting with a knife, in violation of Article of War 96". It held that the assault and battery was proven to be an aggravated assault with a knife and that "the most closely related offense to the assault and battery aggravated under the circumstances here shown is assault with intent to do bodily harm, for which the maximum authorized punishment is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year".

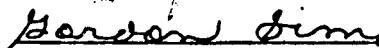
It is believed that the instant case sets forth a similar offense, both by specification and proof.



James P. Collygan, Judge Advocate.



D. F. G., Judge Advocate.



Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army,
12 July 1943.

Board of Review

NATO 239

U N I T E D S T A T E S)	HEADQUARTERS II CORPS
v.)	Trial by G.C.M., convened at
Private JAMES (NMI) BRADDY)	APO 302, 15 April 1943.
(34018168), Company D, 244th)	Dishonorable discharge, total
Quartermaster Battalion.)	forfeitures and confinement
)	at hard labor for duration
)	of his natural life. United
)	States Penitentiary, Lewisburg,
)	Pennsylvania, designated as
)	place of confinement.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification 1: In that, Private James (NMI) Braddy, Company D, 244th Quartermaster Battalion, did, at Bekaria, Commune Mixte of Morsott, Constantine, Algeria, on or about 19 February 1943, with malice aforethought, willfully, deliberately, feloniously, and unlawfully kill one Mahacene, (Yamina) bent Acies, a human being, by shooting her with a rifle.

Specification 2: In that, Private James (NMI) Braddy, Company D, 244th Quartermaster Battalion, did, at Bekaria, Commune Mixte of Morsott, Constantine, Algeria, on or about 19 February 1943, with malice aforethought, willfully, deliberately, feloniously,

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and unlawfully kill one Mahacene, (Djamila) bent Mohamed, human being, by shooting her with a rifle.

CHARGE II: Violation of the 64th Article of War.

Specification: In that, Private James (NMI) Braddy, Company D, 244th Quartermaster Battalion, did, at Bekaria, Constantine, Algeria, on or about 19 February 1943, offer violence against 1st Lieutenant August Koenig, C.A.C., Battery D, 106th Sep CA Bn (AA), his superior officer, who was then in the execution of his office, in that he, the said Private Braddy, did load his rifle and then point the same at said Lieutenant Koenig, directing him at the same time, in a threatening manner, to keep back and not to walk toward him.

CHARGE III: Violation of the 96th Article of War.

Specification: In that Private James (NMI) Braddy, Company D 244th Quartermaster Battalion, did, at Bekaria, Commune Mixte de Morsotte, Constantine, Algeria, on or about 19 February 1943, wrongfully fire a U.S. Cal. 30 Model 1903 rifle in the direction of inhabited Arab huts, greatly endangering the human beings living therein.

Accused pleaded not guilty to all Charges and Specifications. As to Specification 1 of Charge I, he was found guilty except the words "with malice aforethought" and "deliberately", of the excepted words not guilty. As to Specification 2, he was found guilty except the words "with malice aforethought" and "deliberately", of the excepted words not guilty. Of the Charge he was found not guilty, but guilty of violation of the 93rd Article of War.

He was found guilty of Charge II and its specification and of Charge III and its Specification. Evidence of one previous conviction was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor at such place as the reviewing authority may direct for the duration of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary at Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's testimony showed that on 19 February 1943 at 1830 hours, First Lieutenant August Koenig and Second Lieutenant Lewis D. Humble of the 106th Sep. CA Battalion (AA), were proceeding in a jeep along a pass between Tebessa and Thelepte. That they turned off on another road and went into a "dip". That as they came up the other side they heard some shooting and as they came up over the bluff, Lieutenant Koenig saw three soldiers 170 feet down the road and one of them was firing a rifle at some huts to the right (R. 13,14,19). The huts referred to were about 250 feet off the dirt road that leads from the Tebessa-

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Feriana Highway to the old Speedy CP about 10 miles south of Tebessa (R. 8).

The three soldiers were the accused, and Privates Grier and Miller. The accused was the soldier who was firing his rifle. Lieutenant Koenig actually saw Braddy fire two rounds at the time and had heard reports before seeing the three soldiers (R. 13). The witness saw a light and smoke coming from one of the huts and accused was "facing half right at an oblique angle facing toward that corner". It was getting near dusk, but there was plenty of light. The two officers continued up to the men, stopped the jeep and Lieutenant Koenig got out and spoke first to Miller, asking, "What's the shooting for?" Miller "sort of stuttered" and said, "The Arabs are shooting at us". He observed that they had been drinking. At that time accused had his back to Lieutenant Koenig and was reloading his rifle. Lieutenant Koenig told them he was placing them under arrest and ordered them into the jeep. They gave him a little argument but got into it. Accused was sitting in the rear. They started away and were driving along when they stopped the jeep and accused jumped out the rear and backed away. Lieutenant Koenig told accused to get back in the jeep, that he was taking them to their company commander. Accused kept backing away and said, "No one's going to take me in". Lieutenant Koenig walked towards him and accused "pointed the gun in my direction and told me to stop" (R. 14). Lieutenant Koenig stopped and asked accused if he realized he was an American soldier and "that I am an officer". Accused replied, "I know that, Lieutenant, but no one's going to take me in". With that accused drew back the bolt of his rifle, told Lieutenant Koenig to stop and went off to the left of the road down into a gully (R. 15).

Mahrez Tiaba Ben Hassine testified that he lived in one of the huts in question and identified the huts from a photograph which was duly received in evidence (R. 30, Pros. Ex. B). At the time of the shooting he was standing near the huts and saw soldiers coming towards them. As they came near the huts, one of them fired two shots (R. 31) in his direction (R. 32). They were colored soldiers (R. 31). After they fired two shots they went further up the road and were firing at a barking dog that was chained to the hut. Six shots were fired by the same person toward the hut of Djefal Mahacene. He saw a "small taxi" (R. 32) in which were "Military Americans" (R. 33) stop and pick the boys up (R. 32), and heard cries from the Mahacene hut. He investigated and found Yamina Mahacene "moaning and pointing to her stomach and a half hour later she died". Djamila Mahacene "was dead when I entered the hut". She "was in a kneeling position when we came in, and I touched her and found she was dead, so I laid her on the ground. I noticed blood from her shoulders". He had seen her alive that day. She seemed to be in good health (R. 33). Yamina Mahacene was the wife of Mahacene Ben Djefal and the mother of Djamila Mahacene. After she died he dug the grave and buried her and her daughter (R. 31).

Sergeant Mike S. Ward went to the scene later and found 8 empty cartridges and an O3 clip in the vicinity within a radius of 50 yards (R. 39).

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On 13 March 1943, an autopsy was performed upon the two victims of the shooting by Captain Arthur J. Horvat, M.C. (R. 42) who testified that there was a wound through the abdomen of an Arab woman about 30 years of age, about 3 inches above the pubic bone, evidently caused by a projectile. The cause of death was the projectile going through the abdomen with rupture of the bowel and uterus. A fragment of bullet was recovered from the buttock and received in evidence (Pros. Ex. F). It was identified by the witness as a 30 caliber projectile (R. 43).

The second autopsy was performed upon a little Arab girl about 3 years of age. There was a wound in the left bicep region, also one in the chest on the right side, and a wound in the opposite side of the chest; also a wound in the right deltoid region of the arm, fracturing the right humerous (R. 44). In the opinion of the witness, the wounds were caused by a projectile passing through the body and were sufficient to cause death (R. 45).

Djabri Ben Ali testified that he knew the two deceased persons in their life time, was present when they died and was present when their bodies were exhumed for the autopsy (R. 46).

The accused, after having his rights fully explained to him, elected to be sworn as a witness in his own behalf (R. 50). He testified that on 19 February 1943, the date of the shooting, he went with Miller and Grier to take a walk. That they caught a ride into town where they had a few drinks "and got to feeling pretty good". After dinner, about 2:30 or 3:00 o'clock, they got another truck and headed back to camp. On the way they met some French soldiers who had some wine "on their shoulders in canteens" and stopped and "went to drinking with them. That is how I got drunk and I don't know how I got to camp or what happened". Before they met the French soldiers they had drunk 3 or 4 quarts of wine but did not know how much he drank with them.

Upon cross examination accused testified that he did not remember seeing Lieutenant Shulman, the investigating officer, when he got back to camp (R. 51). He did not remember getting supper. He was not drunk when he left Tebessa about 2:00 or 3:00 o'clock but was feeling pretty good. That he had drunk much wine or liquor before this time and had had one previous experience of being in "a so-called blank", a period where he did not know what he was doing. That he was in what he would call a blank state from the time they left the French soldiers. He next knew what he was doing "sometime through the night when I waked up", and his tent mate told him he was drunk. That he cleaned his rifle the next day when he started on guard and the patch looked "a little rusty" and not smoky dark looking like it does when he cleans it after firing on the range.

He did not know whether or not he fired his rifle on February 19th; that he knows he did not fire it while he was sober (R. 55).

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Staff Sergeant Robert E. Baker testified as a defense witness that he had known accused since 11 May 1942, that he was a good worker, a good soldier; had never been in trouble in the company. That he gets along well with the other men in the company (R. 56). He had seen accused have a couple of drinks while he was out on pass but never while on duty. That he acted normally when drinking (R. 57).

The prosecution called First Lieutenant Sam Shulman as a rebuttal witness. He testified that he saw and talked with accused at approximately 8:00 or 8:30 on the evening of 19 February 1943, and that in his opinion accused had been drinking but was not drunk. That he was leaning against a tree and his words were "thickened" (R. 59).

Private A. J. Grier was called as a prosecution witness and testified that he was with accused on the afternoon of the shooting. That some shots were fired before they got to the huts and again after they passed the huts and that Private Braddy was the only one firing (R. 65). That he was firing towards the mountain (R. 67), in the general direction of the huts and the mountain; that some of his bullets could have gone into the mountain in the background and he did not know if any of the projectiles could have gone into the Arab huts (R. 68).

4. In considering Charge I and the two specifications thereunder, the court by exceptions found accused guilty of manslaughter under Article of War 93.

While there was no direct testimony that accused saw the two persons whom he is alleged to have shot and killed, or that he purposely shot at them, there is ample evidence that he fired his rifle in the direction of a group of huts which he knew, or should have known, to be inhabited. Lieutenant Koenig saw him firing a rifle at some huts (R. 13,14,19). The witness saw a light and smoke coming from one of the huts (R. 14). Nahrez Tiaba Ben Hassine testified that he lived in one of the huts and at the time of the shooting he was standing near the huts and saw the soldiers coming towards them and that one of them fired two shots in his direction and that they fired at a barking dog that was chained to the hut (R. 32).

This firing a service rifle in the direction of an inhabited group of huts in utter disregard of human life clearly constitutes an unlawful act malum in se, and since death resulted therefrom, the offense of manslaughter was committed.

Manslaughter is a lesser offense which may be included in a particular charge of murder (MCM, 1928, par. 148 (a)). It was properly within the purview of the court to find accused guilty of the lesser included offense. The evidence amply supports the findings of guilty of all the Charges and Specifications and the sentence.

Penitentiary confinement is authorized for the offense involved in Charge I and its two Specifications; recognized as an offense of a civil nature and so punishable by penitentiary confinement of more than one

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year by section 454, Title 18 of the Criminal Code of the United States.

5. It is noted that Colonel Leon C. Boineau, Adjutant General, signed the indorsement referring this case for trial and that he later sat as a member of the court. Article of War 8 in part provides that--

"No officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution."

The signing of the indorsement of reference for trial is purely an administrative act and was well within the knowledge of defense. No objection was made to Colonel Boineau as a member of the court and the Board is of the opinion that he was eligible to sit as a member thereof.

6. There were two adjournments in the progress of the trial. The proceedings of the second day of the trial were not signed by the trial judge advocate as is provided in par. 41 (d) of the Manual for Courts Martial, U. S. Army, 1928 (R. 59). However the record was properly authenticated at the conclusion of the trial. War Department Policy Memorandum No. 3 (May 24, 1941) provides in part as follows:

"2. A record of general court-martial trial will not be returned for corrective action where the defect is:

"That the proceedings up to an intermediate adjournment were not authenticated by the trial judge advocate, provided such proceedings were not then written in final form for the use of the court by the court reporter and the record of trial at the end thereof is authenticated by a trial judge advocate who attended the trial in that capacity during the period as to which there is no intermediate authentication."

In the opinion of the Board this irregularity is cured by proper authentication of the entire record and does not affect the validity of the proceedings.

The court was legally constituted and had jurisdiction of the accused and the offense. No error injuriously affecting the substantial rights of the accused was committed during the trial. The accused is 22 years of age and had served in the Army since 26 February 1941.

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

Pamuel H. Ferguson, Judge Advocate.

O. J. Zell, Judge Advocate.

Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army,
26 July 1943.

Board of Review

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U N I T E D S T A T E S)	HEADQUARTERS II CORPS
v.)	Trial by G.C.M., convened at
Private First Class CHARLES)	APO 302, U. S. Army, 24 April
(M1) STOJAK (36031134), 690th)	1943. Dishonorable discharge,
Coast Artillery Separate)	total forfeitures and confine-
Battery (AA) (AW).)	ment at hard labor for twenty
)	(20) years. United States
)	Penitentiary, Lewisburg, Pennsyl-
)	vania, designated as place of
)	confinement.

HOLDING 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 I: Violation of the 63rd Article of War.

Specification: In that Pvt. lcl. CHARLES STOJAK, 690th C.A. Btry Sep (AA) (AW), did, at Tebessa, Algeria, on or about February 21, 1943, behave himself with disrespect toward Capt. ETCYL D. DILLARD Jr., his superior officer, by saying to him, "Give me a gun and we'll see whose boss around here", or words to that effect.

CHARGE II: Violation of the 64th Article of War.

Specification: In that Pvt. lcl CHARLES STOJAK, 690th C.A.

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Btry Sep (AA) (AW), did, at Tebessa, Algeria, on or about February 21, 1943, shoot at Lt. MAX W. BEESLEY, his superior officer, who was then in the execution of his office, with his Gun, Submachine, Caliber 45.

CHARGE III: Violation of the 75th Article of War.

Specification: In that Pvt. lcl CHARLES STOJAK, 690th C.A. Btry Sep (AA) (AW), did, at Tebessa, Algeria, on or about February 21, 1943, while before the enemy, by his misconduct endanger the safety of the antiaircraft defense of his platoon and surrounding ammunition dump, which it was his duty to defend in that he caused such disorder and confusion that it disrupted the functions of the remainder of his platoon at his antiaircraft gun position during a time it was threatened by enemy forces.

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 and to become due and to confinement at hard labor for twenty (20) years, three-fourths of the members of the court present at the time the vote was taken concurring in the sentence. 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 21 February 1943, the 690th Coast Artillery Separate Battery (Anti Aircraft) was stationed near Tebessa charged with the mission of protecting from attacks by enemy aircraft an ammunition dump which extended along the road about four miles and contained a "tremendous stock" of ammunition, "approximately enough for three train loads". The battery commander, Captain Etcyl C. Dillard, "had alerted the entire organization, informed all men that they would remain at their positions, and that no one would leave on pass" (R. 6,7).

This disposition of the organization followed a "break-through" by enemy forces in the Kasserine Pass region about 15 February 1943. There was a general retirement of American forces and a continuous stream of vehicles, artillery, tanks and various units returning to the rear (R. 7). On 21 February, the front line was described as "very fluid" with the nearest enemy elements about eight miles from the vicinity of the battery's position (R. 11).

Accused, a member of this battery, had been given permission to visit one of the other gun squads on the afternoon of 21 February (R. 24). About five fifteen o'clock, he came running across the field, went in his tent, got a "tommy" gun and started out towards Second Lieutenant

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Max Beesley's squad (R. 24,25,27). As he left "he met a boy" from the 106th Coast Artillery Battalion who challenged him. Rifle shots were then exchanged between accused and an unidentified person (R. 25,26).

Earlier that afternoon, Lieutenant Beesley, commander of accused's platoon, had picked up the telephone and heard accused cursing one of the corporals (R. 17). This telephone system connected all twelve gun positions of the battery to one line, affording complete intercommunication (R. 9). Lieutenant Beesley, recognizing the voice of accused on the telephone, "called his name, got his attention and told him to go to his squad and go to bed". Accused asked who it was. The lieutenant told him and again ordered him to go to bed, to which accused replied, "Fuck you, I'm coming over to see you" (R. 17). About forty-five minutes later Lieutenant Beesley found the telephone line had been severed (R. 17,18) and accompanied by Privates First Class Lopez and Klug, he set out to repair the break, for which accused later admitted he was responsible (R. 9,18). It was then about a half an hour before nightfall. The Lieutenant, Lopez and Klug were following the telephone line when accused approached and from a distance of about one hundred feet called to them, "halt". They dropped to the ground and Lopez answered the challenge (R. 18,20,22,23). What then happened was described in the testimony of Lopez, as follows:

"We went out to look for the break in the line and ran into Private Stojak on the way about 150 feet from us. He hollered 'Halt', and I answered and told him it was Private Klug and me. He said he knew there were three of us and that he wanted to get the Lieutenant, so I said no, it was just Private Klug and I. Well, for a while there was a pause. In the meantime, Private Stojak kept crawling towards us. Lieutenant Beesley told us to sound off again and I yelled and then a burst from the tommy gun went over our heads. He said, 'Lopez, get up. I want to shoot you', so I stayed there, and then he hollered out, 'get up, you son of a bitch, I want to shoot you'. I stayed where I was and after that he fired another burst from the tommy gun." (R. 22)

Klug, testifying about the same occurrence, said:

"Well, Lieutenant Beesley, myself and Private Lopez started to look for the cut in the wire. We met Stojak coming towards us and he halted us. He fell to the ground and so did we. Lopez talked to him and said there was only two of us, but Stojak said he knew Lieutenant Beesley was in the crowd and there were three of us. Stojak called for Lopez to get up, and Lopez said just so you can shoot me, and Stojak said he wouldn't shoot. He said he didn't

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want us he wanted Lieutenant Beesley. The next time Lopez hollered Stojak shot at us. He called for Lieutenant Beesley to get up and called him a 90 day wonder and said get up so he could shoot him and called him names. We laid there on the ground and he shot a couple of bursts at us, and when it got dark we crawled on back. Lopez came in later." (R. 23)

Accused cursed Lieutenant Beesley and kept up the firing for about fifteen minutes. The men did not return his fire because the Lieutenant told them not to shoot. By that time it had gotten too dark to see well. The firing and shouting ceased and the Lieutenant and the two men returned to their gun squad (R. 18,23).

Lieutenant Beesley testified that all the men of the one squad he observed at the time had to arm themselves, get in the gun pit and watch out for accused, and that "with all the men in the gun pit watching for this one man, it would be rather hard for them to observe and keep watch for enemy aircraft" (R. 19).

Captain Dillard heard of the disturbance and went to investigate (R. 7). After passing the first gun position and going about seventy-five yards, accused came up to that position and a corporal disarmed him. The Captain returned and found the squad "apparently very nervous". He sent for Lieutenant Beesley who came presently, whereupon accused, who had been pacing back and forth, mumbling and cursing, jumped down into the pit and "grabbed a hand grenade". The Captain "had to tell him about six times before he put it back" (R. 8). When he picked it up, he alarmed everyone and several men fell to the ground (R. 8,13). At this time night had fallen but there was sufficient moonlight to see "fairly well in your immediate vicinity, ** you could recognize individuals at fifty yards" (R. 12).

Captain Dillard returned accused to the battery area and put him under guard. There accused told the Captain that he was "really a handy man with a tommy gun" and if the Captain would give him a gun, "they would soon find out who was boss around here" (R. 9,13,14). He told the Captain, "if he had known that he was going to be court-martialed instead of being transferred out that he would still be out there and would not have turned his gun in. He said you have the upper hand now but if we both had a gun we would see who was boss" (R. 30).

An enlisted man of the battery testified that he saw accused about six o'clock on the evening of 21 February and at that time "he was plenty drunk" that he had been drinking "some kind of medical alcohol diluted with water, lemon extract I think". "They" (inferentially, accused and a Private O'Brien, R. 14,29) had a quart bottle but the witness did not know how much accused had to drink (R. 37). Captain

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Dillard could tell by his talk that accused had been drinking something and "was under the influence of some sort of beverage that would tend toward intoxication". When accused jumped in the gun pit, he had no trouble with "his stability" and going back to the battery area over "pretty rough ground", accused had no more trouble walking than did the Captain (R. 9,10,13). Lieutenant Beesley testified that accused was not drunk (R. 21).

For the defense, Second Lieutenant Daryl P. McCroft, one of the battery officers, testified that when the battery was alerted, "I don't believe that the enemy was within twenty miles of us. I think that since we had been on the alert we hadn't seen an enemy plane. *** So far as facing the enemy, except for prisoners, we haven't seen a German". He had stayed with accused's squad for a week or ten days and found him an excellent soldier (R. 31).

Sergeant Edward Denny, Headquarters Battery, 106th Coast Artillery Separate Battalion (Anti-Aircraft) had known and had opportunities to observe accused since 24 February when accused was "turned over" to him. He testified he had worked accused "all day long lots of days and he has been willing and he has proved to me that he can be trusted". He would say accused is an excellent soldier (R. 36).

Accused did not testify nor make an unsworn statement.

4. It thus appears from the uncontradicted evidence that at the place and time alleged, accused insubordinately and disrespectfully said to Captain Dillard, his superior officer, "Give me a gun and we'll see who is boss around here", or words to that effect; that maliciously and without provocation, he fired a Thompson sub-machine gun repeatedly at Lieutenant Beesley, also his superior officer, at a time when the Lieutenant was undertaking to repair a telephone communications line which accused had wantonly cut; that he upset and distracted the members of his platoon by his swaggering, threatening conduct to the extent that some of them were obliged to take cover and protect themselves from accused instead of keeping a lookout for enemy aviation. This reprehensible misconduct occurred at a time when the enemy was advancing toward the ammunition dump which accused and his organization were charged with protecting. The situation was crucial and called for a maximum of coordinated, disciplined effort. By precipitating confusion and distraction among the personnel of his platoon, accused gravely endangered the safety of his comrades and the vast stores of ammunition which it was his duty to guard. The court properly found him guilty of all Charges and Specifications.

5. Specification, Charge II, alleges that at a certain place and time accused shot at his superior officer, who was then in the execution of his office, with a sub-machine gun. It is obvious that the language

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thus employed was intended to set forth an offense within that general class of cases which condemn the offering of violence toward a superior officer. But it is defective by reason of its failure to follow the significant language of that article or to employ words which would exclusively import wrongfulness. However, it is the opinion of the Board of Review that the record justifies the conclusion that the accused could not have been misled by these defects nor that his substantial rights were injuriously affected thereby (Article of War 37; MCM, 1928, par. 87b).

6. Confinement in a penitentiary is not authorized in this case for the reason that no offense of which accused was found guilty is recognized as an offense of a civil nature and so punishable by confinement for more than one year by any statute of the United States of general application within the continental United States or by the law of the District of Columbia. See Article of War 42.

7. Major H. H. Arnold, Jr., Executive Officer of 106th Separate Coast Artillery Battalion (Anti-Aircraft) wrote the reviewing authority a letter, dated 1 May 1943, which is appended to the record of trial, recommending clemency. He refers to the record of trial in the court-martial proceedings in which Private William M. O'Brien was the accused and which he said grew out of the same circumstances as obtained in this case. He said O'Brien was acquitted and that in his opinion the sentence adjudged against accused is unduly severe. He stated that if the sentence of accused were "sufficiently reduced, it is the desire of this command that he be returned to our custody to serve the remainder of his sentence".

8. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty (20) years in a place other than a penitentiary, Federal reformatory or correctional institution.

 Paul D. Poling, Judge Advocate.
C. T. Fife, Judge Advocate.
Soren Simpson, Judge Advocate.

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NATO 240

1st Ind.

Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army,
26 July 1943.

TO: Commanding General, Headquarters II Corps, APO 302, U. S. Army.

1. In the case of Private First Class Charles (M.I) Stojak (36031134), 690th Coast Artillery Separate Battery (AA) (AW), 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 sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty years in a place other than a penitentiary, Federal correctional institution or reformatory, 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 sentence.

2. After publication of the general court-martial order in this case five 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 240).

Hubert D. Hoover

26250-4/250
HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

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

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APO 534, U. S. Army,
9 July 1943.

Board of Review

NATO 242

U N I T E D S T A T E S)	HEADQUARTERS II CORPS
v.)	Trial by G.C.M., convened at APO 302, 15 April 1943.
Private ALFORD RILEY, JR. (33141509), Company D, 28th Quartermaster Regiment (Truck).)	Dishonorable discharge, total forfeitures and confinement at hard labor for ten (10) years. Federal Reformatory, Chillicothe, Ohio, designated as place of confinement.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Alford Riley, Jr., Company D, 28th Quartermaster Regiment (Truck), did, at Tebessa, Algeria, on or about 28 March 1943, with malice aforethought, willfully, deliberately, feloniously, and unlawfully kill one Private Boyd W. Rose, 1800562, Company E, 26th Infantry Regiment, a human being, by shooting him with a pistol.

He pleaded not guilty to both the Charge and the Specification. He was found not guilty of the Charge but guilty of violation of Article of War 93. Of the Specification he was found guilty, except the words "with malice aforethought" and "deliberately", of the excepted words not guilty. No evidence of previous convictions was submitted. He

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was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten (10) years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The facts and circumstances surrounding the alleged crime were elicited by the prosecution through a signed voluntary statement of accused, which was properly offered and received in evidence without objection by the defense. This statement shows that on the night of 28 March 1943, accused, a private in Company D, 28th Quartermaster Regiment, went into Tebessa with Private Grant Compton of the same organization. They had been drinking quite heavily since 3 o'clock in the afternoon. While drinking they met Private First Class Boyd W. Rose, Company E, 26th Infantry Regiment, and offered him a drink which he accepted. After drinking 3 bottles of wine in the street, they went into the French Garrison at 7:30 P.M. There accused had 2 more drinks while Compton and Rose drank heavily. They talked and sang. At the end of an hour Compton left and a half hour later accused and deceased left; their host, Sergeant Henri Julian, accompanying them a few steps beyond the gate where they shook hands, said good night and departed. As they were walking along together an argument started between accused and deceased over the relative merits of Texas, where deceased lived, and North Carolina, the home of accused. Accused told deceased he "wouldn't care if United States declared war on Texas". Then they spoke of fighting. Deceased turned around, "as if he were going to fight and reached in his pocket for something". Accused pulled a gun and shot him three times. In his statement, accused asserted he did the shooting "unintentionally, I was only trying to scare him" (Pros. Exhibit B).

The foregoing facts were amply set forth in a dying declaration made by deceased under such circumstances as to justify its admission in evidence. Private Rose identified accused from among fourteen soldiers who were brought before him and stated positively that he was the one who shot him three times while he was walking the streets of Tebessa (R. 6). He died at 2235 hours 29 March 1943.

Evidence as to the cause of death was elicited from the attending nurse and Captain William F. Kuhn of the Medical Corps. Maryvonne Marty, a nurse by profession, was on duty at the French hospital in Tebessa where deceased was admitted on the evening of 28 March 1943 with wounds in the stomach, chest and right hand. She testified that she was present when he was operated upon that night (R. 5,6,8). His condition was very bad and "we knew he was going to die" (R. 7,8). She assisted in the operation which was performed "in the stomach".

Captain Kuhn took Rose from the French hospital to the 77th Evacuation Hospital on 29 March 1943 (R. 14). He was in a very bad condition at that time, quite ill with a temperature of 103, rapid pulse, short of breath, abdomen distended, morale low. Captain Kuhn

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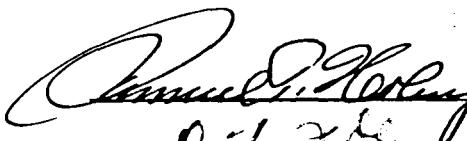
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testified that the "cause of his death was due to penetrating gunshot wounds of the abdomen and chest" (R. 16).

The corpus delicti was established by Corporal Paul C. Thompson, who took a statement from the deceased, witnessed his signature on the evening of 29 March 1943, and who saw his dead body at the morgue the following day (R. 12).

4. The court by exceptions found accused guilty of manslaughter under Article of War 93. Manslaughter is a lesser offense which may be included in a particular charge of murder (MCM, 1928, par. 148 (a)). It was properly within the purview of the court to find accused guilty of the lesser included offense. The sentence is the maximum that could be imposed upon the findings. The evidence supports the findings and the sentence. The court was legally constituted and had jurisdiction of the accused and the offense. No error injuriously affecting the substantial rights of the accused was committed during the trial. The accused is 22 years of age and has served in the Army since 16 February 1942.

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


Paul J. Holmgren, Judge Advocate.
O. T. F. de L., Judge Advocate.
Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army,
13 July 1943.

Board of Review

NATO 252

UNITED STATES

v.

Private RICHARD F. DICKERSON
(35427698) and Private TERRY
O MORTON (35428954), both
of 800th Quartermaster Platoon
(Truck) (Aviation) (Separate).

) HEADQUARTERS NORTHEAST AFRICAN AIR FORCES

) Trial by C.C.M., convened at Chateau-
d'Am-du-Rhumel, 26 February 1943
(7 April 1943).
) As to Dickerson: Dishonorable dis-
charge, total forfeitures and confine-
ment at hard labor for six (6) months.
) Disciplinary Training Center No. 1
designated as place of confinement.
) As to Morton: Confinement at hard
labor for six (6) months and forfeiture
of \$25.33 per month for like period.
) The Guard House at Maison Blanche,
Algeria, designated as place of confine-
ment.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

The record of trial in the cases of the soldiers named above, having been examined in the Branch Office of The Judge Advocate General and there found legally insufficient to support the findings and the sentence, has been examined by the Board of Review. The Board of Review holds the record of trial legally sufficient to support the sentence.

SAMUEL T. HOLMGREN, Judge Advocate,

G. Z. IDE, Judge Advocate,

GORDON SIMPSON, Judge Advocate.

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NATO 252

MEMORANDUM.

SUBJECT: Record of trial in the case of Private Terry O. Morton and Private Richard F. Dickerson, both of 800th Quartermaster Platoon (Truck) (Aviation) (Separate), APO 523.

1. Accused Morton was found guilty of suffering the wrongful disposition of twelve five-gallon cans of gasoline, in violation of the 83rd Article of War and the accused Dickerson of the unlawful sale of the same gasoline, in violation of the 84th Article of War.

The questions presented are whether the gasoline was (Article of War 83) military property belonging to the United States and (Article of War 84) issued for use in the military service.

2. The evidence, so far as requires consideration, shows that on 20 February 1943, a convoy of six army trucks, with twelve men, was engaged in transporting gasoline from Chateaudun-du-Rhumel to the Tébessa Airport (R. 6,11,14). Stationed at this place was the 800th Quartermaster Platoon (Truck) (Aviation) (Separate), of which the accused were members. On one of these trucks, Morton was the driver and Dickerson the assistant (R. 14). They had been in such convoys before (R. 15).

Sergeant Clifford J. Mitchell, 800th Quartermaster Platoon, who was in charge of the convoy testified,

"We were here on the convoy. We had a load of gas and we were to report to the Colonel at Tébessa." (R. 6)

He further testified that upon arriving at the airport, which is about two miles from the city, the accused were found missing. Their truck, when last seen by him, was parked in a street in Tébessa (R. 12,14).

It was brought out by the testimony of First Lieutenant Donald D. Hickman, XIIth Air Force Service Command, that, on February 26, 1943, while in Batna on certain investigative work, he was asked by the French police for assistance in another matter. He testified that as a result of this contact, he found Dickerson and another soldier, named Spikes, and took them to a place where the French police had two civilians, Cohen and Levy, under arrest (R. 10). He further testified that,

"Through our interpreter and in the presence of the accused Dickerson, this story was related to me: That Dickerson, in company with some other American soldier on the day previous, sold some twelve 5-gallon cans of gasoline to the civilian Cohen through this other civilian whose name I believe was Levy ... I

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questioned Dickerson as to his participation in this offense. At first he denied he had anything to do with it but after being identified by both civilians as being the one who sold the gasoline he admitted he had sold the gasoline for the sum of 2,000 francs. The other accused, Morton, was not in the room at that time ... I did not find him when I went out that morning. But as I ordered both the negro Spikes and Dickerson into arrest, the defendant Morton came to the station and I also inquired of him as to his presence in Batna and what he had, if anything, to do with this sale of gasoline. He said he didn't know anything about it" (R. 10).

When witness found Dickerson, the latter was on the driver's seat of a 2½-ton Government truck parked alongside a hotel. Morton was not around (R. 10,11). Witness could not recall definitely whether Dickerson told him from what place the truck had been driven; "I did know they gave me the impression the truck had come from Chateaudun where their organization was located". They said, "they had been down on some missions between there and Tébessa", and Morton admitted, "he was along with the truck" (R. 11).

Andrew Cohen, a witness for the prosecution, testified that on February 25th he purchased some gasoline from Dickerson, for which he paid him 2,000 francs. The gasoline was in twelve small containers, which were indicated by witness to be of a size, "approximately 15 inches high and about a foot square". The gasoline was rose-colored. (R. 12)

Upon being advised of their rights, Morton chose to remain silent and Dickerson to be sworn as a witness (R. 16).

Dickerson, upon being asked what took place at Batna, testified that:

"There was a boy by the name of Levy and he directed us to where to sell gasoline. It was the first time Morton and I were in Batna. We were parked on the side of the street. We met a Corp. Coons and he asked Morton and I in for a drink in a restaurant there. We went in and had a drink. The decision came up then about selling gasoline. Levy was to direct us where to sell the gasoline and when he did we went around and took it in to Andre Cohen. We took it in there and Morton didn't go in with me. Levy went in and sold Andre Cohen the gasoline. I don't remember how much it was. But he said it was 2,000 francs. After we sold the gasoline Morton and I both spent the money at a

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restaurant ... we ate there and stayed there two or three nights ... While we were there, I think it was on the 26th, Lt. Hickman came ... I parked by the restaurant and Morton and Coons and the two colored boys were in the restaurant. When I parked there Lieutenant Hickman came and told me he would like to have a word with me and he took me to the police headquarters. He questioned me about selling the gasoline. I told him I did and told him Morton didn't have anything to do with it ... When he (Lt. Hickman) came back he took ... the twelve five gallon cans of gas to Tebease ... After hearing that Morton had made a statement I figured that taking it on myself like it started wasn't fair and the best thing to do would be to tell the whole truth about it. When I came back to camp I first saw him and made that statement to him and told Lieutenant Dobberpfuhl everything that happened on the convoy and what happened at Batna between Spikes, Coons and I". (R. 16,17)

He further testified that he had told Lieutenant Hickman that "Morton, Coons and the two colored boys didn't have anything to do about it. This wasn't right, after I heard about Morton's statement I figured the best I could do was to tell the truth" (R. 17). He also testified that he and Morton were together all the time after they left Tebease for Batna, except when Lieutenant Hickman "took him to the room" (R. 17).

The record also discloses the following testimony (R. 17,18):

"Q: Did you and the other defendant, Morton, agree between yourselves to sell this gasoline.

A: Yes, sir.

Q: Which one of you received the money?

A: I did, sir.

Q: Did you keep all the money yourself?

A: No, sir.

Q: What did you do with it?

A: I gave Morton part of the money besides we gave Levy part of it. We cut it three ways.

Q: Where was Morton at the time that you took the gasoline to Ghren?

A: In the truck. He didn't get out.

Q: In other words he had you to drive the truck to where Coen was located and you sold the gasoline yourself and Morton stayed in the truck?

A: Yes, sir.

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- Q: Levy went in and had a conversation with Cohen to buy the gasoline. You split the money three ways?
A: Yes, sir.

It was also brought out that the truck, when it left the base at Chateaudun for the airfield at Tebessa, had a full load of from 200 to 300 cans. "We unloaded the load at Tebessa ... the place that Morton and I was supposed to have got lost in the convoy" (R. 18). And, (R. 19):

- *Q: You had left these 12 cans of gasoline on the truck?
A: Yes, sir.

- Q: Were you supposed to unload the truck?
A: They had a detail.

- Q: How were the 12 cans left on the truck?
A: They were extra cans in case we ran out.

- ...
Q: When this arrangement for the sale of gasoline was made in this restaurant between yourself and Levy, was Morton a part of the arrangement?
A: Yes, sir.

- Q: The two of you discussed it and agreed to sell the gasoline?
A: There were three of us -- Morton, Corp. Coons and myself.

- Q: The three of you agreed to sell the gasoline to Levy?
A: Yes, sir.

3. Although there may be no direct evidence that the property sold and suffered to be disposed of, was military property of the United States and issued for use in the military service, still circumstantial evidence such as evidence that the property involved was of a type and kind issued for use in, or furnished and intended for the military service, might warrant the court in inferring that it was such military property and was so issued (MCM, 1928, p. 153).

Such proof, in the opinion of the Board of Review, is sufficiently established and in a manner which reasonably excludes any hypothesis of a different ownership. While gasoline possesses optically no peculiar characteristics evidential of ownership, it, like any other property, may be established as government owned, by circumstances indicative of its origin, possession and use. In this determination absolute proof is not essential. It is only necessary that a conviction be founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of the accused's guilt (Bunting v. State, 15 Tex. App. 490, cited in CM 197408 (McCracken) and CM 206522 (Young)).

It appears from uncontroverted testimony that the gasoline in question was a part of a quantity which, on February 20, 1943, was loaded

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on army trucks at a quartermaster truck-aviation unit stationed at Chateaudun-du-Thoumel and from thence transported to an airfield located near the city of Tebessa. The accused were members of that quartermaster organization. The containers in which the gasoline was transported were obviously of a commonly known type and size and such as to indicate, if not identify, them as government owned. Competent testimony establishes the fact that of the load of 200 to 300 of such cans of gasoline removed from Chateaudun on their truck, the accused unloaded at Tebessa all except the twelve cans in question. When asked how it happened that these twelve cans were left on the truck, Dickerson answered by saying, "They were extra cans in case we ran out". (R. 18)

These circumstances reasonably justify the inference that the gasoline was military property of the United States and issued for use in the military service within the meaning of these articles of war. Moreover, there is not the slightest intimation in the record that this particular truck movement was for any purpose other than to supply our air forces with gasoline; issued for use in the military service at an airfield where operations were being conducted. The particular kind of quartermaster organization (truck-aviation), from which the gasoline originated and by which it was transported, compels this conclusion. The record certainly fails to suggest even a possibility that the gasoline, at least before its delivery at that airfield, could have been owned by, or for the exclusive use of a government or authority other than that of the United States.

The response of Dickerson that the twelve cans which were not unloaded from the truck "were extra cans in case we ran out", is also consistently significant. It reasonably eliminates any hypothesis of private ownership and at the same time identifies the particular gasoline with a government owned truck. The source of these twelve cans is thus definitely fixed and the wrongful disposition thereof could have no other result than to create a shortage in the stock from which they were taken. It is significant moreover that from Batna, Lieutenant Hickman took the twelve cans of gasoline to Tebessa.

The circumstances in this case differ materially from those in CM 207591 (Naah et al); Dig. Op. JAG, 1912-1940, sec. 452 (10). In that case no shortage of government gasoline was proved and the circumstances disclosed by the record served only as a conjectural basis for holding that the gasoline was taken from government trucks. The availability of other sources was too strong to justify a conviction.

It must be noted moreover that in North Africa the source of gasoline supply is markedly restricted and that the privilege of privately owning and possessing gasoline driven vehicles by enlisted personnel on duty here is virtually nonexistent. These well known conditions justify the exclusion of any theory that the accused might have acquired the gasoline from a source other than government owned stock.

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Because of the foregoing, the Board is convinced that the record presents no reasonable hypothesis except the one of guilt and that it would be unreasonable to indulge in a hypothesis that this gasoline could be owned either privately or by some Government with which we are allied. Judicial determination of evidence does not involve relaxation in purely speculative excursions, especially where the record furnishes no suggestive basis therefor. It has been aptly stated that "A theory of innocence must be rational and must find its support in facts. We are not required to adopt an unreasonable theory or one not fairly founded upon evidence. We are not required to give to circumstances a strained or artificial construction in determining whether they are consistent with innocence" (State v. Yancey, 47 Idaho, 1, 272, p. 495; cited in Wharton's Criminal Evidence, sec. 922, p. 1609).

Samuel T. Holmgren, Judge Advocate.

O.Z. Ide, Judge Advocate.

Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army.
12 July 1943.

Board of Review

NATO 270

U N I T E D S T A T E S)	HEADQUARTERS 2ND ARMORED DIVISION
v.)	Trial by G.C.M., convened at
Private WILLIAM J. LUDLUM)	Headquarters 2d Armored Division,
(14045259), Company A,)	APO 252, 21 June 1943.
67th Armored Regiment.)	Dishonorable discharge, total
)	forfeitures and confinement at
)	hard labor for ten (10) years.
)	Disciplinary Training Center
)	Number 1 designated as place of
)	confinement.

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 has been examined in the office of the Assistant Judge Advocate General, North African Theater of Operations, and there found legally insufficient to support the findings in part, but legally sufficient to support the sentence. The Board of Review has now examined the record and submits this, its opinion, to the Assistant Judge Advocate General, North African Theater of Operations.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private (then Corporal) William J. Ludlum, Company "A", 67th Armored Regiment, did at his organization bivouac area near Rabat, French Morocco, on or about March 6, 1943, feloniously embezzle by fraudulently converting to his own use money, of the value of \$500.00, the property of Staff Sergeant Harold R. Price, Company "A", 67th Armored Regiment, entrusted

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to him for deposit in soldier's deposits of Staff Sergeant Harold R. Price, by said Staff Sergeant Harold R. Price.

Specification 2: In that Private (then Corporal) William J. Ludlum, Company "A", 67th Armored Regiment, did at his organization bivouac area near Rabat, French Morocco, on or about March 6, 1943, feloniously embezzle by fraudulently converting to his own use money, of the value of \$230.00, the property of Tech 5th Grade Henry W. Kozdron, Company "A", 67th Armored Regiment, entrusted to him for deposit, in soldier's deposits of Tech 5th Grade Henry W. Kozdron, by said Tech. 5th Grade Henry W. Kozdron.

Specification 3: In that Private (then Corporal) William J. Ludlum, Company "A", 67th Armored Regiment, did at his organization bivouac area near Rabat, French Morocco, on or about March 6, 1943, feloniously embezzle by fraudulently converting to his own use money, of the value of \$150.00, the property of Private lcl. Lloyd Van Santen, in Company "A", 67th Armored Regiment, entrusted to him for deposit in soldier's deposits of Private lcl. Lloyd Van Santen, by said Pfc. Lloyd Van Santen.

Specification 4: In that Private (then Corporal) William J. Ludlum, Company "A", 67th Armored Regiment, did at the station of his organization near Rabat, French Morocco, on or about March 10, 1943, with intent to defraud, falsely make in its entirety a certain receipt in the following words and figures, to wit:

SOLDIERS' DEPOSITS

APO 252, % Postmaster, New York, N.Y.

March 10, 1943

THE CHIEF OF FINANCE, WASHINGTON, D.C.

The following deposits have this day been made with H. W. Uhrbrock, Lt. Col. FD, Finance Officer, U. S. Army.

Price, Harold R. 6897524 St.Sgt. Co. "A", 67th Ard Regt \$500.00

Total \$500.00

P. J. EDWARDSEN,
2nd Lt., 67th Armored Regiment
Asst., Personnel Officer.

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which said receipt was a writing of a public nature, which might operate to the prejudice of another.

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 and to become due, and confinement at hard labor for ten (10) years. The reviewing authority approved the sentence and directed its execution but suspended execution of the dishonorable discharge until the soldier's release from confinement and designated Disciplinary Training Center Number 1, North African Theater of Operations, as the place of confinement. The proceedings were published in General Court-Martials Order Number 50, Headquarters, 2d Armored Division, 24 June 1943.

3. The evidence shows that on or about 6 March 1943, at the bivouac area of Company A, 67th Armored Regiment, near Rabat, French Morocco, accused, then a corporal and the company clerk of his organization, was entrusted with five hundred dollars by Staff Sergeant Harold R. Price, two hundred thirty dollars by Technician Fifth Grade Henry W. Kozdron and one hundred fifty dollars by Private First Class Lloyd Van Saften, which accused was to deliver to the Finance Department to be credited to the soldiers' deposit accounts of these men (R. 6,7,8,9,10,11).

Accused gave Price a receipt for the money and a few days later, an instrument which Price described as a "deposit slip". At the same time, he told Price credit for the money had been entered in Price's deposit book and he did not have to keep the "deposit slip", so Price "threw it in a sump hole" where he retrieved the unburned portion of it later. This partially burned paper was identified as Exhibit I and introduced in evidence (R. 8). It reads:

"The Chief of Finance, Washington, D.C.

The following deposits have this day been made^{hrb..}
Finance Officer, U. S. Army.

NAME (Enter surname first)	SERIAL NO.	RANK	ORGANIZATION	AMOUNT
Price, Harold R.	6897524	S/Sgt.	Co. A, 67th Armd Regt.	\$500.00

'EXTRACT OF DEPOSIT SLIP' .

It was stipulated "that if Lieutenant P. J. Edwardsen, formerly Personnel Adjutant of the 67th Armored Regiment, were here and sworn as

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a witness, he would testify that he did not sign, nor did he authorize anyone to sign, the receipt or letter of transmittal now before the court as Exhibit "I" for the Prosecution" (R. 11).

Captain Harry W. Naylor, Regimental Personnel Officer, 67th Armored Regiment, testified that if soldiers of the regiment had deposited money with the Finance Department during the month of March, 1943, he would have a record of the transactions and he had made a search and found no record of any deposits having been made during that month to the credit of Price, Kozdron, or Van Santen. He testified further that Lieutenant Edwardsen, the Assistant Personnel Officer, was receiving money for deposits during the month of March (R. 12).

Accused, after having been admonished of his rights, made a voluntary statement (R. 13, Exhibit 2), which was introduced in evidence. He admitted that he took the money from Price, Kozdron and Van Santen for the purpose of depositing it with the Finance Department but failed to make the deposits because he gambled the money away. He admitted writing the "deposit slip" (Exhibit 1), and said he unauthorizedly signed Lieutenant Peter J. Edwardsen's name to it (Exhibit 2).

4. The evidence thus shows beyond a reasonable doubt that at the place and time alleged, Price, Kozdron and Van Santen entrusted accused with their funds, in the amounts alleged, to be deposited to their accounts with the Finance Department and that accused breached his trust, converted the money to his own use and gambled it away. Bad faith and breach of trust characterized his misconduct and impute to him a fraudulent intent. He was guilty of embezzlement as charged (MCM, 1928, par. 149h; par. 451 (16) (17) (18) (19), 452 (3), Dig. Op. JAG, 1912-40).

The evidence is less satisfactory in establishing the guilt of accused to the charge of forgery as alleged in Specification 4 of the Charge. The instrument alleged to have been forged was partially burned and some of its language obliterated. Consequently, its text is incomplete. The legible portions are set out in a preceding paragraph. It is noted that Exhibit 1 introduced in evidence varies from the instrument alleged in the Specification in that the former does not include the words "with H. W. Uhrbrock, Lt. Col., FD" nor the name and official designation of the person signing the certificate. Without the omitted matter the exhibit is emasculated and meaningless. This omitted language might properly have been supplied by secondary evidence since a predicate for its introduction had been laid by showing the circumstances attending the mutilation of the document (26 C.J. 960, 961). But the missing portions cannot be supplied by conjecture or speculation. The only proof establishing the missing language was the admission by accused that he unauthorizedly signed the name of "Lieutenant Peter J. Edwardsen" to the certificate. There is a total absence of proof, secondary or otherwise, that the words "with H. W. Uhrbrock, Lt. Col., FD" were included in the text of the instrument as originally drawn or that "2nd Lt. 67th Armored Regiment, Asst. Personnel Officer" appeared beneath the signature of Lieutenant

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Edwardsen. Since these material portions of the instrument alleged to have been forged are not established by any evidence, it cannot be said that the writing was proven beyond a reasonable doubt to have been falsely made, as alleged. Absent this evidence, forgery is not proven (MCM, 1928, par. 149j).

But assuming the contents of the entire document, the authorship of accused and the falsity of the instrument were established by the proofs, not only must these elements be proven but it must also be shown "that such writing was of a nature which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice" (MCM, 1928, par. 149j). And where an instrument is so palpably and absolutely invalid that it can under no circumstances be proof in a legal procedure, then falsely to make it is no forgery (Wharton's Criminal Law, 12th Ed., sec. 903; 26 C.J. 906).

The instrument alleged to have been forged does not purport to impose any liability upon another nor to change his legal liability to his prejudice. If suit were brought by Price against either the United States or Colonel Uhrbrock for the five hundred dollars Price entrusted to accused, the unsworn, unauthenticated statement of Lieutenant Edwardsen addressed to The Chief of Finance that a deposit of five hundred dollars was made with Colonel Uhrbrock by Price, on 10 March 1943, would not be admissible in evidence. The instrument does not purport to be the copy of any book, record, paper or document in any of the executive departments, authenticated under the seal of the department and hence admissible in evidence under the applicable federal statute (Title 28, sec. 661, U.S.C.A.). It purports to amount to no more than the hearsay, ex parte statement and opinion of Lieutenant Edwardsen to the effect that the deposit had been made by Price with Colonel Uhrbrock. It would be wholly incompetent as evidence. Being a completely ineffectual and impotent writing, the false making of it cannot be a forgery.

Nor could it be argued that the instrument might be rendered effective to defraud when taken in connection with extrinsic facts not averred in the Specification. It is indispensable that any such facts be set out in the indictment and failure to allege them renders the indictment fatally defective (26 C.J., 943, 944). "Where an instrument is incomplete on its face, so that as it stands it cannot be the basis of any legal liability, then, to make it the technical subject of forgery, the indictment must aver such facts as will invest the instrument with legal force" (2 Wharton's Criminal Law, 12th Ed., sec. 948).

It is difficult to conceive facts which could supplement the questioned document so as to make it effective to defraud. But even if such facts did exist, they could not be proven unless they had been pleaded.

It is concluded that the findings of guilty of forgery cannot be sustained.

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5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally not sufficient to support the findings of guilty of Specification 4 of the Charge, but is legally sufficient to support all other findings of guilty, in violation of Article of War 93, and legally sufficient to support the sentence.

Ronald D. Thompson, Judge Advocate.
O. J. ..., Judge Advocate.
Donald Simpson, Judge Advocate.

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KATO 270

1st Ind.

Branch Office of The Judge Advocate General, NATOUS A, APO 534, U. S. Army,
17 July 1943.

TO: Commanding General, NATOUS A, APO 534, U. S. Army.

1. Herewith transmitted to you are the record of trial and the opinion of the Board of Review based upon its examination thereof, in the case of Private William J. Ludlum (14045259), Company A, 67th Armored Regiment, who was tried by General Court-Martial convened at Headquarters, 2d Armored Division, APO 252, 21 June 1943, found guilty under three separate specifications of embezzlement aggregating eight hundred eighty dollars (\$880.00), and of forgery of an alleged receipt, all in violation of Article of War 93, and sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten (10) years. The reviewing authority approved the sentence, directed its execution but suspended the dishonorable discharge, and designated the Disciplinary Training Center Number 1, North Africa, as the place of confinement. The sentence was published in General Court-Martial Order No. 50, Headquarters, 2d Armored Division, 24 June 1943.

2. Specification 4 of the Charge sets out a writing which accused is alleged to have forged. Not only does the evidence fail to prove up this instrument, but if it had been properly proven, on its face the writing is palpably and absolutely ineffective as a means to defraud and no extraneous facts are pleaded or proven which would give it any different effect. Accordingly, forgery was not established.

3. The record of trial, after preliminary examination in this office, was re-examined by the Board of Review as provided by Article of War 50 $\frac{1}{2}$. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the finding of guilty of Specification 4 of the Charge. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the finding of guilty of Specification 4 of the Charge be disapproved.

4. I enclose herewith a form of action designed to carry this recommendation into effect should it meet with your approval.

Adam Richmond
ADAM RICHMOND
Brigadier General, USA
Assistant Judge Advocate General

3 Inclosures --

- Incl. 1 - Record of Trial
- Incl. 2 - Opinion of Board of Review
- Incl. 3 - Form of Action

(Finding of guilty of Specification 4 of the Charge disapproved.
GCMO 13, NATO, 25 Jul 1943)

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

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APO 534, U. S. Army,
12 July 1943.

Board of Review

NATO 288

U N I T E D S T A T E S)	HEADQUARTERS EASTERN BASE SECTION
v.)	Trial by G.C.M., convened at
Private JAMES R. LILSON)	Headquarters, Eastern Base
(34322107), Company D, 62nd)	Section, APO 763, 14 June 1943.
Quartermaster (Ldry) Battalion.)	Confinement at hard labor for
)	six (6) months, forfeiture of
)	\$40.00 per month for the like
)	period. Disciplinary Training
)	Center Number 1 designated as
)	place of confinement.

OPINION OF 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 the sentence, has been examined by the Board of Review, who submits this, its opinion, to the Assistant Judge Advocate General with the North African Theater of Operations, pursuant to Article of War 50 $\frac{1}{2}$.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 94th Article of War.

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Specification 1: In that Private Linson did at Company "D" 62nd QM Ldry Bn, located on the outskirts of Matuer, Tunisia on or about 1500 hrs 25 May, 1943, wrongfully appropriate to his own use a Federal tractor truck of the value of about \$5,000.00, property, of the United States furnished and intended for military service thereof.

CHARGE II: Violation of the 63rd Article of War.

Specification 1: In that Pvt. Linson did at Matuer, Tunisia on or about 1515 hrs 25, May 1943, behave himself with disrespect toward 2nd Lt. Bert W. Borem, his superior Officer, by saying to him, "go fuck yourself", or words to that effect.

ADDITIONAL CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Linson, having been restricted to the limits of Co. "D", 62nd QM (Ldry) Bn., near Mateur, Tunisia, on or about 1600 hours May 30 1943, did break said restriction by going to Tunis, Tunisia.

Specification 2: In that Private Linson having been restricted to the limits of Company "D" 62nd QM (Ldry) BN., near Mateur, on or about 1700 hrs. 6 June 1943, did break said restriction by going out of the area on a motorcycle.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and the Additional Charge and their Specifications. He was found not guilty of Charge I and its Specification; and guilty of Charge II and its Specification; he was found not guilty of Specification 1 of the Additional Charge; guilty of Specification 2 of the Additional Charge and guilty of the Charge. He was sentenced to six months' confinement at hard labor and to forfeit \$40.00 per month for a like period. The General Court Martial Order, promulgated 25 June 1943, added dishonorable discharge to the sentence.

3. The court was appointed by virtue of Paragraph 9, Special Orders Number 80, Headquarters East Base Section, dated 24 May 1943. Captain Rufus B. Burrus was designated as law member. On 12 June 1943, Captain Rufus B. Burrus was relieved as law member of the court and Major Walter B. Smith was detailed as law member in his stead by Paragraph 17, Special Order 99, Headquarters, Eastern Base Section.

The court met pursuant to these orders on 14 June 1943, with Captain Rufus B. Burrus acting as law member and tried the accused. The record of trial contains the following explanation for this irregularity:

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(Special Order No. 99, dated 12 June, 1943, had not been distributed on this date resulting in Captain Rufus B. Burrus sitting as law member) (R. 2).

Memorandum from the examiner in the Branch Office of The Judge Advocate General, points out eight separate and distinct irregularities in the record of trial bearing upon the legal sufficiency of the record. The Board of Review deems it unnecessary to discuss any irregularity except the jurisdictional question of whether or not the court was legally constituted.

4. It appears from the orders appointing the court and the subsequent orders designating changes in the personnel of the court that on 12 June 1943 Captain Rufus B. Burrus was relieved as a member of the court. His presence on the court was therefore unauthorized, the court was illegally constituted, and the proceedings were null and void (C.M. 127173-1918; 132574-1919; 131672-1919), (365 (1), (6), (7), (8), (9) Dig. Op. JAG, 1912-1940).

The fact that accused did not object to the presence of the unauthorized member does not confer upon the illegally constituted court jurisdiction to try him (C. M. 152563-1922). The explanation of the unauthorized member's presence does not, in the opinion of the Board of Review, cure the irregularity.

5. For the foregoing reason, the Board of Review is of the opinion that the court was not properly constituted and that its proceedings are null and void.

Daniel E. Chapman, Judge Advocate.
O. J. S., Judge Advocate.
Bertram Simpson, Judge Advocate.

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NATO 288

1st Ind.

Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
16 July 1943.

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

1. Herewith transmitted to you are the record of trial and the opinion of the Board of Review based upon its examination thereof, in the case of Private James R. Linson (34322107), Company D, 62nd Quartermaster (Ldry) Battalion, who was tried by General Court-Martial convened at Headquarters, Eastern Base Section, APO 763, 14 June 1943, found guilty of disrespectful behavior, in violation of Article of War 63, and breach of restriction, in violation of Article of War 96 and sentenced to confinement at hard labor for six months and to forfeit \$40.00 per month for a like period. The reviewing authority approved the sentence, directed its execution and designated the Disciplinary Training Center Number 1 as the place of confinement. The sentence was published in General Court-Martial Order No. 12, purporting, though not stated, to be of Headquarters Eastern Base Section, 25 June 1943.

2. The record shows that among the personnel of the court who sat at the trial of the above accused was an officer, designated as law member, who had been relieved from duty therefrom. His presence resulted in an illegally constituted court.

3. The record of trial, after preliminary examination in this office, was re-examined by the Board of Review as provided by Article of War 50¹. The Board of Review is of the opinion that inasmuch as the court was not legally constituted, the proceedings in the case are null and void. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be vacated and the soldier restored to duty, and all rights, privileges and property of which he has been deprived by virtue of said sentence be restored.

4. I inclose herewith a form of action designed to carry this recommendation into effect should it meet with your approval.

Adam Richmond
ADAM RICHMOND
Brigadier General, USA
Assistant Judge Advocate General

3 Inclosures--

- Incl. 1 - Record of Trial
- Incl. 2 - Opinion of Board of Review
- Incl. 3 - Form of Action

(Findings and sentence vacated. GCMO 12, NATO, 25 Jul 1943)

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

Board of Review

APO 534, U. S. Army.
31 July 1943.

NATO 297

U N I T E D S T A T E S

v.)
Staff Sergeant LEWIS E. GIBSON)
(36292375), Company C; Private)
EARL (N.M.I) BARNES (33107299),)
Company C; Private MONROE L.)
WALTON (38179155). Company A;)
Private MARION V. BONDS (38164492),)
Company B; Private JAMES B. SCOTT)
(38164728), Company B, all of)
379th Port Battalion, Transportation)
Corps.

ATLANTIC BASE SECTION

Trial by G.C.M., convened at
Casablanca, French Morocco,
27 May 1943. Walton, Bonds
and Scott, not guilty.
Gibson and Barnes, dishonor-
able discharge, and confine-
ment for ten (10) 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 soldiers above named
has been examined by the Board of Review.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Staff Sergeant Lewis E. Gibson,
Company C; Private Earl (N.M.I) Barnes, Company C;
Private Monroe L. Walton, Company A; Private Marion
V. Bonds, Company B; and Private James B. Scott,
Company B, all of Three Hundred Seventy-Ninth Port
Battalion, Transportation Corps, acting jointly and

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in conjunction with each other, did, at Casablanca, French Morocco, on or about 17 April 1943, with intent to interfere with the morale of the Military Forces of the United States, wrongfully prepare and distribute a petition and caused to be procured approximately four hundred eight (408) signatories thereon from soldiers of said Companies A, B and C, members of the Military Forces of the United States, wherein disloyalty and insubordination were advocated against the lawful military authority of the United States, the afore-mentioned acts being in violation of Public Laws, June 28, 1940, chapter 439, Title I.

Each accused pleaded not guilty to the Charge and Specification. Walton, Bonds and Scott were found not guilty of the Charge and Specification. Gibson and Barnes were found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Gibson and Barnes were each sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten (10) years. The reviewing authority approved the sentence, 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. Before making his opening statement, and apparently to supply a background for the offenses committed by accused, the Trial Judge Advocate introduced in evidence, without objection, copies of two purported administrative reprimands dated 23 May 1943; one addressed to a Captain Christopher FitzSimmons III, and the other to a Captain Andre M. G. Bourgeois (R. 7,8). Captain FitzSimmons is stated therein to have used, in August 1942, the following language before his company: "the trouble is I trusted you black bastards, the man who stole the money knows who I am talking about" (R. 4), and Captain Bourgeois to have said, on or about 17 August 1943, upon a visit to the 379th Port Battalion Area: "Military Police had tried to arrest a drunken 'nigger'. When they tried to place him in the Jeep, a mob of disorderly 'niggers' threatened them with stones and knives". (Ex. 5)

Evidence of prosecution shows that on 17 April 1943, accused collaborated in the writing of a letter, alleged a petition, directed to the battalion commander (R. 11,12,13; Exhibits 6,7) and that they subsequently caused it to be signed by members of the companies of the 379th Port Battalion (R. 15; Ex. 8). It finally contained 408 signatures, including those of accused (R. 13,14,15; Ex. 8). It, with the signatures, was received in evidence without objection (R. 15; Ex. 8). In some of the instances testified to, the signers either did not see or read the alleged petition (R. 25,34,42,45,47,52,53). One was told by Gibson that it was "to demand an apology from the M.P." (R. 20,25); to another Gibson said, "I heard that an M.P. came out here and called us "a bunch of niggers"" (R. 29,30). This witness added that Gibson said "he was just trying to get some satisfaction for the insult to us, that is all" (R. 33). Prosecution pleaded surprise to the testimony of one witness who said Barnes did not also ask him to sign, and, without objection, a sworn statement of witness was introduced, which

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reads, "I was present in the company area on the night of April 17, 1943 and I heard Pvt Earl Barnes say, 'We are going to make the MP Capt. apologize to the Battalion'" (R. 35,37; Ex. 9). One testified that Gibson, while asking him to sign, did not advocate insubordination or disloyalty (R. 27). Private Barnes planned to send a copy of the letter back to "the States" to one of the colored newspapers (R. 109,110; Ex. 10).

The alleged petition, Exhibit 8, reads as follows:

"379TH PORT BATTALION, TRANSPORTATION CORPS
APO #668, c/o PM, N.Y., N.Y.

April 17, 1943

"TO - The Battalion Commander.

"Sir, it is becoming increasingly evident to the Enlisted Men, and undoubtedly to the unprejudiced officers of this Battalion Command that the fight for Freedom is not to be fought alone against the Axis Powers. The tyrannical principles that we have been told infest the peoples of the Axis Powers are evident in the thought and action of 'particular' Commissioned Officers of this Battalion and of the United States Army.

"Incidents occurring within and involving 'particular' Officers of this command must cause us to inevitably conclude that there does exist in those 'particular' Officers a type of primitive hate and prejudice that compares, or rather that is superlative to that of our professed enemies -- the peoples and rulers of Germany, Italy, and Japan. For the 'particular' Officers of this Command and the United States Army while professing the principles of Democracy, namely, the equality, the Rights of man -- they profess these principles -- they do not practice them or they indulge in gloved tyranny.

"There is first the incident -- irreconcilable to us -- involving the now Captain Christopher FitzSimmons III. We have not forgotten this unnecessary reference to the members of Company "B", his former Command, as being "Black Bastards" -- as being "Niggers". We can but bitterly remember the incident of Captain FitzSimmons III for when he was told and advised that we were soldiers -- American Soldiers, he reiterated his statement with enlarged effrontery, referring again to the men as being "Black Bastards" -- as being "Niggers" -- not as being American Soldiers. We thought then that perhaps we were not fighting for Freedom -- we thought perhaps we were only fighting for the enslavement of, or rather the continued enslavement of our people. We only thought then. We did not act -- for Captain FitzSimmons was

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only one Officer of the United States Army --- we should not allow him to obscure the ideals of Democracy contained in our Constitution -- as enunciated by our beloved President Franklin D. Roosevelt -- as reiterated by the leader of the British Empire -- Prime Winston Churchill -- as inclosed in the Atlantic Charter.

"Our belief in the "right" of the United States Government was not shaken. We, while not reconciling ourselves to the incident minimized its importance -- we continued to soldier thinking that there would be no other such incidents. There were none -- until we had been several days at sea -- then we were again subjected to prejudiced acts of Commissioned Officers of the Troop Transport Command. We were to be segregated. One part of the boat was to be reserved for the Colored Troops. We wondered about that. Was it that the forward part of the ship more likely to torpedoing? Was the front the front end to sink first? Could one jump off more easily forward than aft? It seemed not so, for reasonably the forward part of the ship afforded more opportunities for self-preservation. Could it be then that the Officers were neglecting the deeply ingrained law of self-preservation, to effect the even popular one of Racial Prejudice? We wondered about that, but we also acted -- we weren't segregated and we were finally allowed again to traverse the ship at will. We again shared the better view with the white Troops. We were not called "niggers". There were no fights. We felt that we were American Soldiers.

"We felt that we were mingling among white soldiers in whom there was inculcated, and living the Democratic principle. We forgot the lynchings -- we forgot that one of us had been burned in gasoline -- dragged through the streets of Missouri by an automobile. The number of lynchings for 1942 listed in the Negro Press, was momentarily forgotten. We preferred to be guided by the light of the Star of Love than to be stumbling and fallen in the morass of "hate and revenge". Our voyage had this value for us. It had not been long though, before we again come to know of the prejudice and hate instilled ineradicably in the hearts of the 'particular' Officers of this Command. Lieutenant John Bute, consistent with his policy of "hate and prejudice" of the members of his Command, abused and over-exercised his authority by unnecessarily drawing a pistol upon a member of his Command, receiving the approbation of Lieutenant Frank T. Higgins whose words were "kill the nigger" -- the Inspector General ordered a thorough investigation -- an investigation undoubtedly calculated to safeguard the rights of the Enlisted man -- to hamper the uncautioned passion of the 'particular' Commissioned Officers. As yet, the Enlisted Men of this Command have no evidence of anything concrete being done. His, the Inspector General's intention was not ill-advised. Weeks have not passed since Lieutenant Frank T.

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Higgins of Company "A", this Battalion, unnecessarily fired a rifle at one of our fellow enlisted men, at the same time using abusive language to that enlisted man. We find this time that it is Lieutenant Barkett, Commanding Officer of Company "A", this Battalion, voicing his approbation with the words, "you should have killed the nigger". We shall not further enumerate the many incidents that have recently occurred. The manner and attitude of our own Officers are for the moment forgotten.

"Our prime concern now is the conduct of the Military Captains, who this day April 17, 1943, with their insulting remarks and arrogant attitude bring to a climax the brewing storm of ill-treatment to which the men of this Command have been subjected. We cannot -- we will not reconcile ourselves to having been fooled through an unauthorized show-up -- or to Mr. George W. Williamson having been told through and by one of the Military Police Captains that he, the Captain, was looking for some "niggers". We will never learn to appreciate our having been treated as ordinary "Criminals". We will not accommodate ourselves to the first expression of the Military Police Captain, or to his reply to Mr. Williamson's protest. We are not used to being called "niggers" -- have not the slightest intention of becoming used to being called "niggers" -- we will do something about it.

"It is our demand -- not our request -- that the high ranking Officer of the 6TH PORT AREA and of this Battalion Command require of the insulting Military Police Captains their recantation and apology to the enlisted men in massed formation and to Mr. Williamson. It is necessary -- it is absolutely impérative that the infiltration of the Nazis principles be stopped. We demand to be respected as soldiers -- as men that our work on the docks be paid tribute to. Our morale is very low -- is a sad dream. The condition of the Negro at home and abroad -- the lynchings -- the poll tax -- the Jim Crowism are prominent in our consciousness -- they disease our daily thoughts. How can it be otherwise? Are we not experiencing the same here? Is not the arrogant attitude and the remarks of the Military Police Captain and other Commissioned Officers of this Battalion typical of the Nazis that are pictured to us in the newspapers -- on our radios?

"We are told to hate and kill the Nazis. What shall be the treatment of the Nazis-minded Military Police Captain and other Commissioned Officers? Are not they committing indirect acts of "Sabotage" -- even "espionage". Our job is to unload ships. Shall incidents of this kind continue to rob us of our spirit and energy -- shall not the tonnage lower -- is hate and prejudice to clog the stream of supplies to the fronts? It is our firm belief that the high ranking Officers of the 6TH PORT AREA and of this Battalion will not sit idly and by their passiveness, condone this treatment of the Enlisted Men of their Command. We believe that our Commanding Officers

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will remedy and not further allow anyone to, for any moment, further lower our morale, and therefore make possible our, until now restrained response. The starred ideals are obscured to our vision. We await the affirmation of the words of President Roosevelt and Winston Churchill -- the four Freedoms embodied in the Atlantic Charter. We await the realization of the words contained in the Preamble of the Constitution. We await -- but can not we also act?

"From the Enlisted Personnel of the
379th Port Battalion, whose names
are herewith attached."

4. For the defense, accused Gibson was sworn as a witness in his own behalf and admitted that he and Barnes wrote the petition (R. 79,81) and that he had procured signatures thereon from members of his company (R. 76,80,86). He denied that he obtained any signatures by falsely representing the petition as a receipt for clothing, or a statement of charges for lost clothing (R. 84,85,86). That the petition was on the table and "the men who had signed in the beginning did most of the getting of the other men to sign" (R. 89). That he did not intend to lower the morale of his comrades and in the procurement of the signatures he maintained the highest possible standard (R. 80,86). He "didn't think that the letter was going to receive such an interpretation as this. It didn't have that interpretation to me" (R. 80). He explained the words of the petition, "it is our demand, not our request" by saying, "we were concerned at the time with the right", but that they were not going to demand it (R. 82), not literally. As to the words "can not we also act?", he explained that the action referred to was the writing of the letter (R. 83). He said his interest was only to bring the matter to the attention of the battalion commander, "to relieve the condition, to make it known" (R. 89). Upon cross-examination, he stated that his judgment and opinion bore considerable weight among the enlisted men of his company (R. 80,81).

Barnes declined to testify or make an unsworn statement.

Character evidence was introduced to the effect that both Gibson and Barnes were hard workers and enjoyed excellent records in the company (R. 116,117,118,120,121). As to Gibson, a witness testified that he did not remember "anyone having said anything about his being insubordinate" (R. 119); that Barnes was one "in whom we had confidence, in whom we trusted" (R. 120). Rebuttal witnesses for the prosecution testified that Gibson had on occasion been discourteous to officers of the Battalion (R. 140,141) and that Barnes had been a trouble maker in his company and had been reduced from corporal to private because of insubordinate conduct and inefficiency (R. 126,127,128,139), and that he was not amenable to strict discipline (R. 124).

5. Article of War 96 condemns disorders and neglects to the prejudice of good order and military discipline which are not made punishable.

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able by any of the preceding articles. The language is understood to mean any act or omission which may have a direct and palpable effect on good order and military discipline (MCM, 1928, par. 152a; Winthrop, reprint, 720-726). The Specification charges that the accused did, "with intent to interfere with the morale of the Military Forces of the United States, wrongfully prepare and distribute a petition and caused to be procured ... signatories thereon from soldiers ... wherein disloyalty and insubordination were advocated against the lawful military authority of the United States ... being in violation of Public Laws, June 28, 1940, chapter 439, Title II". That accused acted jointly in pursuance of a common design, is clearly established by the evidence and the only question requiring consideration is the legal sufficiency of the record of trial.

The defense disavowed any intention of interfering with morale and, in effect, disputed the charge that the writing advocated disloyalty and insubordination. The language employed in the writing (Ex. 8) was a matter for interpretation by the court, which is generally a question of law (16 Corpus Juris 923). "The meaning is to be sought in the words primarily, and, in cases of ambiguity or doubt, in the context, the subject matter and the reason and purpose of the instrument" (People v. New York Cent. R. Co., 24 N.Y. 485, 488 (12 Corpus Juris 1501)). It was therefore appropriate for the court, representing the functions of judge as well as of a jury (Winthrop, reprint, p. 373) to decide whether or not the contents of the alleged petition and the circumstances attending its preparation and publication, constituted a disorder within the purview of Article of War 96.

It is clear that the tenor of the writing is suggestive of a disposed conformity with military duty only upon the fulfilment of certain conditions. It takes the form of a demand rather than a request, and what is demanded is accompanied by such veiled threats as "we will do something about it" and "shall not the tonnage lower". These implications are conjoined with references to the past -- lynchings, poll tax, Jim Crowism -- which, it states, "are prominent in our consciousness". It significantly mentions an incident on shipboard, when, upon an attempted segregation of colored troops on the forward part of the ship, the subscribers, it is stated, had occasion to wonder whether it was safer there than in another place and to ask whether "the Officers were neglecting the deeply ingrained law of self-preservation, to effect the ever popular one of Racial Prejudice? We wondered about that, but we also acted -- we weren't segregated and we were finally allowed again to traverse the ship at will". These and other interjections precede the expressed demand, among others, "that the high ranking Officer of the 6TH PORT AREA and of this Battalion Command require of the insulting Military Police Captains their recantation and apology to the enlisted men in massed formation and to Mr. Williamson". It requires but small imagination to conceive that the drafters of this writing were dictating the prescribed form in which the alleged grievances were to be redressed. It is plain they purposed to substitute their will for the judgment of their superiors

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and, falling short of that, to insinuate, characteristically of the tenor of the entire instrument, "can not we also act?"; and in advertising to incendiary language they could not but be held chargeable with inciting the minds of the signatories. The conclusion is inescapable that all their expressions, viewed in the light of the surrounding circumstances, clearly warranted the interpretation that accused advocated a species of disloyalty and insubordination which impinges prejudicially upon good order and military discipline.

The gravamen of the offense is the interference with the morale of the military forces by advocating disloyalty and insubordination against military authority. The term "disloyalty" is conceivably employed here in the restricted sense of being untrue to a lawful superior or authority (Webster's International Dictionary, Second Edition). The act of disloyalty is occasioned by the advocacy of measures which are not in conformity with the laws and customs of the military service or specifically, as alleged, with "the lawful military authority of the United States". No other form of disloyalty is implied.

The Specification, it is noted, alleges that the acts of accused are in "violation of Public Laws, June 28, 1940, chapter 439, Title I." Section 1 of that act (18 U.S.C.A., sec. 9) provides that,

"(a) It shall be unlawful for any person, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States--

- (1) to advise, counsel, urge, or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or
- (2) to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States.

"(b) For the purposes of this section, the term 'military or naval forces of the United States' includes the Army of the United States, as defined in section 2 of Title 10."

The words "any person" referred to in (a) above seem to be all-inclusive and hence applicable to members of the armed forces of the United States. It is unnecessary however to determine this question, since if the law cited be inapplicable, its inclusion in the Specification might be regarded as mere surplusage and the acts of accused could be condemned upon the general provisions of the 96th Article of War (LAW, 1928, par. 152b).

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6. At the outset of the trial the prosecution offered in evidence copies of the aforementioned administrative reprimands of Captain Christopher FitzSimmons, III, and Captain Andre M. G. Bourgeois. These were admitted and marked exhibits without objection by defense (R. 7,8; Exhibits 4, 5). While the reprimands shed some light upon events leading up to the acts of accused, they really had no bearing upon the issues of the case. The condemned reprehensible remarks of the two officers certainly served no legal justification for the acts of the accused. However, any error in the admission of these exhibits tends to operate in favor of the accused by way of extenuation.

It is clear moreover that an appropriate petition for redress of grievances could have been made and presented by accused, or such a one as is provided for by Article of War 121. It is not necessary however to consider the propriety of an act of one or more members of a military organization to assume to take it upon themselves to act in a representative capacity for others, as demonstrated, in part, by the act of accused in the instant case.

7. The accused Gibson is 25 years old and has served in the Army since 10 July 1942. The accused Barnes is 23 10/12 years old and has served in the Army since 8 December 1941.

8. 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.

Daniel O'Halloran, Judge Advocate.
O. J. Ide, Judge Advocate.
Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army,
16 July 1943.

Board of Review

NATO 303

U N I T E D S T A T E S)	HEADQUARTERS 5TH ARMY
v.)	Trial by G.C.M., convened at
Technician Fifth Grade)	APO 464, U. S. Army, 21 June
EARNEST (NMI) STEWART)	1943. Dishonorable discharge,
(33097009), Company L, 22nd)	total forfeitures and confinement
Quartermaster Regiment.)	at hard labor for sixteen (16)
)	years. United States Penitentiary,
)	Lewisburg, Pennsylvania, design-
)	nated as place of confinement.

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. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Technician Fifth Grade EARNEST (NMI) STEWART, Company L, 22nd Quartermaster Regiment, did, at Oujda, French Morocco, on or about 10 May, 1943, with intent to commit a felony, viz, murder, commit an assault upon Second Lieutenant JOSEPH S. MARLOW, 22nd Quartermaster Regiment, by shooting at him with a dangerous weapon, to wit, a rifle.

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Specification 2: In that Technician Fifth Grade EARNEST (NMI) STEWART, Company L, 22nd Quartermaster Regiment, did, at Oujda, French Morocco, on or about 10 May, 1943, with intent to commit a felony, viz, murder, commit an assault upon Private first class GEORGE W. SCOTT, Company L, 22nd Quartermaster Regiment, by shooting at him with a dangerous weapon, to wit, a rifle.

Accused 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 and to become due and confinement at hard labor for sixteen (16) years. The reviewing authority approved the sentence, designated 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 prosecution's evidence shows that on 10 May 1943 accused and another soldier started to leave the company area and were told by Second Lieutenant Joseph S. Marlow that they could not leave the area in fatigue clothes and without a pass (R. 5). The lieutenant asked accused if he had been drinking and accused replied, "Why are you picking on me? What have you got against me?" Lieutenant Marlow then directed the corporal of the guard to take the accused to his tent and he told accused he wanted to see him the first thing the next morning. The accused continued to argue with the lieutenant for about 5 minutes when the lieutenant left the area in a jeep at about 6:45 P.M. This jeep was the only vehicle of its kind in the company (R. 6).

Lieutenant Marlow returned to the area at about 8:55 P.M. It was just about dark. He turned off the headlights of the jeep when he parked the car (R. 34). He had taken about 10 steps towards the tent of the duty officer when he heard a shot and heard someone scream. He then heard another shot and the bullet struck in front of him (R. 7). He ran behind the jeep and heard another bullet "whiz by". After the third or fourth shot he called to Corporal Dunn and Private First Class Scott, and their reply came from the fox holes in the rear of the orderly tent (R. 8,17).

Private First Class G. W. Scott was standing in the door

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of the orderly tent when the first shot was fired. The bullet struck very close to him and knocked up gravel which hit him in the back (R. 16). Another shot was fired and he "jumped up and down" and ran through the tent and into the fox hole at the rear with Corporal Dunn, who was in the tent at the time (R. 16, 17).

Lieutenant Marlow ran to the maintenance shop and telephoned the military police and while telephoning recognized the voice of accused on the phone. He tried to talk with him but accused hung up. The telephone in the maintenance shop was on the same line as the one in the orderly tent (R. 8).

Sergeant Clyde F. Richburg, of the same organization, was at that time walking from the orderly room tent to his own tent and heard a shot when he was about 6 paces from his tent. He proceeded into his tent then came out and "hopped into a fox hole". He counted the last 5 shots but some were fired before that. When the firing ceased he went to the orderly room tent and found accused trying to telephone. His rifle was lying within hands' reach on a stool (R. 18). Sergeant Richburg picked up the rifle and unloaded it. He noticed that it was warm. He heard accused say on the telephone, "Come on over M.P.'s" (R. 19). When Lieutenant Marlow arrived at the tent accused said, "I will get you yet" (R. 20,21).

Two bullet holes were found in the orderly room tent and one went through the center ridge pole. The rifle which was found near to him belonged to accused (R. 19).

The accused was duly advised as to his rights and elected to be sworn and testify in his own behalf. He testified that he had eaten no lunch that day and that between five and five-thirty (R. 26) o'clock he drank a pint of cognac and a quart of vermouth (R. 22,25,26). He started for a walk with Private Johnson and was told by Lieutenant Marlow that he could not leave the area in fatigues and without a pass. He asked the lieutenant if anything was wrong and the lieutenant directed the corporal to take him to his tent. He went to his tent and the lieutenant drove off. He never had a grudge against Lieutenant Marlow, nor Private First Class Scott and never had threatened either of them (R. 22). After going to his tent he went to bed and to sleep. He awoke later and decided to write some letters in the recreation hall before the lights went off. He first went to the latrine and while there saw two men approaching from the barbed wire fence inclosing the

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area and saw them enter a tent in the area. He knew they were not "our men" and wanted to see what they wanted. He followed them to the tent and they both jumped on him at the door (R. 23). He was struck on the head, body, chin and hand. His chin and hand bled a little (R. 24). He got loose from them, ran to his tent and got his rifle and fired at them. They ran out, one going to the right of the orderly room tent and one to the left (R. 23). He fired four shots at them and five more into the air (R. 30). When he quit firing he went to the orderly room tent and telephoned the Military Police. He heard Lieutenant Marlow's voice on the telephone. He laid his rifle on the bed and came back and got it after telephoning (R. 31).

The defense recalled Lieutenant Marlow who testified that prior to 10 May some German prisoners had escaped in the Oujda area and he had directed his men to remain in the area on the alert. That the camp was near an Arab settlement and that Arabs continually passed the camp. That recently the officers' latrine had been cut in half (R. 33) and that two Arabs had been found in the area with a barracks bag which they were attempting to steal (R. 34).

Scott was recalled and testified that he and accused were good friends. Upon cross examination he stated he had not seen nor heard anyone running past the orderly room tent at the time of the shooting (R. 35). Nor had Richburg. However, he had seen a scratch on accused's hand when he found him in the orderly room tent and that it was bleeding some (R. 36).

4. An assault with intent to commit murder is an assault aggravated by the concurrence of the specific intent to murder; in other words it is an attempt to murder. There must be an intent, actual or apparent (MCM, 1928, p. 177). Malice may be presumed from the use of a deadly weapon (MCM, 1928, par. 112) and the intent may be inferred from facts proved (Underhill's Criminal Evidence, par. 555). There must be an overt act and to constitute an attempt to murder by firearms the actual infliction of injury is not necessary. Where a man with intent to murder another deliberately shoots at him, the fact that he misses him does not alter the character of the offense (MCM, 1928, p. 178). The testimony clearly establishes that accused fired his rifle in the direction of Lieutenant Marlow and Scott, the persons alleged to have been assaulted and it shows a motive for shooting at Lieutenant Marlow. The fact that no motive is shown for assaulting Scott is immaterial since from the testimony, the court could properly find that accused shot at him thinking that he was Lieutenant Marlow.

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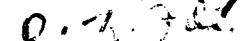
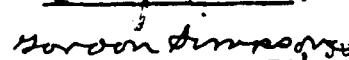
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which would constitute an assault with intent to murder upon Scott.

"Where the accused, intending to murder A, shoots at and wounds B, mistaking him for A, he is guilty of assaulting B with intent to murder him; so also where a man fires into a group with intent to murder some one, he is guilty of an assault to murder each member of the group" (MCM, 1928, par. 149 (1)).

The accused was found guilty of both Specifications and the Charge. Under Section A, Table of Maximum Punishments, the maximum punishment for both offenses is dishonorable discharge, total forfeitures and confinement at hard labor for forty (40) years. The evidence supports the findings and the sentence. The court was legally constituted and had jurisdiction of the accused and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The accused is twenty seven years old and has served in the Army since 24 July 1941.

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


John D. Bolinger, Judge Advocate.

C. T. F. S., Judge Advocate.

Gordon Simonds, Judge Advocate.

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

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APO 534, U. S. Army,
27 July 1943.

Board of Review

NATO 347

U N I T E D S T A T E S)	MEDITERRANEAN BASE SECTION
v.)	Trial by G.C.M., convened at
Captain ROBERT A. PURVIS (O-1696595), Medical Corps, 151st Station Hospital.)	Oran, Algeria, 10 June 1943. Dismissal.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

CHARGE I: Violation of the 85th Article of War.

Specification 1: In that Captain Robert A. Purvis, MC, 151st Station Hospital was, on or about May 14, 1943, found drunk while on duty as Ward Officer, 151st Station Hospital, Oran, Algeria.

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

Specification 1: In that Captain Robert A. Purvis, MC, 151st Station Hospital, having received a lawful order from Captain John S. Sprague, MC, his superior officer, to perform two surgical operations, the said Captain John S. Sprague being on the execution of his office, did, at Oran, Algeria, on or about 14 May 1943 fail to obey the same.

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Specification 2: In that Captain Robert A. Purvis, MC, 151st Station Hospital having been assigned to duty as Medical Ward Officer on surgical Ward -C- and as assistant medical Ward officer on wards -D-, -E-, and -F- did, at Oran, Algeria, on or about 14 May 1943, wrongfully fail to perform the duties thereof in that he failed and neglected to make ward rounds and to do necessary surgical dressings which were required to be done in connection therewith.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Specification and Charge I; of Specification 1, Charge II, he was found guilty except of the words "two" and "operations", substituting therefor "a" and "operation", of the excepted words "not guilty", of the substituted words "guilty"; of Specification 2 of Charge II not guilty, and of Charge II guilty. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and transmitted the record of trial to the confirming authority who confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

3. The testimony shows that accused joined the 151st Station Hospital about 3 April 1943, and was assigned to the section of orthopedics. His specific assignment was that of Ward Surgeon of Ward C and assistant to the Chief of the Section of Orthopedics in Wards D, E and F. He also did general surgery (R. 4,11,14). On 14 May 1943, accused was on duty (R. 4,6,15) and at about 0800 hours he attended a meeting of the surgical staff in the office of the Chief of the Surgical Service (R. 6). Immediately following the meeting, Captain John S. Sprague, Chief of the Surgical Service and a superior officer under whom accused worked (R. 4), told accused he had been assigned to perform two operations on that day and called his attention to the schedule of operations posted on the bulletin board in the office of the Chief of the Surgical Service.

Second Lieutenant Lucy E. Adamowitz, the nurse in charge of Ward N, saw accused in the ward at about 0800 hours that day and advised him that the patient who was scheduled for the hemorrhoidectomy operation had eaten breakfast (R. 31) and because of this accused cancelled the operation. He also cancelled the other operation but gave no reason therefor (R. 35).

At about 1000 hours, 14 May 1943, Captain Sprague saw accused in his room in bed apparently under the influence of alcohol (R. 8,9) and at about 1315 hours on the same day, he returned to accused's room, accompanied by three other medical officers and examined accused to determine whether or not he was drunk (R. 9,18). Captain Sprague and Captain McElroy testified that in their opinion accused was drunk. (R. 9, 19). Accused enunciated very badly certain words and phrases, was unable

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to walk a straight line, could not stand with his heels together and eyes closed without swaying, could not write his name, and could not write words which were read to him at random from a novel found in accused's room; his eyes were bloodshot and his breath smelled of alcohol (R. 10, 11, 12, 13, 19, 20); Captain Sprague and Captain McElroy identified Prosecution's Exhibit "A" in evidence as the handwriting of accused written by him on that occasion (R. 10, 19); this writing was done by accused while sitting in a chair at his bedside table and was written with his right hand (R. 12, 13).

Accused called Captain Sprague's attention to an infected finger. Captain Sprague examined the finger and found it to be infected, but was not emitting pus. None of accused's other fingers were infected. The infected finger was the fifth finger but Captain Sprague could not recall which hand it was on (R. 12, 13, 14). The nurses on duty on Wards C, D, E and F did not see accused that day on their wards (R. 9, 16, 17). Accused, as assistant ward officer on wards D, E and F, was not required to perform any duties unless requested to do so by the ward officer. No such requests were made on 14 May 1943 (R. 11, 14, 15). Accused was admitted as a patient in the hospital in the afternoon of 14 May 1943, "primarily with the diagnosis being most convenient of an infected finger" (R. 12).

Accused was sworn as a witness in his own behalf and testified that for almost two weeks previous to 14 May 1943, the condition of his hands had been an almost daily topic of conversation with Captain Sprague, who cautioned him not to do any clean surgery or any work on patients which might expose them to infection (R. 24). That on 13 May 1943, accused and Captain Sprague decided that accused should not perform any operations while his hands were in their present condition (R. 26). That on that date they talked about the future performance of two operations by accused but he was never notified that they were scheduled for the morning of 14 May 1943 (R. 22). That on 14 May 1943, accused had an abscess on the fifth finger of his left hand and an abscess on the index finger of his right hand, both of which were swollen and draining pus, and two or three small infections on both hands (R. 23). That he attended the conference in Captain Sprague's office at 0800 hours on 14 May 1943, after which he had a few words with Captain Sprague. Nothing was said by Captain Sprague about any operations and he believed that Captain Sprague inquired as to the condition of his finger (R. 21). It was the custom in the hospital for each officer to schedule his own operations and turn in slips the day before covering whatever work he intends to do the next day (R. 24); accused did not prepare and turn in on 13 May any list of operations to be performed 14 May (R. 21); he was not notified by anyone on 13 May or 14 May that he was scheduled to perform any operations on 14 May (R. 22); accused did not look at the bulletin board in the Surgical Service Office on 13 or 14 May (R. 24).

Accused denied he was drunk on the day in question. He stated that following the conference in Captain Sprague's office he went to Wards L, N and 10-Y, saw all the patients and attended to the dressings in these

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wards, completing his work shortly before 1200 hours. That he went to his room only once before noon, to take two aspirin tablets, but that he did not go to bed, nor did he see Captain Sprague (R. 22).

He was assisted in Ward L by the wardmen and in the other wards by the patients and enlisted men (R. 26). He saw only one nurse while making his rounds. She was sitting at the far end of Ward L as he entered. He believes she was Miss Ullrich (R. 27, 28).

Accused testified that at about 1200 hours he went to his room, soaked both hands in a basin of water, took two more aspirins and a half grain of cocaine, then undressed and lay on the bed (R. 22). He took his temperature shortly before noon and the thermometer registered 101.8 (R. 30). He drank no intoxicating beverages on that date (R. 22) and, except for some fruit juices, which accused drank before going to his room, he had no nourishment that day (R. 30). He did not ask to be relieved from duty nor did he notify his superior officers when he went to his room. He went to sleep and was awakened at about 1400 hours when Captain Sprague and three other medical officers came to his room (R. 23). He submitted to the various tests for drunkenness and did the writing on Prosecution's Exhibit "A" while lying in bed and holding the pen between the middle finger and thumb because of the abscess in his index finger (R. 14). After seeing his hands, Captain Sprague told accused he would have to go into the hospital as a patient. He was admitted the following day and remained in the hospital as a patient until 10 June 1943 (R. 24).

4. The only issue raised by accused's plea of not guilty to Specification and Charge I was whether or not accused was found drunk on duty. It was conceded that he was on duty as ward officer on 14 May 1943. He was found in his bed at 1000 hours by Captain Sprague who testified that he was "apparently under the influence of alcohol" at the time. Later, at about 1915 hours, Captain Sprague accompanied by three other medical officers, found him still in bed. They awakened him and gave him not only one, but many, recognized tests for drunkenness and all agreed that he was drunk. His denial left it as a question of fact for the court to decide. The evidence amply sustains the findings of guilty of this Charge and Specification.

The court by exceptions and substitutions found accused guilty of Specification 1, Charge II; not guilty of Specification 2, Charge II and guilty of Charge II. Captain Sprague and accused had attended a meeting of the Surgical Staff in the office of the Chief of Surgical Service at 0800 hours on 14 May 1943. Directly after that meeting, the captain notified accused that the latter had been assigned to perform the two operations and directed his attention to a schedule on the bulletin board. The court properly found that accused was justified in cancelling one of these operations, but that he had failed to perform the other, after having received a valid order so to do. There was no testimony that accused was drunk at the time he cancelled the operations. The testimony is sufficient to establish the fact that an order had been given by proper authority to perform the operation which accused cancelled without cause. Unexplained failure by accused to perform this operation is a violation of the order.

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5. It appears that the accused is 37 years old and has served in the Army as a medical officer since 7 July 1942.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of violation of Article of War 86, and is mandatory upon conviction of violating Article of War 85 if, as in this case, the offense be committed in time of war.

James D. Harrington, Judge Advocate.

O. J. Dodge, Judge Advocate.

Harold Simpson, Judge Advocate.

NATO 347
1st Ind.
Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
28 July 1943.

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

1. In the case of Captain Robert A. Purvis (O-1696595), Medical Corps, 151st Station Hospital, 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 $\frac{1}{2}$, you now have the authority to order the execution of the sentence.

2. After publication of the general court-martial order in the case, six 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 347).

Hubert D. Hoover

HUBERT D. HOOVER

Colonel, J.A.G.D.

Assistant Judge Advocate General

(Sentence ordered executed. GCMO 19, NATO, 29 Jul 1943)

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

APO 534, U. S. Army,
27 July 1943.

Board of Review

NATO 361

U N I T E D S T A T E S)	MEDITERRANEAN BASE SECTION
v.)	Trial by G.C.M., convened at
Second Lieutenant HAROLD G.)	Oran, Algeria, 22 June 1943.
O'CONNOR, A.U.S. (O-1823922),)	Dismissal.
7th Battalion, 1st Replace-)	
ment Depot.)	

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Harold G. O'Connor, A.U.S., 7th Battalion, 1st Replacement Depot, did, at Oran, Algeria, on or about 28 May 1943, behave himself with disrespect toward Lieutenant Colonel Thomas DeF. Rogers, his superior officer by failing to salute him and by saying to him in an insolent manner "Is there anything wrong with you. I am going to Canastel. I have been in the Army five years, and, I am working for a Brigadier General, and we'll see whether you can make this stick or not", or words to that effect.

Specification 2: In that Second Lieutenant Harold G. O'Connor, A.U.S., 7th Battalion, 1st Replacement Depot, was, at Oran, Algeria, on or about 28 May 1943, in a public place, to wit a public street known as Rue d'Arzew, drunk and disorderly while in uniform.

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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 be dismissed the service. The reviewing authority approved the sentence and transmitted the record of trial to the confirming authority who confirmed the sentence and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on the night of 28 May 1943, at about 2345 hours, accused and an enlisted man were standing together under a street light on Rue d'Arzew, Oran, Algeria, about two and one-half blocks east of the Galleries de France (R. 4,5). Lieutenant Colonel Thomas DeF. Rogers passed within two feet of them and accused, although he was facing Colonel Rogers at the time, failed to salute him. Colonel Rogers turned around, approached accused and asked him if he recognized him as an officer and told accused he should salute. Accused did not salute Colonel Rogers but talked in a drunken fashion, to the effect that he had been in the Army five years, was going to Canastel and that he worked for a general. Accused adopted an aggressive attitude, "his feet spread apart and his chin stuck out". When Colonel Rogers asked accused his name he refused to give it but said in a drunken manner to the soldier who was with him, "did you hear what he said", or something on that order.

Colonel Rogers then took accused by the arm, told him to come along, that he was placing him under arrest. Accused swung himself free and ran. Colonel Rogers pursued accused and stopped him by throwing him to the ground. Accused got up, "took a swing at" Colonel Rogers and again ran off. Colonel Rogers again caught him and threw him to the ground. When accused got up Colonel Rogers turned him over to some military police who were passing in a truck (R. 5).

Colonel Rogers was wearing the uniform cap with the insignia on the proper side. The enlisted man with accused also failed to salute (R. 5,6).

Private First Class Cecil Lloyd Dunn, one of the Military Policemen in the truck which took accused to the station, testified that in his opinion accused was drunk (R. 7). Second Lieutenant Alexander Wood III testified that at the Military Police Station the accused showed "no respect at all" to Major Walker who asked him questions. His answers were not responsive and several times he addressed Major Walker with the words:-- "Now listen here --". In the opinion of Lieutenant Wood, accused was drunk (R. 8).

Accused elected to testify under oath. He testified that he had had four or five drinks that evening. That around 2245 hours that night he was standing on Rue d'Arzew intending to get a ride to Camp Canastel. He was standing about ten feet in back of some enlisted men who were trying to get a ride to the camp, but he was not with them or with any enlisted men. It was "pretty dark" and a voice accosted him and demanded

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why he did not salute. He started to move on (R. 9) as he saw the enlisted men had "hopped up" and it was his intention to stay out of any brawl. When the Colonel "tackled" him and threw him to the ground, he got up and "started to move out again". The second time he was tackled he recognized Colonel Rogers as a "Lieutenant Colonel out of the Engineers" and "stayed in his grasp". He was not hostile and did not recognize Colonel Rogers at first and did not understand why he "should be picked out of a million soldiers as one individual at that time of night". He did not say anything to Colonel Rogers until after he was "tackled". He may have said "What was wrong with you. I am going to Canastel", but "I don't know where the brigadier general comes in". He denied that he was staggering (R. 10).

Upon cross-examination, accused admitted that he heard Colonel Rogers ask why he had not saluted but stated that he did not recognize him as a Colonel and that he did not turn around to ascertain who it was before "moving out" because "the main thing that entered my mind, sir, was not to get involved in any brawl" (R. 11) and "it being night". He did not deny that there was a light there, nor that Colonel Rogers took him by the arm. He did not recall "taking a swing" at Colonel Rogers (R. 12). He would not say that he was running away, nor that he was walking. "It was a medium pace" (R. 13).

4. It thus appears from the uncontradicted evidence that at the place and time alleged accused behaved himself with disrespect toward Colonel Rogers, his superior officer; he failed to salute the Colonel and when questioned about this omission, persisted in his refusal to render the salute; he insubordinately addressed the Colonel without assuming a military posture; he spread his feet apart and aggressively protruded his chin; in response to the Colonel's inquiry about saluting, accused insolently said he had been in the Army five years, was going to Canastel and that he worked for a general. When the Colonel asked his name, he refused to give it, but drunkenly said to an enlisted man standing nearby in substance, "Did you hear what he said?"; when Colonel Rogers placed him under arrest and restrained him physically, accused swung himself free and fled; he would have made good his escape had not the Colonel persevered in pursuing him; and when overtaken and stopped, he tried to strike Colonel Rogers.

It was alleged that accused said to Colonel Rogers, "Is there anything wrong with you. I am going to Canastel. I have been in the Army five years, and, am working for a brigadier general and we'll see whether you can make this stick or not" or words to that effect. With respect to the language used by accused, the proof does not extend beyond the statements that he had been in the Army five years, that he was going to Canastel and was working for a general. By themselves, these statements could be deemed consistent with respect. But the Specification, by setting forth that they were expressed in an insolent manner, attended by a failure to salute, leaves no doubt as to the legal sufficiency of the charge. The

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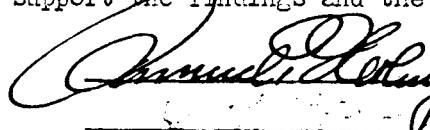
disrespectful behavior is not dependent upon the words alone but comprises as well the manner in which they were expressed. "Where, however, it is doubtful whether an act, or language, not necessarily disrespectful in se, may properly be treated as amounting to disrespect, the animus of the party becomes a material inquiry" (Wintrop, reprint, p. 367). Words may be disrespectful merely because of the connection in which and the circumstances under which they are used. It is believed, therefore, that by allegation and proof, the elements of the offense have been fully established.

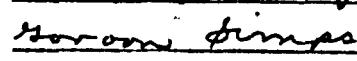
It also appears from the evidence beyond a reasonable doubt that accused was drunk and disorderly in uniform at the place and time alleged. He admitted he had taken four or five drinks but did not say what; in the opinion of an enlisted man and an officer at the military police station, he was drunk; his arrogant, drunken attitude, his flight when arrested by Colonel Rogers on Rue d'Arzew, his manner of speech, his misbehavior and insolence at the Military Police Station, demonstrate his disorderliness. The evidence clearly establishes the acts alleged and the circumstances under which accused committed them. He was properly found guilty of being drunk and disorderly in uniform in a public place as charged (MCM, 1928, par. 152a).

5. The offense alleged in Specification 1, was erroneously laid under Article of War 96; the facts pleaded and proven bring it within the offenses denounced by Article of War 63. The punishment for violation of Article of War 63 lies within the discretion of the court, just as does punishment for violation of Article of War 96. No punishment was imposed on accused of a kind to which he was not liable for the offense committed by him. Under Article of War 37, the error does not constitute ground for invalidating the findings or the sentence (Dig. Op. JAG, 1912-1940, par. 394 (2)).

6. The record of trial shows that accused was twenty-six years old and married (R. 9,15). He entered the Army 21 December 1940, and had had previous National Guard service in Missouri. He had been a Provost Sergeant on Union Pacific railroad trains for about a month and a half and a Staff Sergeant at the 751st Military Police Battalion at Boulder City, Nevada, for seven or eight months before entering an Officers' Candidate School (R. 13) at Camp Hood, Texas. He was commissioned 18 February 1943 (R. 9,15).

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. Dismissal is authorized upon conviction of violation of Article of War 96. The Board of Review holds that the record of trial is legally sufficient to support the findings and the sentence.

 Judge Advocate.
_____, Judge Advocate.

 Judge Advocate.

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NATO 361

1st Ind.

Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army.
28 July 1943.

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

1. In the case of Second Lieutenant Harold G. O'Connor, A.U.S. (O-1823922), 7th Battalion, 1st Replacement Depot, 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 $\frac{1}{2}$, you now have the authority to order the execution of the sentence.

2. After publication of the general court-martial order in the case, six 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 361).



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

(Sentence ordered executed. GCMO 14, NATO, 28 Jul 1943)

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

APO 534, U. S. Army.
27 July 1943.

Board of Review

NATO 362

U N I T E D S T A T E S)	MEDITERRANEAN BASE SECTION
v.)	Trial by G.C.M., convened at
Second Lieutenant JOHN B. ESTEP)	Oran, Algeria, 22 June 1943.
(O-1296839), Infantry, 8th)	Dismissal.
Battalion, 1st Replacement)	
Depot.)	

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant JOHN B. ESTEP, Infantry, 8th Battalion, 1st Replacement Depot, was at Saint Cloud, Algeria, on or about 27 May 1943, drunk and disorderly in uniform in a public place, to wit: a public bar in Saint Cloud, Algeria.

Specification 2: In that Second Lieutenant JOHN B. ESTEP, Infantry, 8th Battalion, 1st Replacement Depot, was at Saint Cloud, Algeria, on or about 27 May, 1943 drunk and disorderly in uniform at the French Jail at Saint Cloud, Algeria.

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He pleaded guilty to each Specification, except the words "and disorderly", of the excepted words not guilty, and guilty to the Charge. He was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and transmitted the record of trial to the confirming authority who confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that at about 2000 hours, 27 May 1943, two military policemen, Corporals Clark Greer and Adrian Julsrud, both of the 794th Military Police Battalion, patrolling in a scout car, observed accused coming from behind some Arab quarters in Saint Cloud (R. 5,8). They had been directed to that locality because of a reported disturbance (R. 8,9). The accused "looked like he was awful mad about something" (R. 5), was staggering, unsteady on his feet and was plainly drunk (R. 5,7,8). The military police told him that he was off limits and that he should get back into town (R. 5,8). After he had left, an Arab with a bloody nose approached the military police and apparently endeavored to relate some occurrence involving the accused (R. 5,6,8,9).

On their way toward town where they were to close a saloon, the military police caught up with accused who asked for a ride (R. 6,9). When they arrived at the saloon and accused found out what the military police were going to do, he "took it upon himself to go in and close up the place" (R. 6,9). Inside, accused walked up to the bar where he grabbed a bottle of wine out of a soldier's hand and told him to go outside (R. 6). At the other end of the bar was a sailor and near him was Corporal Julsrud. Accused "went over there and started hollering at the sailor, telling him to get out" (R. 6,9). He spoke to him in "a very sarcastic manner" (R. 9). The latter resented this and an argument followed (R. 6,9). In the saloon were seven or eight other soldiers and one or both of two civilians who operated the establishment (R. 6,7,9). The military police finally succeeded in removing accused and the sailor from the place. The sailor proceeded down the street and the accused set out to follow him. He stopped the sailor and the argument was resumed. The military police again separated them and told accused he would have to stop the disorder and leave town or be locked up. Accused retorted they could not do that to an officer. He persisted in arguing and was finally taken to the French jail in Saint Cloud (R. 7,9).

Eve LeGac, chief of the Gendarmerie of Saint Cloud, testified that he first saw accused at the jail at about 2000 or 2030 hours (R. 10). Later, while in his living quarters which adjoins the jail, LeGac heard accused "yelling and hitting on the door" (R. 15). According to this witness, "the soldier wanted to go out. So I said 'No'. So he pushed me out of the way. I tried by force to push him inside but the soldier took me by the tie. At that moment I did not want to let him go so I grabbed

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him by the shoulders and I had to really fight to prevent him leaving the jail. So the other gendarme heard the noise and came in and helped me put the soldier in jail again" (R. 15). Afterwards, LeGac found out accused was a Lieutenant (R. 15).

The military police were thereupon told of the difficulty (R. 15). They opened the door of the jail and while it was ajar with the foot of a military policeman against it, accused broke through and hit LeGac's right eye with his fist (R. 15,16). Accused also kicked an interpreter with whom LeGac was talking at the time (R. 16). Jacques Crespo, a gendarme of Saint Cloud, who had assisted Chief LeGac in restraining accused, testified about the disturbance in the jail (R. 16,17). He observed accused "yelling and pointing at the chief all the time and at the moment of inattention the lieutenant managed to get out and strike the chief with his fist" (R. 17). Both of these witnesses testified that accused was drunk or had been drinking (R. 16,17).

Private Henry L. Maughan of the 794th Military Police Battalion, testified that he arrived at the Saint Cloud jail at about 2200 hours (R. 10). Accused "was cursing and swearing that he was going to kill the French police that was there" and witness saw him hit one of them in the right eye (R. 11). A fight was prevented and after accused said to the military police that "I will give you my word of honor if you don't put me back in there that I won't cause you any more trouble", they permitted him "to stay a step or two on the outside of the jail". But while out there, he kicked another Frenchman who came near him (R. 11).

A Sergeant Max M. Wexler, of the 794th Military Police Battalion, arrived at about 2230 hours and caused the removal of accused to Oran. The sergeant observed that one of the French gendarmes had a black eye (R. 13) and that accused, by his "actions, speech and locomotion", was drunk (R. 14).

Accused elected to testify under oath (R. 18). His testimony is to the effect that in the evening of 27 May 1943, he in company with three other second lieutenants, went to Saint Cloud where they ate and drank wine and that he could not remember anything until he was in the Provost Marshal's office. He could not remember being in the French jail at Saint Cloud.

4. The evidence, with his pleas of guilty, unquestionably establishes the drunkenness of accused. That he was disorderly is also clearly shown. His usurpation of the authority of the military police in closing the saloon, his act in grabbing the bottle of wine from the hand of a soldier, his provoking language and manner directed toward the sailor, were obviously out of order and, with the other circumstances, constituted reprehensible conduct in this public place. And his subsequent conduct in the French jail was plainly contentious, disorderly and disgraceful.

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5. While the disorderliness at the two places arose from the same condition of drunkenness, the circumstances of the case justify separate specifications.

6. Accused is 27 years of age. He was commissioned 16 October 1942, and had previous service since 20 August 1941.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. Dismissal is authorized upon conviction of the 96th Article of War.

8. The Board of Review holds the record of trial legally sufficient to support the findings and the sentence.

Paul D. Holmgren, Judge Advocate.
O. J. Goe, Judge Advocate.
Sorom Dimason, Judge Advocate.

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NATO 362, 1st Ind.
Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
28 July 1943.

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

1. In the case of Second Lieutenant John B. Estep (O-1296839), Infantry, 8th Battalion, 1st Replacement Depot, 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 $\frac{1}{2}$, you now have the authority to order the execution of the sentence.
2. After publication of the general court-martial order in the case, six 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 362).



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

(Sentence ordered executed. GCMO 15, NATO, 28 Jul 1943)

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

APO 534, U. S. Army,
20 August 1943.

Board of Review

NATO 367

U N I T E D S T A T E S)	EASTERN BASIC SECTION
v.)	Trial by G.C.M., convened at
Private JAMES (NMI) STALLWORTH)	Mateur, Tunisia, 6 July 1943.
(34101698), Company A, 28th)	Dishonorable discharge, total
Quartermaster Regiment (Truck).)	forfeitures and confinement at
)	hard labor for twenty (20)
)	years. United States 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 Charges and Specifications:

CHARGE I: (Nolle prosequi.)

Specification: (Nolle prosequi.)

CHARGE II: Violation of the 93rd Article of War.

Specification I: In that Private (then Private First Class) James Stallworth, 34101698, Company A., 28th Quartermaster Regiment (Trk), did, near the vicinity of Mateur, on or about 0130 hours, 24 June 1943, with intent to commit a felony, to wit, to rape, commit an assault upon Fatima Ben Sala by wilfully and feloniously grabbing

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her as she lay on the bed and attempting to disrobe her and saying to her "Zig-zig!, Zig-zig!", or words to that effect.

Specification 2: In that Private (then Private First Class) James Stallworth, 34101698, Company A., 28th Quartermaster Regiment (Trk), did, in the vicinity of Mateur, Tunisia, on or about 0130 hours, 24 June 1943, with intent to do him bodily harm, commit an assault upon Medeb Aid, an Arab, by willfully and feloniously striking him in the temporal region of the head with a M-1903 service rifle.

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 twenty (20) 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 sometime during the night of 24 June 1943, the accused, armed with a rifle, entered a dwelling house in the vicinity of Mateur, Tunisia, occupied by an Arab by the name of Medeb Aid and his wife, Fatima Ben Sala. The latter testified that she awoke from her sleep when she felt a light shining in her face; that she immediately arose to put on her dress and while doing so, "a colored soldier" seized her, grabbed her "in the legs" and uttered the words, "zig-zig! zig-zig!"; that "he started grabbing hold of me, feeling me up and tearing my clothes"; and that she was in fear of her life and "cried out" (R. 6,7,8,9,10). She testified that her husband thereupon came to her aid and as he did so, she saw the soldier strike him on the eye with a rifle (R. 6,9,10). Witness testified she went out of the house and that her husband's cousin and an Italian came to her husband's assistance. Together they subdued the soldier, tied him and took him away (R. 6). She testified she could not recognize this soldier (R. 6).

The husband, Medeb Aid, identified accused as the soldier who came that night (R. 11). He testified that, awakened from his sleep, he saw a light on his wife's face, heard the accused say, "zig-zig" and saw accused "grabbing hold of my wife's dresses" as she was "trying to pull away from him". Witness testified he got up, grabbed hold of the rifle in accused's hands to prevent his using it and that, "I held him and he hit me on the eye" with the butt of the rifle; also that, "When he hit me I held on to him regardless. It was between me and my wife, because if I didn't hold him, he would make a grab for my wife" (R. 11,12); that with the aid of "Ahmed", followed by an Italian, they took accused's rifle away from him, tied his hands and feet and later took him to his company (R. 12). Witness testified that he had a wound near his right

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eye which bled and took about ten days to heal (R. 13,14).

A witness by the name of Ahmed Ben Ali, testified of his being a neighbor of Medeb Aid and that in the latter's home on the night in question, he helped subdue and tie a soldier whom he could not identify (R. 14,15). A witness by the name of Theodore Angelo Yoorsceny, testified that the three Arabs were his employees and that in the early morning he was called by Ahmed to Medeb's house where witness found an American soldier whose hands and feet were tied (R. 15). Witness identified the accused as that soldier (R. 16). He further testified that not wishing to leave accused with the Arabs, he untied accused's feet and took him to his commanding officer (R. 15).

First Sergeant James N. Dreyery, 1955 Quartermaster Company, testified that "one evening about one-fifteen" two Arabs and an Italian brought accused to his tent in the company area. His hands were tied. One of the Arabs had a rifle which he said belonged to accused. It was a 1903 Springfield, M-1 (R. 17).

Accused testified that in the early evening of 23 June 1943, he was on duty with his company as assistant dispatcher and that at bed-time he did not feel like "laying down" and wanted a drink of wine (R. 19). He thought he could get it either from the Italians or French who had vineyards in the vicinity. He started up to go to a Frenchman's place (R. 20,21). He then "came in contact" with three Arabs who were later joined by a fourth. One was standing with a large stick. Accused had his rifle. He had always been told not to "fool around" with the Arabs because they were dangerous. He did not know how to speak so he said, "cigarette, Johnnie". Two of the "fellows" took a cigarette but the "third fellow" with the stick did not take one and "kept on looking at me like he was going to charm me". Accused testified he thought the Arab was "coming at me", and said "allez" to him. The Arab, he testified, "sits looking at me charming me and I hit him with the rifle". He testified that no women were involved and that he did not see any "lady" (R. 20). Accused further testified that after he had hit the Arab "they hollered, 'Mohamed, Mohamed, Mohamed'" and "two fellows" grabbed accused and fastened his hands together and later bound his legs. When the "Frenchman" came they took him to the sergeant (R. 20). Accused also testified that he thought "zig-zig" meant "a man having something to do with a woman" (R. 22). Accused was a married man (R. 23).

4. It thus appears from the evidence that at the time and place alleged, the accused wrongfully entered the home of Medeb Aid and his wife, Fatima Ben Sala, who were asleep, and, approaching the woman, flashed a light in her face and uttered the words "zig-zig", a colloquialism for sexual intercourse. When she awoke and arose to put on her dress, accused grabbed her legs and clothes and attempted to overcome her struggles to get away from him. The light had been observed by Medeb Aid who immediately came to his wife's assistance. He grabbed the rifle in accused's hands, and, while endeavoring to hold it and to prevent

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accused from further violence, the latter hit him over the right eye with the butt of the rifle, causing a wound which bled and took ten days to heal.

Specification I charges accused with an assault with intent to commit rape. The offense is established where there is an overt act amounting to an assault accompanied by an intent to have carnal knowledge of the woman assaulted by force and without her consent (MCM, 1928, p. 179). The overt act of accused is amply shown by evidence that he seized the woman by her legs and grabbed at her clothing while she was struggling to get away from him. His intent to have carnal intercourse with the woman is shown by use of the words "zig-zig", and from that and the attendant circumstances, it is clearly inferable he intended to commit the act by force and without her consent. The evidence clearly establishes the essential elements of the offense charged.

The evidence is equally clear in support of the findings that accused made an assault upon Medeb Aid with intent to do him bodily harm. The latter came to the aid of his wife and justifiably attempted to prevent further assaults on her. By striking Medeb Aid with the butt of his rifle, the accused committed not only an assault but also a battery and it is manifest under these circumstances that the assault was made with the specific intent required to constitute the offense charged (MCM, 1928, p. 180).

5. Accused is 29 years old. He was inducted into the service 12 April 1941. No prior service is shown.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the 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. Penitentiary confinement is authorized for the offense of assault with intent to commit rape as alleged in Specification I, Charge II, 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 D. Haugen, Judge Advocate.
O. G. Zoller, Judge Advocate.
Baron Simpson, Judge Advocate.

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

APO 534, U. S. Army,
12 August 1943.

Board of Review

File No. 970

UNITED STATES)	EASTERN BASE SECTION
v.)	Trial by G.C.M., convened at
Private First Class ELEBERT)	Bizerte, Tunisia, 9 July 1943.
(M.I.) DRAKEFORD (32063284).)	Dishonorable discharge and
227th Quartermaster Salvage)	confinement for twenty (20)
Collecting Company.)	years.
)	"Federal" Penitentiary, Lewis-
)	burg, Pennsylvania.

HOLDING 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 93rd Article of War.

Specification: In that Private 1st class Elbert (M.I.) Drakeford, 227th Quartermaster Salvage Collecting Company, Eastern Base Section, did, at bivouac area of 227th Quartermaster Salvage Collecting Company, on or about June 20, 1943, with intent to kill, commit an assault upon T/Sgt Arthur R. Griffin, 33006661, by shooting at him with a dangerous weapon, to wit, a sub-machine gun, 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

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to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty years, three-fourths of the members present concurring in the sentence. The reviewing authority approved the sentence, designated the "Federal" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 501.

3. The evidence shows that on 20 June 1943, a group of soldiers, including accused and a Private Chambers, went to Tunis, Tunisia, for a recreation trip in a truck driven by Technician Fifth Grade Arthur R. Griffin, 227th Quartermaster Salvage Collecting Company (R. 5,20). Griffin testified that upon their return that afternoon to the bivouac area of the 227th Quartermaster Salvage Collecting Company (R. 5):

"This fellow Chambers, he jumped over the tail gate of the truck so I told him I wouldn't jump over the tail gate if I were he. So he said you seem to be smart anyhow because you are a truck driver and this fellow Chambers he hauls off and slaps me and I hit him back. This fellow Drakeford he takes it up so I had a couple of blows with Drakeford too" (R. 14).

After this altercation, accused went to his tent and Griffin to the motor pool (R. 14,15,25). In about fifteen minutes accused emerged from his tent with a "Tommy gun", and was surrounded by six or seven soldiers; "they seemed to be in a tussle". Master Sergeant Arthur White disarmed accused who thereupon left (R. 4,5,21,25) but returned five or six minutes later with another "Tommy" gun (R. 5,11). He said "I am going to kill him" (R. 10), without saying whom, and started in the direction of the motor pool (R. 6,10). White and one of the company officers, Lieutenant Lauro J. Perucco, asked accused to surrender the gun (R. 6) and First Sergeant Douglas E. Shockley asked him what was wrong (R. 10,11). He told each of them to get back or he would shoot (R. 6,10,11). At that time, accused was bleeding at the mouth (R. 13). White testified accused "was backing off from us and we were all walking forward on him and he kept saying get back" (R. 6). White, Shockley and a group of other soldiers followed accused who kept them at bay with his gun (R. 6,11). Being thus occupied with keeping back the men who were following him and at the same time walking "backwards and sideways" toward Griffin's truck, he did not see Griffin who had been checking the tires and was not in plain view until only a short space separated them (R. 6,7,12,14). Accused started to turn and at that moment "evidently" saw Griffin who stepped quickly forward and seized the barrel of the gun which accused was pointing in his direction (R. 6,7,8,11,14,15). The gun "went off about seven or eight times" (R. 6), one bullet going through Griffin's trousers and three, four or five through his jacket but none actually striking him (R. 13,14,16,31). Griffin testified, "I was wrestling with him and when I got him there on the ground, that is when the gun went

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"off" (R. 31). The gun was on "full automatic" and the shots were fired in rapid succession (R. 7). Griffin had known accused ever since he had been in the Army, a period of about two and a half years, and they had never previously had any trouble (R. 13).

Griffin testified he had not been drinking on the trip to Tunis but accused had (R. 16,17) and was "pretty well charged" but Griffin would not "consider him drunk" (R. 19). The sergeant who took the first gun away from accused testified the latter might have been drinking, "but the man wasn't drunk" (R. 8). An enlisted man, one of the group that went to Tunis, testified accused did not stagger and could talk coherently but witness "would say" accused was intoxicated (R. 22).

One sergeant and two privates of accused's organization expressed the opinion that he had a "very good reputation in the company" (R. 9, 22,23).

Accused elected to testify under oath (R. 25). He described the altercation upon the return of the soldiers from Tunis as follows:

"We got back to the company and I was on the truck and I saw Corporal Griffin slap a Private Chambers *** and I got out of the truck and he walks up there and slaps him again and I walks up and says there is no sense in that, man, so when I says that, I was going to take Private Chambers to his tent, so he hit me in the mouth".

Accused testified the blow was hard and made him dizzy. He went to his tent, sat on his bed, wiped his mouth with a towel, then picked up a machine gun and went back "to the company" where he gave the gun to a master sergeant. He returned to his tent, sat down again and

"there is another Tommy gun, laying on another boy's barracks bag so I picked it up and I went back to the arca and I didn't know where Griffin was, in the motor pool or the arca or where, so I goes on by the motor pool. I didn't see him *** I goes right on down the hill and I comes up behind there and he grabbed me in my back and grabbed the gun and he grabbed the stock and he grabbed the barrel of it and he tripped me and throwed me over on my side. When I went over on my side, somehow or other I squeezed the trigger on the gun and it went off. I turned the gun loose and that is all I remember about it" (R. 25).

Accused testified he had been drinking but was not drunk, that the blow on his head was what made him dizzy and he did not know what he was doing at the time; if he had not been "dizzy in the head", he "would

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never have did it" (R. 26,27,28). He did remember telling an officer to whom he made a statement, that when he fell, he pulled the trigger (R. 29,30).

4. It thus appears from substantial evidence that at the place and time alleged accused committed an assault upon Technician Fifth Grade Arthur R. Griffin by shooting at him with a Thompson sub-machine gun and that he committed this assault with the specific intent to kill. It may be inferred from the evidence that accused brooded about the injury he considered Griffin had done him and concluded to avenge himself by shooting Griffin. Actuated by this motive, he set about the accomplishment of his design, openly uttered threats to kill and would have succeeded in his announced undertaking but for the intervention of events he did not anticipate and over which he had no control.

Accused intimated but did not unequivocally claim that the gun was accidentally discharged. The evidence shows, however, that the barrel of the gun was pointed at Griffin when the shots were fired and that Griffin's trousers and jacket were perforated with the bullets. The assault by the accused, with his previously expressed intention to kill and his deliberate search for his intended victim, is measurably more consistent with an intentional than an accidental shooting. The court was fully warranted in concluding that accused entertained the specific intent to kill when he committed the assault on Griffin.

5. Accused is charged with the assault with "intent to kill". The allegations do not bring the offense charged within the scope of assault with intent to murder, malice aforethought not having been averred. The phrase "intent to kill" is not synonymous with "intent to murder", in that it is lacking in the element of premeditation and deliberation, which is an essential element in an intent to commit murder (United States v. Barnaby, 51 Fed. 20; State v. Barker, 68 N.J.L. 19, 52 Atl. 284; cited in footnote, Wharton's Criminal Law, 11th Ed. p. 1137). The specification does sufficiently allege an offer or attempt to commit an unlawful homicide. The intent to murder not being alleged, the offense of which accused was convicted must, therefore, fall in the category of an assault with intent to commit voluntary manslaughter which

"differs from assault with intent to murder in the lack of the element of malice necessary to constitute the latter crime. It is an assault in an attempt to take human life in a sudden heat of passion" (MCM, 1928, par. 149 1, p. 179).

The Table of Maximum Punishments (MCM, 1928, par. 104c) fixes the maximum punishment for an assault to commit any felony except murder and rape at dishonorable discharge, forfeiture of all pay and allowances due and to become due and confinement at hard labor for ten years.

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Accordingly, the sentence to confinement for 20 years imposed on accused is excessive.

6. Accused is twenty-six years old and enlisted in the Army 17 March 1941. He had no prior military 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 as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. Confinement in a penitentiary 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 453, Title 18, United States Code.

Ronald E. Chapman, Judge Advocate.
O. J. Gde, Judge Advocate.
Gordon Simpson, Judge Advocate.

NATO 970 1st Ind.
Branch Office of The Judge Advocate General, NATOUSUSA, APO 534, U. S. Army,
13 August 1943.

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

1. In the case of Private First Class Elbert (M.I) Drakeford (32069284), 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 sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years, which holding is hereby approved. Under the provisions of Article of War 501, you now have authority to order execution of the sentence, following action in accordance with the holding.

2. You designated the "Federal" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement. The correct designation of that penitentiary is "United States Penitentiary, Lewisburg, Pennsylvania". In publishing the general court-martial order in the case it is recommended that the designation, United States Penitentiary, Lewisburg, Pennsylvania, be used.

3. After publication of the general court-martial order in the case, six copies thereof should be forwarded to this office with the

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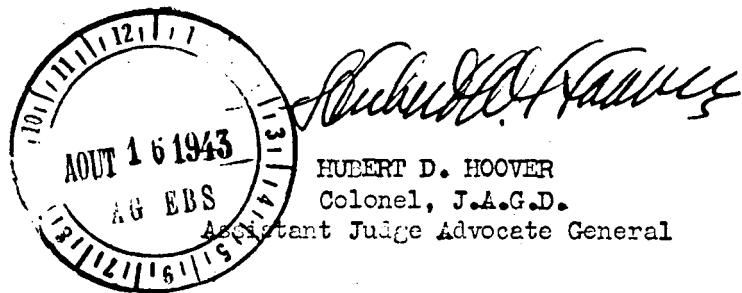
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NATO 370, 1st Ind.,
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foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

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

APO 534, U. S. Army.
21 August 1943.

Board of Review

NATO 371

U N I T E D S T A T E S)	EASTERN BASE SECTION
v.)	G.C.M., convened at Mateur, Tunisia, 9 July 1943.
Private VERNON W. JACKSON (37201592), and Corporal GLEEN (NMI) CURRIE (34277634), both of Company D, 62nd Quarter- master (Laundry) Battalion.)	Currie: Dishonorable dis- charge, confinement at hard labor for sixteen years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.
)	Jackson: Not guilty.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

2. The accused were tried jointly upon the following Charges and Specifications:

CHARGE I: Violation of the 66th Article of War.

Specification: In that Corporal Gleen Currie Co D 62nd QM (Ldry) BN., and Private Vernon W. Jackson Co D 62nd QM (Ldry) BN., acting jointly, and in pursuance of a common intent, did, at the camp of the said Co D 62nd QM (Ldry) BN., near Mateur, Tunisia on or about the 6th day of June 1943 wrongfully and deliberately attempt to create a mutiny in the said company by urging members of said company concertedly and as a group to go to Mateur, Tunisia and overrule for the time being,

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lawfully military authority by taking James R. Linson, a member of the company from the custody of the Military Police.

CHARGE III: (Finding of not guilty.)

Specification: (Finding of not guilty.)

They pleaded not guilty to Charge I and its Specification. As to the Specification of Charge II, they pleaded guilty except the words "moving towards Mateur, Tunisia for the purpose and intent of releasing James R. Linson from the custody of the Military Police to the prejudice of good order and military discipline", to the excepted words not guilty.

To Charge II, guilty. The court found accused Jackson not guilty of both Charges and Specifications and found accused Currie guilty of Charge I and its Specification, and not guilty of Charge II and its Specification. No evidence of previous convictions was offered. Currie was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 16 years. The reviewing authority approved the sentence as to Currie, 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 general situation, as is adduced from the evidence, was that on 6 June 1943, at their camp near Mateur, Tunisia, Linson and Clinghead, of Company D, 62nd Quartermaster Battalion, became involved in trouble and the company guard refused to arrest them. The Military Police were called in, arrested the men and took them to Mateur. Several of the men in the company resented the way the arrest was handled and assembled with rifles in the company area. The accused Currie was one of the apparent leaders and he stated that they were going into Mateur to bring the men back. At this time, the company commander appeared and called a company formation, at which the matter was discussed, and he ordered the men to return their rifles to their tents. They dispersed and the officer thought the matter was settled. Shortly thereafter, the men reassembled in the company area, fired their rifles into the air and were once more dispersed by the officer who went among them, ordered them to cease firing and return to their quarters.

Second Lieutenant Rupert Riley, 62nd Quartermaster Battalion, testified that the guard of the company refused to arrest the two men and that the Military Police made the arrest. There was some trouble in finding the two men and "a lot of words passed back and forth" (R. 16). "The MP's...had to go out and round up the two men through the company area...I was with one of the MP's all the time". Several men in the company disagreed with the way "we were handling things"... "They didn't actually do much at that time" other than that several of them were armed with rifles (R. 18). Later on during the night, there "seemed to be a good bit of disturbance going on through the company area". The men were getting "riled up, ...just after the MP's had taken the

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two men away" (R. 16). Accused was heard to make the statement that "we have got plenty of ammunition, Lets go get 'em". Later on during the night, the "fire works really started". There was a lot of shooting. The witness did not know who was concerned with the shooting, "I wasn't there" (R. 16). He left the company area because they were shooting at him. Company C of the 504th Military Police, at Mateur, had custody of Linson (R. 18).

Captain Stuart L. Melville, 62nd Quartermaster Battalion, the company commander, testified that about 8:45 o'clock on the night in question, he came into the area and saw "a group of men with rifles coming up towards the orderly room towards the road out of camp". The first sergeant and a master sergeant said the "men were pretty well het up over an incident involving Linson". He immediately had a company formation called which included the men who had rifles at which "the whole thing was discussed to the point of the uselessness of any attempt to go into town as they apparently were intending to do, to bring Linson and--Clinghead". After the formation was dismissed, Captain Melville, thinking "that the thing was completely settled" returned to the officers area and shooting started in the company area. He and another officer were in a jeep and started out through the area when the first shot was fired. The shooting became quite heavy. It was "by the road". He went back into the area "where the shooting was going on" and later "got everything under control and had a peaceful night from then on" (R. 8). He did not recognize anyone as individuals. There were 25 or 30 men in the group with rifles. Upon cross-examination Captain Melville testified that at the company formation he invited the members of his company to express their grievances. He wanted "to get it thrashed out--find out what was causing it and show the men what they thought was serious enough for a thing like that wasn't necessary". It was an orderly formation. There was no attempt made to collect the arms. He believed the trouble was settled. No ammunition had been issued to the men (R. 9). He heard no statements by any of the men before the formation. He remembered seeing accused at the formation (R. 10,12). After the formation, the men were ordered to return to their tents and return their rifles to their tents "and to carry on in a normal manner". He saw them putting their rifles away. When the shooting was taking place, the Captain was in the area and the men stated that they were shooting because "somebody else was shooting" (R. 12). It was about ten minutes after the formation, after he had instructed them to put their rifles away. He went to the area himself and shouted as loud as he could. He ran up to one particular man and "ordered them to cease firing or stop making such damn fools of themselves". The shooting stopped (R. 13). There was no concerted mob. It had not been the practice for the members of the company to shoot their rifles at will without orders in the company area (R. 14).

First Sergeant Howard L. Bell, Company D, 62nd Quartermaster Battalion, testified that on the afternoon in question, a baseball game was being played and James Linson was arrested. The rest of the company "didn't like" it and they gathered around and discussed it among them.

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selves. He heard accused say, "well lets go get him", and Vernon Jackson agreed with him and they started towards the tent area to get their rifles. "He came around with the rifles" in sight of us again. The company commander drove up and "blew the formation"; the company formed, the officer spoke to them and the crowd returned to the tent area (R. 19). About thirty men had rifles. He heard that accused was one of the "ring-leaders" (R. 20). Accused said, "Lets go get 'em, get 'em out of the guard house", referring to Linson. He appeared to be determined and meant what he said (R. 21).

Master Sergeant Washington Bellamy, Company D, 62nd Quartermaster Battalion, testified that after Linson was arrested some of the men said, "they was going to get him". About twenty-five men were in the group. They had rifles. Accused was one of the men who made the statement. The statements were made at the company formation (R. 22).

Sergeant John D. Ryan, Company D, 62nd Quartermaster Battalion, testified that after Linson was arrested by the MP's, a "bunch of fellows were coming out with guns on their shoulders so the Sergeant decided he'd call a company formation". He stated that "from what I heard and from the way they were collected, their intentions were to get Linson". When asked to state if he knew who the ring leaders were, he replied, "Well, sir, to be sure that Corporal Currie and Private Vernon Jackson seemed to have the situation pretty well in hand, sir". His basis for that answer was what he heard those two men say at the company formation (R. 27). It looked like they meant business (R. 28). He heard Corporal Currie say, "Lets go get Linson" (R. 31). The statements were made at the formation in the presence of the company commander (R. 30). He was not sure that Captain Melville heard Corporal Currie make that statement but Captain Melville was "in seeing distance" (R. 31).

Staff Sergeant Gude Wimbish, Company D, 62nd Quartermaster Battalion, testified that he was manager of the baseball team which was playing on the afternoon in question. After the ball game broke up he "met Corporal Currie and quite a few of the other men behind him, and he had his rifle at sling arms". At the company formation, Captain Melville said he would do what he could for Linson but couldn't promise to bring him back that night. Corporal Currie said, "We'll go up and get him". After the formation, when "others partly stood in a huddle around. Corporal Currie walked a distance from here to the door, and said, 'We'll go get him tonight'" (R. 31,32). There was no response to that statement (R. 33).

Private First Class Charlie Jones, Company D, 62nd Laundry Battalion, testified that he saw Currie and Jackson "with the rifle" at the "riot before the formation" (R. 36). He heard accused say, "Let's go get James Linson". This statement was made before the company formation (R. 37).

Corporal Vernon Jeffers, Company D, 62nd Laundry Battalion, testified that after the arrest of Linson he heard Corporal Currie say, "Lets go get Linson" (R. 38).

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Corporal Silas Lockett, Company D, 62nd Laundry Battalion, a witness for the defense, testified that he was with accused after the formation and that accused made no statements while he was with the witness.

Private First Class James T. Clemons, Company D, 62nd Laundry Battalion, testified for the defense that he was with Corporal Currie on the night of 6 June, after the formation. They went back to the area together and he did not hear accused make any statements (R. 44).

The defense counsel made a statement in behalf of Currie, as follows:

"He admits being among those who fired a rifle after the formation. He pleaded guilty to that and he pleads not guilty to inciting a riot and he pleads not guilty to moving toward Mateur with any intent and asks for the mercy of the court under those circumstances" (R. 47).

4. Charge I and its Specification charge an attempt to create a mutiny in violation of Article of War 66.

"Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority" (MCM, 1928, par. 136a).

"An attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission" (MCM, 1928, par. 152c).

"Voluntary abandonment of purpose after an act constituting an attempt--is not a defense" (MCM, 1928, par. 136a).

Had the group of soldiers gone into Mateur and collectively defied lawful authority in an effort to free Linson from the custody of the military police, a mutiny would have been committed. There is evidence that accused made statements to the group designed to induce the collective action indicated. He made the statements both before and after the company formation. There was an apparent possibility that mutiny would result from accused's statements. His intentions can clearly be inferred from the statements which he made and repeated, and from his accompanying actions of getting his rifle and discharging it in the company area. From the testimony, it would appear that had it not been for the timely and vigorous intervention of the company commander the mutiny might have taken place.

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The Board of Review is of the opinion that there is sufficient evidence to support the findings of guilty.

5. Accused is thirty years of age. He was inducted into the service 25 May 1942. No prior service is shown.

6. There are attached to the record of trial letters from four officers of accused's company, including the company commander, to the reviewing authority, attesting to the previous good record of accused and requesting clemency.

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 the sentence.

Frank M. Tolleson, Judge Advocate.
O. J. Tol., Judge Advocate.
Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army,
17 August 1943.

Board of Review

NATO 372

U N I T E D S T A T E S)	EASTERN BASE SECTION
v.)	Trial by G.C.M., convened at
Staff Sergeant CHRISTOPHER)	Mateur, Tunisia, 4 July 1943.
(NMI) BROWN (34075895),)	Dishonorable discharge and
Company C, 98th Engineer)	confinement for life.
Regiment.)	"Federal" Penitentiary, Lewis-
)	burg, 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 92nd Article of War.

Specification: In that Christopher (NMI) Brown, Staff Sergeant, Company C, 98th Engineer Regt. (GS) on or about Saturday, the 17th day of April 1943, near LeTarf, Algeria, forcibly and feloniously and against her will, have carnal knowledge of Yamina bent Mohamed.

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, desig-

nated the "Federal" 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 17 April 1943, the prosecutrix, Yamina bent Mohamed, with her sister, her sister's husband and their two children, occupied an Arab hut located some two kilometres from the town of Le Tarf, Algeria, just off the highway to La Calle (Ex. A; R. 6,7,12,13,14). Accused was in the military service of the United States and was a member of an organization bivouacked in that vicinity (R. 19,20,21,25). He was in Le Tarf on the evening in question where he met other members of his organization and drank some wine (R. 18, 25, 26, 30, 34, 35). Sometime after 2100 hours, he left Le Tarf with nine other colored and three white soldiers to return to camp (R. 19,30,31). Some of the members of the group wanted more wine and when they reached a point near the camp they left the road and crossed a field to some Arab huts (R. 19,26,31,35). Members of the party entered a hut and brought out an Arab whom they placed under an armed guard while other members of the group entered the nearby hut occupied by Yamina and others and brought out the Arab husband of Yamina's sister, and placed him also under guard (R. 6,7,9,26,31). Yamina, who had been sleeping in the nude, ran from the hut while still in the nude. She was soon caught and thrown to the ground by some of the soldiers who thereupon gathered around her (R. 7,10,15,19,27,31,40). Accused was identified as a member of this group (R. 19,20,22,32,37,38). Some of them were kneeling and some were standing and they alternated positions from time to time, one getting up and another getting down (R. 20,22,30). A member of accused's organization testified that he saw an Arab girl "on the ground and one soldier was having intercourse with her" (R. 38).

Prosecutrix testified that on the night in question she was sleeping in her sister's hut when some colored American soldiers came in, grabbed her and took her about twelve metres from the hut where "all the soldiers attacked me"; that she was attacked seven or eight times, there being a penetration each time; and that each soldier upon violating her "satisfied" himself. She testified that the assailants held a rifle over her; that she was in fear for her life; and that she did not consent to the acts but resisted and yelled until they put a handkerchief in her mouth (R. 14,15). She did not identify accused as one of her assailants (R. 16).

One witness, when asked if he saw "anybody screw" prosecutrix, answered, "I think I did", and when questioned as to who it was, answered, "Well, one was Sergeant Cris Brown". Witness was then asked if he saw accused "screw" the girl and replied, "Well, I think I did" (R. 32). On cross-examination this witness testified that he did not see accused assault the girl "when I was there in by the bunch". He was then asked if he saw accused "get on top of the Arab girl", to which he replied, "No, sir, not as I can remember" (R. 33).

The soldiers remained at the scene of the offense from half an hour to forty-five minutes and then all walked back to their camp together (R. 20,33,36). Accused was in the group returning to camp (R. 27,32,36,38,40). Shortly after leaving the scene and before reaching camp, accused remarked that "he did get some tail" (R. 40).

Accused testified that he was present at the time and place in question, that someone had a gun, and that he went into one of the huts but that he did not see any Arab women (R. 44,45). He testified:

"I never raped any woman like they say I did.
I have a mother, she is a woman, and I have
a wife, I never raped nobody, I just can't
explain myself. I am innocent" (R. 44).

4. The uncontroverted evidence thus shows that at the time and place alleged, a number of colored soldiers raped prosecutrix and that accused was present. The question presented to the court was whether accused was one of the soldiers who assaulted prosecutrix. The court by its finding resolved that question against the accused. If there is substantial competent evidence to support the finding it can not be here disturbed.

The fact that accused was a member of the group that gathered around prosecutrix while she was on the ground being ravished, is clearly established by the testimony of several witnesses. Prosecutrix testified that the soldiers took her about 12 metres from her hut where "all" of them attacked her. Therefore, since accused was a member of the group of soldiers that gathered around her after she was thrown to the ground and while she was being ravished, it is reasonable to infer that he was one of the soldiers who raped her. It would be unreasonable to assume that in this statement she referred to soldiers other than those present in the group around her.

Another witness testified that he thought he saw accused have intercourse with prosecutrix. This answer, although qualified, was competent evidence, was properly admitted and had probative value (Underhill's Criminal Evidence, 4th Ed., p. 176, sec. 128).

There is no suggestion in the record that accused had intercourse while in Le Tarf. A number of witnesses testified that they were with him from the time he left camp until the offense occurred and there is no suggestion either by them or by accused that he had intercourse with any other person during the day or evening in question. Shortly after leaving the scene of the offense and before reaching camp, accused volunteered the statement that he had had some "tail". Was accused referring to some other time or place? Nothing of this kind is suggested in the evidence. Although he denied have committed rape, accused admitted his presence at the place and time involved, and admitted going into one of the Arab huts. Such being the state of the record, it is but

reasonable to infer that when accused, upon leaving the scene, remarked that he had intercourse, he was referring to his having had intercourse with prosecutrix. His statement was tantamount to an admission that he had had intercourse with her. The court was justified in finding accused guilty of the rape charged.

5. The prosecution, without objection, and for the purpose of impeachment of one of its witnesses who had failed, to the surprise of the prosecution, to testify that he had seen accused have intercourse with the Arab girl, after laying a proper predicate, introduced a sworn statement signed by the witness, which contained the following: "I know I saw Sergeant Brown screw the girl, and the other boys, I screwed her myself". The witness admitted subscribing his name to the statement but testified that "he didn't say that" (R. 41, Ex. B). The signed sworn statement was introduced solely for the purpose of impeachment and therefore was for consideration only in determining the credibility of the witness in question and not as having any bearing on the issue of the guilt of accused (16 C. J., 855, sec. 2156).

6. The verb "did" was omitted from the Specification. The Specification as drawn, however, contained substantial allegations of all the elements of the offense with which accused was charged and therefore was sufficient (MCM, 1928, par. 73, p. 57; MCM, 1928, par. 87b, p. 74; Dig. Op. JAG, 1912-1940, p. 296, sec. 428 (8)).

7. The accused is twenty-five years old and has served in the Army of the United States since 24 May 1941.

8. The court was legally constituted and had jurisdiction of the person and offense involved. The penalty of death or imprisonment for life is mandatory upon conviction of rape under Article of War 92. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review holds the record of trial legally sufficient to support 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 punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

/S/ Samuel T. Holmgren, Judge Advocate.

/S/ O.Z. Ide, Judge Advocate.

/S/ Gordon Simpson, Judge Advocate.

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

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

Board of Review

NATO 381

U N I T E D S T A T E S)	ATLANTIC BASE SECTION
v.)	Trial by G.C.M., convened at Casablanca, French Morocco, 14 June 1943.
Private DAVID P. WALSH (36004324), Headquarters Company, Third Battalion, 30th Infantry.)	Dishonorable discharge (suspended) and confinement for five years. Disciplinary Training Center. Atlantic Base Section.

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 sentence, has been examined by the Board of Review and the Board of Review 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private David P. Walsh, Headquarters Company, Third Battalion, 30th Infantry, did, at Casablanca, French Morocco, on or about 11 November 1942, desert the service of the United States and did remain absent in desertion until he was apprehended by the Military Police at Casablanca, French Morocco, on or about 28 March 1943.

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 and did remain absent in desertion", substituting therefor the words

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"absent himself without leave from the service of the United States and did remain absent without leave", of the excepted words not guilty, of the substituted words guilty, and not guilty of the Charge, but guilty of violation of the 61st Article of War. 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, remitted five years of the confinement, suspended the execution of the dishonorable discharge and designated the Disciplinary Training Center, Atlantic Base Section, as the place of confinement. The sentence was published in General Court-Martial Orders No. 105, Headquarters Atlantic Base Section, 19 July 1943.

3. The evidence shows that on 11 November 1942, accused absented himself without leave from his organization which was bivouacked at Fedela, French Morocco, and remained absent without leave until apprehended by military police on 28 March 1943. An extract copy of the morning report of Headquarters Company, 3d Battalion, 30th Infantry, showing the original absence, was introduced (R. 5,6,7,8; Pros. Ex. 3). A witness for the prosecution attached to the Criminal Investigation Division, Provost Marshal Office, Atlantic Base Section, testified that accused was brought into the police station by two military police on 28 March 1943, and turned over to him for questioning (R. 6,7). After being advised of his rights under the 24th Article of War accused told this witness that he was with his organization during the initial invasion of North Africa and while it was bivouacked at Fedela he became drunk and did not sober up sufficiently to realize he was absent without leave until four days afterward, that he realized he was "in a bad spot" and was afraid to "turn himself in" and went to Casablanca where he stayed at various hotels until he was apprehended (R. 7,8,9,10).

It was stipulated that during accused's absence a member of his organization had advised him that he had either been charged with desertion or was considered as having deserted and that he would probably get into trouble if he returned (R. 12). It was further stipulated that if one of the officers in accused's organization were present he would testify that accused had been recommended for the Silver Star for his conduct during the landing (R. 12).

Accused elected to remain silent.

4. The evidence supports the findings of guilty. It appears that accused's unauthorized absence commenced on 11 November 1942. Executive Order No. 9267, 9 November 1942, suspends, as to offenses committed after the effective date thereof, 1 December 1942, the limitations prescribed by the Table of Maximum Punishments, Paragraph 104c of the Manual for Courts-Martial, 1928, upon punishments for absence without leave in violation of Article of War 61. Absence without leave is not a continuing offense, and in order to come within the application of the executive order, such absence without leave must originate on or subsequent to 2 December 1942 (Bull. JAG, January 1943, p. 10).

Inasmuch as the offense of which accused was found guilty was committed

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prior to 2 December 1942, the limitations upon maximum punishment prescribed by Paragraph 104c of the Manual for Courts-Martial, 1928, are applicable. The maximum punishment there prescribed for absence without leave for more than sixty days is dishonorable discharge, total forfeitures and confinement at hard labor for six months.

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

Ronald E. Tolson, Judge Advocate.
O. J. Gde, Judge Advocate.
Gordon Simpson, Judge Advocate.

NATO 381 1st Ind.
Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army.
4 April 1944.

TO: Commanding General, NATOUS, 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 David P. Walsh (36004324), Headquarters Company, 3d Battalion, 30th Infantry, together with the opinion of the Board of Review in this Branch Office that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months. I concur in the opinion of the Board of Review and recommend that so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months be vacated, and that all rights, privileges and property of which accused has been deprived by virtue of that portion of the sentence so vacated be restored.

2. By letter dated 8 September 1943 this Branch Office advised the Commanding Officer, Atlantic Base Section, that the maximum punishment authorized by Paragraph 104c of the Manual for Courts-Martial for the offense for which accused was found guilty was dishonorable discharge, total forfeitures and confinement at hard labor for six months and recommended that the excessive portion of the sentence to confinement be remitted. General Court-Martial Orders No. 175, Headquarters Atlantic Base Section, 13 September 1943, were thereafter issued purporting to remit so much of the sentence to confinement as was in excess of six months and to order execution of the sentence as thus modified.

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3. By letter to this Branch Office dated 10 March 1944, the Staff Judge Advocate, Headquarters Atlantic Base Section, advised that it had been discovered that the accused was still in confinement and that General Court-Martial Orders No. 175 remitting the excessive portion of the sentence had not been delivered to the Disciplinary Training Center, his place of confinement. By this letter it was also stated that by General Court-Martial Orders No. 86, Headquarters Atlantic Base Section, 9 March 1944, the unexecuted portion of the sentence had been suspended and that accused had been restored to duty.

4. Inasmuch as General Court-Martial Orders No. 175, Headquarters Atlantic Base Section, 13 September 1943, purporting to remit the excessive portion of the sentence, was special and individual in its operation and was not delivered, it did not, in the opinion of this Branch Office, become effective (AR 310-50, 8 Aug. 1942, par. 14).

5. Although vacation of the excessive portion of the sentence at this time will not directly affect the forfeitures of pay which were collected during the period of confinement in excess of that legally authorized, it is believed that vacation of the invalid portion of the sentence may be of indirect assistance in securing a determination as to whether accused is legally entitled to reimbursement of the forfeitures so collected.

6. 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. - Form of Action.
Record of trial.

(Sentence vacated in part in accordance with recommendation of
Assistant Judge Advocate General. GCMO 27, NATO, 30 Apr 1944)

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

APO 534, U. S. Army,
7 September 1943.

Board of Review

NATO 384

UNITED STATES

v. }
Technician Fourth Grade HENRY) Trial by G.C.M., convened at
P. MIDDLETON (32172807), and) Mateur, Tunisia, 5 July 1943.
Sergeant FRANK (NMI) BURNETY) As to each: Dishonorable
(34103683), both of Company C,) discharge and confinement for
98th Engineer Regiment (General) life.
Service).) "Federal" Penitentiary, Lewis-
burg, Pennsylvania.

EASTERN BASE SECTION

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. The accused were tried jointly upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Frank (NMI) Burney, Sergeant, Company "C", 98th Engineer Regiment. (GS) and Henry P. Middleton, T/4, Company "C", 98th Engineer Regt. (GS) did, acting jointly and in pursuance of a common intent, on or about Saturday, the 17th day of April, 1943, near LeTarf, Algeria, forcibly and feloniously and against her will, have carnal knowledge of Urida Yamina bent Bonrasi.

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Each accused pleaded not guilty to and was found guilty of the Charge and Specification. 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. The reviewing authority approved the sentences, designated the "Federal" 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 2100 hours on 17 April 1943 some colored American soldiers came to the hut of Tebib Mohamed, near Le Tarf, Algeria, and asked for "Fatima", the Arabic word for "women". Tebib informed them that his wife was dead whereupon they seized him and took him to a nearby hut occupied by Bonrasi Ali ben Mohamed, Urida bent Mohamed, his wife, Yamina bent Mohamed, a sister, and two children (R. 6,7,8,9). Bonrasi was forcibly removed and with Tebib placed under an armed guard (R. 7,8,17,18). Yamina tried to escape but was seized and taken outside where some of the soldiers gathered around her while the two accused and a third soldier remained in the hut with Urida (R. 8,10,11,13, 17). She had "tried to come out but they pushed her back into the hut" (R. 9). Both the accused were heard talking to the "Arab woman" about "zig zig" and the two were seen standing by her, by "something like a bed" (R. 13,14). Bonrasi heard Urida cry out and Yamina heard her "yelling" (R. 9,10). Accused and the group remained there about half an hour and all left together (R. 18).

When asked to state her name prosecutrix replied "Urida". She testified that on the night in question some colored soldiers forced their way into her hut and seized and removed her husband and Yamina, that three of them knocked her to the ground and one held her by the shoulder while the other spread her legs apart and a third struck a match "to see his way through" and that "they" then "attacked" her. She screamed and cried out several times and "tried to push and push them away". Asked if she consented she replied, "I did under the threat of my life. I had to give in by force. I was afraid of my life". None of the soldiers gave her money. She could not identify her assailants but said that there were three soldiers in the hut who attacked her and she knew they were colored (R. 11,12). When Bonrasi was released he found Urida "crying badly" and she told him the soldiers "attacked and violated" her (R. 9). Middleton was later heard to say that he had given the women some money (R. 15,20).

The defense did not present any witnesses and each accused elected to remain silent.

4. It thus appears from the uncontradicted evidence that at the place and time alleged, each of the two accused forcibly and without her

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consent had sexual intercourse with Urida bent Bonrasi. A group of soldiers including accused, had approached an Arab settlement asking for women; they went into the hut of Bonrasi Ali ben Mohamed, husband of Urida, seized and took him outside and kept him under an armed guard while three soldiers, including the two accused, remained in the hut with Urida and forced her to submit to them; she screamed and repeatedly cried out; her assailants threw her to the ground, one held her by the shoulders, another spread her legs apart and the third struck a match "to see his way through"; all three of them attacked her. She resisted by trying to push the soldiers away but they overpowered her. She testified that accused put her in such mortal fear that she was forced to submit while they ravished her. The crime of rape is established if the evidence shows that the accused had carnal knowledge of a certain female, as alleged, and that the act was done by force and without her consent (MCM, 1928, par. 148b). These elements are plainly inferable from the evidence. The circumstances also show that the rapes were accomplished in the course of a common venture in which each accused aided the other. The finding of joint action in pursuance of a common intent was therefore justified. Accused were properly found guilty as charged.

The proof that accused actually had carnal knowledge of Urida included her testimony that they "attacked" her and the testimony of her husband, Bonrasi, that immediately after the commission of the offenses, she told him the soldiers had "attacked and violated her". Proof of penetration is indispensable (MCM, 1928, par. 148b) but it need not be in any particular form of words (52 C.J. 1058, 1090, 1091). If penetration is the only inference comportable with the evidence, the proof is sufficient. When Urida stated she had been attacked and violated the words used could only connote that she had been ravished. The word "violate" means "To commit rape on; to ravish; outrage" (Webster's International Dictionary, 2d Ed., unabridged). The testimony and statements of Urida, together with all the surrounding circumstances justified a conclusion that her assailants penetrated her person and had unlawful carnal knowledge of her. The testimony of Bonrasi that he found his wife crying and that she told him the soldiers had attacked and violated her was competent not only as showing a prompt complaint but also as original evidence of the nature of the unlawful assault to which the soldiers had compelled her to submit (52 C.J. 1063, 1064, 1065; Wharton's Criminal Evidence (12th Ed.) sec. 520).

Urida was unable to identify her assailants. She only knew that at the place and time alleged three colored soldiers ravished her. But both accused were unequivocally identified as being two of the three soldiers in Urida's hut when the offenses were committed. It was shown that all three soldiers who were then in the hut forcibly and without her consent had sexual intercourse with her. The proof thus points directly and unerringly to accused as two of the three men who committed the assaults upon Urida and the facts and circumstances exclude every reasonable hypothesis except that these accused were among the guilty parties (Wharton's Criminal Evidence, 11th Ed., sec. 922).

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5. In the charge sheet the name of the woman alleged to have been raped is set forth as "Urida Yamina bent Bonrasi". This name, as it appears in the Specification as erroneously copied in the record of trial is "Urida bent Mohamed (Bonrasi)". The prosecutrix testified her name was "Urida". She was shown to be the wife of Bonrasi and the sister of Yamina. While definiteness and accuracy are required in alleging the name of the accused, this rule applies with less strictness to the name of the injured party (Winthrop's, reprint, p. 137,138). Extreme exactness in paraphrasing or rendering into English names foreign to that language is not required (45 C.J. 376). With substantial completeness the proof here identifies the injured woman, Urida, as the person named in the Specification. The rape of but one woman by accused is shown. The pleadings and the evidence so completely identify the transaction that accused could successfully plead the judgment in this proceeding in bar of any future prosecution for the rape at the time and place alleged of "Urida Yamina bent Bonrasi", whether she be called by that name or any other. There is no variance between the allegations and proof which may be regarded as injuriously affecting the substantial rights of accused within the meaning of Article of War 37.

6. Accused Middleton is 24 years of age and was inducted into the Army of the United States 8 September 1941. Accused Burney is 21 years of age and was inducted into the Army of the United States 14 May 1941. Neither had any prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The death penalty or imprisonment for life is mandatory upon conviction of rape under Article of War 92. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused. 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 O'Halloran, Judge Advocate.
C. J. Dill, Judge Advocate.
Borvoon Simpson, Judge Advocate.

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

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APO 534, U. S. Army,
24 August 1943.

Board of Review

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U N I T E D S T A T E S)	EASTERN BASE SECTION
)	
v.)	Trial by G.C.M., convened
Private LEROY (NMI) SPEED)	at Mateur, Tunisia, 3 July 1943.
(34052985), Company C,)	Dishonorable discharge and con-
98th Engineer Regiment)	finement for life.
(General Service).)	"Federal" Penitentiary, Lewis-
		burg, 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. The accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 96th Article of War.
(Stricken by court.)

Specification 1:(Stricken by court.)

Specification 2: In that Leroy (NMI) Speed, Private, Company C, 98th Engineer Regt. (GS) did, on or about the 17th day of April 1943 near LeTarf, Algeria, wrongfully assault Bonrasi Ali Mohamed, Tebib Mohamed and Bonrasi Asen Mohamed with a dangerous weapon, to wit, a repeating firearm, in that he did them and there point such firearm at and menace and threaten said persons therewith.

ADDITIONAL CHARGE I: Violation of the 92nd Article of War.

Specification: In that Leroy (NMI) Speed, Private Company C, 98th

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Engineer Regiment (GS), did, on or about the 17th day of April, 1943 near Le Tarf, Algeria, forcibly and feloniously, against her will, have carnal knowledge of SME Yamima Bent Mohamed.

ADDITIONAL CHARGE II: Violation of the 92nd Article of War.

Specification 1: In that Leroy (MMI) Speed, Private Company C, 98th Engineer Regt (GS) did, on or about the 17th day of April, 1943 near Le Tarf, Algeria, forcibly and feloniously, against her will, have carnal knowledge of Urida Bent Bonrasi.

He pleaded not guilty to and was found guilty of the Charges and Specifications except Specification 1 of the Charge under the 96th Article of War, which was stricken by the court upon motion of the defense. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due and to become due and confinement at hard labor for "the rest of his natural life". The reviewing authority approved the sentence, designated the "Federal" 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 accused and another enlisted man went to the village of Le Tarf, Algeria, on the evening of 17 April 1943, where, to use the words of the latter, they "stayed around up there" until "around eight something, the places were closing up" (accused) had been drinking a little too much so we sat down awhile and these other men came by and said they was going to look for some more wine and that was on the way back to camp, so we just got with them on our way back to the camp" (R. 26,27). There were twelve in the group which started back to camp and on the way they went by "the Arabs' houses" to see if they could find some more wine (R. 27,35).

At about nine-thirty o'clock, the soldiers approached the hut of Tebib Mohamed who, when they were yet fifty or sixty meters away, caused his wife to flee "to the mountain". Asked if there were any women around, Tebib told the soldiers his wife was dead. Two of the group seized him by the arms and carried him to a hut occupied by Bonrasi Ali Mohamed and "these two women" (R. 22), sisters, one of whom was Yamima Bent Mohamed, and the other, Urida Bent Mohamed, both married (R. 15,18,19). One soldier held Tebib outside the hut while the others "got the husband of the woman (Bonrasi Ali Mohamed) and brought him out there", where "one soldier guarded us with a gun" (R. 22). An Arab soldier on furlough, whose identity is not disclosed by the evidence, came up and was also placed under guard. Tebib testified that the guard was a black soldier, "that he was right on the side of me" and that the barrel of the gun "was pointed towards me" (R. 23).

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Members of the group of soldiers called out at the hut of Bonrasi Ali Mohamed, "Mohamed, Mohamed, we are looking for women!" Bonrasi testified that two soldiers seized him, brought him outside and "guarded me with a rifle and I don't know what was happening to the others after they guarded me with the rifle" (R. 24). He said they were black soldiers and he counted eleven or twelve of them (R. 25). When asked why he went out of his hut and left his wife, Bonrasi testified, "They made me get out of my hut...they brought me outside the hut and brought me with the other native". He was asked if he stayed there with the other natives and answered "yes". He was then asked why and replied "because they had me by force" and when asked what kind of force, he replied, "There were two soldiers there and one of them had a gun in his hand, so I couldn't move" (R. 25).

Yamina Bent Mohamed (whose name appears in the Specification as "Yamima" Bent Mohamed) testified that on the evening of 17 April:

"About 9 or ten o'clock I was sleeping in my hut and I saw some soldiers in front of my hut. They came in and they asked my sister's husband where the women were. The husband said there were no women around so he grabbed him by the arm and brought him outside. I tried to see him, but I ran out and they caught me in about five or six metres outside of the hut. My sister stayed inside, she was caught in the hut. After that, I was attacked, raped. I don't remember exactly how many times, seven or eight times" (R. 15).

She described her assailants as colored American soldiers. She testified that as she fled disrobed from the hut, the soldiers seized her by each arm and threw her to the ground (R. 15,16). Seven soldiers violated her. There was a penetration each time. She did not consent, was in fear of her life, "hollered" until they stuffed a handkerchief into her mouth, resisted "all I could" and was overpowered. One soldier held her head and others held her legs (R. 16,17).

Urida Bent Mohamed, wife of Bonrasi Ali Mohamed (whose name appears in the Specification as "Urida Bent Bonrasi"), testified that between nine and ten o'clock the night in question, one white and two black soldiers came into her hut (R. 18).

"We were sleeping in our hut and weren't expecting anything and suddenly we saw a match and the soldiers walked in. They called, 'Mohamed, Mohamed!'. The soldiers asked my husband for the women and he said there were no women around and they then brought my husband outside. After my husband went out, my sister ran out and I stayed on the bed with my child and I tried to run and this soldier grabbed me by the arm and made me lay down again. After he threw me down, one of them caught me by the throat and each

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arm and he put a gun on me, a revolver. While one of the colored soldiers was attacking me, one of them was lighting matches and the other one held a revolver. Then the second colored soldier attacked me and then the white boy was last" (R. 19).

She testified that the soldiers forcibly took her child out of her arms and that each of the three raped her; there was a penetration; that she did not consent to these sexual relations; that she resisted; she said, "I hollered until I couldn't any more". The soldiers did not pay her anything (R. 19). She did all she could to prevent a penetration by the first soldier but was overpowered. Two of the soldiers grabbed her, threw her down and pulled and held her legs "open by force" (R. 20).

Neither Tebib, Bonrasi, nor either of the two women who were assaulted, identified accused (R. 18,19,22,25). Three soldiers, members of the group which visited the Arab huts on the night of 17 April 1943, testified they saw accused holding a rifle or "tommy gun" (R. 27, 28,30,32,35,36,43,46). According to one, accused was holding the gun "kind of at port arms"; the Arabs were "sitting down and he was standing up with the gun" (R. 28,30,32). Another testified "one of the soldiers gave Speed a gun to hold while he beat these Arabs" -- accused was "just holding" the gun at port arms, "he could have been guarding the Arabs" (R. 35,36,41). The other testified accused "had a rifle and he looked like he was guarding some Arabs, guarding somebody". Witness told accused, "Leave them old Arabs alone" (R. 43), when accused said, "God damn it, don't move" ... "God damn it sit down here" (R. 45). He did not know how long accused stood guard (R. 43). Witness also testified that accused

"guarded the Arabs and after he must have turned them loose, but what time after, how long it was he turned them loose, I don't know, sir, but he turned them loose than when this white boy struck this Arab. It was a long distance away from the house where Speed was guarding the Arabs. I would say guarding because he had a rifle there" (R. 59).

After the consummation of the offenses, accused left for camp with the group (R. 44).

The defense called as witnesses five enlisted men, all members of Company C, 98th Engineers, who were in the group which visited the Arab settlement on the night of 17 April 1943. They testified they did not see accused with a gun, nor did they see him have sexual intercourse that night (R. 55,56,58,63,67,71). On cross-examination, one of these witnesses said he didn't remember seeing accused around the huts and admitted he "didn't get up to the Arab huts" (R. 71). Each of the other four said they would not swear that accused did not have a gun or did not have sexual intercourse on the night in question, but only that they did not see him (R. 56,58,64,68). One of these said witnesses testified that if accused had gotten "on top of an Arab" woman that night, he would have seen it (R. 55).

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Accused elected to make an unsworn statement. He said, "I am not guilty of holding the gun on any Arab and I am not guilty of having intercourse with an Arab woman". Continuing, he said,

"about this happening at the Arab shack, I was along with the crowd all right, I was with the crowd of these boys that went by, but I don't know what went on up there, I was with these boys when they went by there, but I don't know about anything going on up there" (R. 74).

He said he thought "them boys" just accused him of holding the gun, he guessed "they figured they would say if somebody did something, that would put them out clear, and just give one man the bag to hold" (R. 74).

4. It appears from the evidence that at the place and time alleged, accused wrongfully and threateningly pointed a firearm at Bonrasi Ali Mohamed, Tebib Mohamed and an unnamed Arab soldier; he stood guard over these men while three of his companions were committing rape on the wife of Bonrasi and seven others were forcing her sister to submit to their sexual desires; he cursed the men he was guarding and ordered them not to move, to "sit down there". The very act of presenting a firearm ready for use within range of another constitutes an assault (MCM, 1928, par. 149 1, p. 177). That this assault was made in a minacious and threatening manner has ample support in the evidence.

It was averred that accused assaulted Bonrasi Ali Mohamed, Tebib Mohamed and Bonrasi Asen Mohamed. There is no proof that a person of the latter name was assaulted but it was established that a third man, an unnamed Arab soldier, was one of those assaulted. This failure of proof was of no material consequence and did not injuriously affect the substantial rights of accused. The evidence is sufficient to support the findings of guilty of Specification 2, Charge I, as alleged.

5. The evidence shows that at the place and time alleged, seven or eight soldiers, companions of accused, had sexual intercourse with Yamina Bent Mohamed; she sought safety in flight from her hut but her assailants overtook her, threw her to the ground and through force, one after another, satisfied their sexual desires. She cried out for help but they gagged her mouth with a handkerchief and stifled her cries; she resisted but her assailants forcibly overcame her; she did not consent and was in mortal fear; she stated unequivocally that seven of the soldiers penetrated her person.

It further appears from the evidence that at the place and time alleged, three of accused's companions compelled Urida Bent Mohamed (named in the Specification as Urida Bent Bonrasi) to submit sexually to them; she tried to run but one of the soldiers seized her by the arm, tore her child from her, and forced her to lay upon the bed; she did not consent to the sexual relations which ensued but resisted and cried for help until she was exhausted; she was seized by the arms and throat and threatened with a revolver; the three assailants took turns in assaulting her, one holding a revolver, another lighting matches and the other forcing her to yield to

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him sexually, until all three had accomplished their criminal design.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent. The essential elements of proof are (a) that accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent" (MCM, 1928, par. 148b, p. 165).

In the case of both Yamina and Urida, clear cases of rape by members of the group were established. Without their consent the soldiers had carnal knowledge of them. The assailants used force, fear, intimidation and physical abuse in their assaults on each of the women.

Accused was charged as a principal with the commission of these offenses. The evidence shows that while his companions were assaulting the two Arab women he stood guard with a rifle or tommy gun over the husband of one of them, who was also the brother-in-law of the other, over another Arab who was their neighbor and over an unidentified Arab soldier. The effect of accused's action was to render aid in the perpetration of the crimes and make him an aider and abettor. At common law he would have been a principal in the second degree (16 C. J., p. 125, sec. 112, and p. 133, sec. 123; 52 C. J. 1036 sec. 50, note 68b; Wharton's Criminal Law, 12th Ed., sec. 256). The distinction between principals in the first and second degree is a distinction without a difference and is no longer required in indictments (Wharton's Criminal Law, 12th Ed., secs. 245, 259 and 745; 52 C. J. 1049, sec. 73). The distinction has been abolished by statute in the United States courts (Sec. 550, Title 18, U. S. Code). Even before the enactment of the abolishing statute the rule was that all of those present at the place of a crime and either aiding, abetting or assisting its commission were principals (U. S. v. Snyder (C.C. Minn. 1882) 14 F. 554; U. S. v. Boyd (C.C. Ark. 1890) 45 F. 851; U. S. v. Hughes (D. C. Tex. 1888) 34 F. 732). Aiders and abettors under rules of general application may be charged as principals (52 C. J. 1049, sec. 73; Wharton's Criminal Law, 12th Ed., sec. 245).

Although two persons cannot be jointly guilty of a single joint rape, because by the very nature of the act individual action is necessary, all persons present aiding and abetting another in the commission of rape are guilty as principals and punishable equally with the actual perpetrator of the crime (52 C. J. 1036, sec. 50).

The principle stated in the United States Criminal Code, as follows:

"Principals' defined. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal". (Sec. 550, Title 18, U.S.C.)

has been expressly held applicable to cases tried by courts-martial
C. M. 157840, Culp et al.

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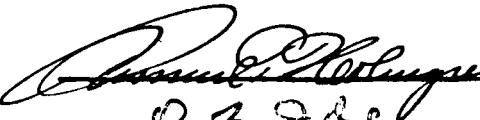
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The accused was properly charged as a principal with the offense of rape as alleged in the Specification, Additional Charge I, and in the Specification, Additional Charge II.

6. The misnomer of Urida Bent Mohamed in Specification, Additional Charge II, did not injuriously affect the substantial rights of accused. No objection to the misnomer was made by defense and no surprise appears to have resulted therefrom. Moreover, the conviction under Specification, Additional Charge I (rape of Yamina Bent Mohamed), alone would support the sentence.

7. The accused is twenty-four years old and has served in the Army of the United States since 27 May 1941.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The penalty of death or imprisonment for life is mandatory upon conviction of rape under Article of War 92. The Board of Review is of the opinion that the record of trial is legally sufficient to support findings of guilty 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 punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.


Paul D. Holmgren, Judge Advocate.
O. Z. J. d.c., Judge Advocate.
Howard Simpson, Judge Advocate.

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

APO 534, U. S. Army.
2 September 1943.

Board of Review

NATO 397

UNITED STATES)

v.)

Private JOSEPH A. BARBIERI)
(12009617), and Private JOHN)
(NMI) BILCAVITCH (6139671),)
both of Company B, 18th Infantry.)

SECOND ARMORED DIVISION

Trial by G.C.M., convened at
APO 252, U. S. Army, 23 June
1943. Death, committed to dis-
honorable discharge, total
forfeitures and life imprison-
ment, as to both accused.
United States Disciplinary
Barracks, Fort Leavenworth,
Kansas.

HOLDING 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 separate Charges
and Specifications:

As to Barbieri:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Joseph A. Barbieri, Company B,
18th Infantry, being present with his company while it
was engaged with the enemy, did, at El Guettar, Tunisia,
on or about March 24, 1943, shamefully abandon the said
Company and seek safety in the rear and did fail to
rejoin it and remained absent until he surrendered him-
self at Algiers, Algeria, on or about April 7, 1943.

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

Specification: In that Private Joseph A. Barbieri, Company B, 18th Infantry, did, at El Guettar, Tunisia, on or about March 24, 1943, with intent to avoid hazardous duty, to wit, combat with an enemy force, desert the service of the United States, and did remain absent in desertion until he was returned to military control in a manner not shown at Algiers, Algeria, on or about April 7, 1943.

As to Bilcavitch:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private John Bilcavitch, Company B, 18th Infantry, being present with his company while it was engaged with the enemy, did, at El Guettar, Tunisia, on or about March 24, 1943, shamefully abandon the said company and seek safety in the rear and did fail to rejoin it and remained absent (until he was apprehended at Algiers, Algeria) on or about April 4, 1943.

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

Specification: In that Private John Bilcavitch, Company B, 18th Infantry, did, at El Guettar, Tunisia, on or about March 24, 1943, with intent to avoid hazardous duty to wit, combat with an enemy force, desert the service of the United States, and did remain absent in desertion until he was returned to military control in a manner not shown, at Algiers, Algeria, on or about April 4, 1943.

Each pleaded not guilty to and was found guilty of the Charges and Specifications pertaining to him. No evidence of previous convictions was introduced. Each of the accused was sentenced to be shot to death with musketry. The reviewing authority approved the sentences and transmitted the record of trial to the confirming authority, the Commanding General, North African Theater of Operations, who disapproved, as to Barbieri, so much of the finding of guilty of the Specification, Charge I, as finds that accused surrendered at Algiers, Algeria; as to Bilcavitch, disapproved so much of finding of guilty of the Specification, Charge I, as finds accused was apprehended at Algiers, Algeria, confirmed the sentence but commuted them, in the case of each accused, 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. He designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as place of confinement, and forwarded the record of trial for action under Article of War 50½.

This was a joint trial, but accused were separately arraigned and as to each, there were separate findings and sentences (R. 5,20,21).

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3. The evidence shows that the company of which accused were members, had been in combat with the enemy in the El Guettar sector during the Tunisian Campaign and, on 24 March 1943, had attacked a series of hills and attained its objectives. At the conclusion of this action, accused got permission to go after water, which was to be found in a hole up a ravine two or three hundred yards to the rear of company headquarters, but within the "company area" (R. 6,7,11,12,14,16). They had no authority to leave this area (R. 6). They departed, ostensibly to get water, but did not return to their company until after it had completed its battle engagements, or as one witness put it, "until after the show was over" (R. 7,15,18). After they left, "considerable fighting was going on all the time" and the organization, to use the words of the company commander, "was very short handed, terribly" (R. 7,17). The next time accused were seen with their command was about the first of May, in a rest area some thirty-five miles to the rear where the company had gone upon being relieved (R. 7,15).

When he returned to his organization, Barbieri told the company commander that he went back for water and "while in a rear area received some shell fire" and because of it, went to the first aid station as he "was slightly shell shocked". There he said he was told to go back to his organization, but being in no condition to return, he "went the other way to Algiers". He disclaimed any intention of deserting (R. 8).

Bilcavitch, upon his return, told the company commander "that he went back for water and received some shell fire and became dazed from shelling and that he went to the Battalion Aid Station and when told to return to his unit the next day, he was in no condition to go back and went to Algiers and as soon as he got there he felt better". He might have said he went to Algiers for medical attention (R. 8,9).

Each accused said he remained in Algiers about four days (R. 8,9).

Morning reports of the company were introduced in evidence without objection (R. 12,13; Exs. 1,2). These reports showed Barbieri from "duty to desertion", as of 24 March 1943, and from "des to ab conf", 14 April 1943. They showed Bilcavitch from "duty to desertion", as of 24 March 1943, and from "des to ab conf", 13 April 1943.

Two sergeants of the company testified accused were "good soldiers"; one sergeant believed he would be "satisfied to have the men in a detail he was taking to the front" and the other would be "satisfied to have either of the accused present with him in a patrol or any similar engagement with the enemy" (R. 16,17,18).

Both accused, after being apprized of their rights, elected to remain silent (R. 18).

4. It thus appears from the uncontradicted evidence that, at the place and time alleged, accused were present with their company while it

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was engaged in combat with the enemy and during a lull in the battle, they left to go to the rear for water, but failed to return to their organization which was sorely in need of their services; that they went to a first aid station and there were told to return to their command; that they did not return, but proceeded to Algiers, Algeria, over three hundred miles from the combat zone; that they remained unauthorizedly absent from their organization until after the fighting was over.

The only explanation of this misconduct advanced by the accused was that they had "received some shell fire" while going for water. Barbieri said he was "slightly shell shocked" and "was in no condition to return" to his company. Bilcavitch said he "became dazed from the shelling" and "was in no condition to go back" to his organization. They did not explain why they had been told at the first aid station to return to their command. They did not offer any evidence to support their bare assertions that they had been "slightly" shell-shocked or "dazed" from the firing. Obviously, the court rejected these claims as improbable and in reaching this conclusion, it was entirely justified.

The requirements of proof for conviction of violation of Articles of War 58 and 75 were fully satisfied (MCM, 1928, pars. 130a, 141a).

5. The company commander of accused's organization was permitted to testify that, in his opinion, the statements accused made to him "contained a confession". The statements, which were received in evidence without any showing that they were voluntarily made, were not in fact confessions since they fell short of admissions of guilt. But they did constitute admissions against interest which the court properly admitted without requiring any inquiry into the circumstances under which they were made (MCM, 1928, 114b). The opinion expressed by the company commander as to the legal effect of these statements was patently incorrect, but was harmless.

6. As to Barbieri, it was alleged in the Specification, Charge I, that "he surrendered himself at Algiers, Algeria, on or about April 7, 1943" and in the Specification, Charge II, that "he was returned to military control *** in a manner not shown at Algiers, Algeria, on or about April 7, 1943".

As to Bilcavitch, it was alleged in the Specification, Charge I, that "he was apprehended at Algiers, Algeria, on or about April 4, 1943", and in the Specification, Charge II, that "he was returned to military control *** in a manner not shown at Algiers, Algeria, on or about April 4, 1943".

The confirming authority disapproved so much of the findings of guilty of the Specification, Charge I, in the case of Barbieri, as found he "surrendered at Algiers, Algeria", and so much of the findings of guilty of the Specification, Charge I, in the case of Bilcavitch, as found he was "apprehended in Algiers, Algeria".

There is no evidence showing the place of the termination of the unauthorized absence in the case of either accused, and, consequently,

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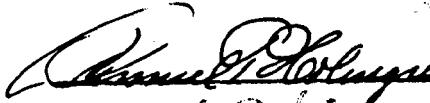
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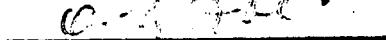
no support in the record of trial for the findings that each was returned to military control in a manner not shown at Algiers, Algeria. The variance or deficiency in proof in this regard is not material and does not affect the validity of the findings of guilty of the offenses charged (Dig. Op. JAG, 1912-40, par. 416 (14)). That accused were returned to military control is apparent upon the face of the record. In this case, no circumstance prejudicial to the rights of accused is inferable from the place of the termination of the unauthorized absence and it is of no importance that this return to military control may have occurred in Algiers or elsewhere.

7. The allegations were that Barbieri's unauthorized absence terminated on 7 April 1943, and Bilcavitch's on 4 April 1943. Hearsay and ordinarily inadmissible statements in the morning reports carry Barbieri from desertion to absent in confinement as of 14 April 1943, and Bilcavitch from desertion to absent in confinement, 13 April 1943. Competent proof of a return of these accused to military control fixes the time as "about the first of May". In each instance the unauthorized absence was shown by competent proof. This status of unauthorized absence having been established, it will be presumed to have continued until something to the contrary was shown (MCM, 1928, par. 112a). Findings of terminations of the absences at dates earlier than otherwise would be presumed could not injuriously affect the substantial rights of accused.

8. The same transaction in the case of each accused was made the basis of charges of desertion to avoid hazardous duty, violative of Article of War 58, and misbehavior before the enemy, violative of Article of War 75. This is not an unreasonable multiplication of charges. Accused could be properly tried and convicted of desertion and misbehavior before the enemy where, as here, the absence relied on as misbehavior before the enemy was the same absence on which they were charged with desertion (Dig. Op. JAG, 1912-1940, sec. 428 (5); CM 130018 (1918)).

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentences.

 Judge Advocate.
C. P. O'Halloran

 Judge Advocate.
C. F. Gill

 Judge Advocate.
Gordon Simpson

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NATO 397

1st Ind.

Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
4 September 1943.

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

1. In the case of Private Joseph A. Barbieri (12009617), and Private John (NMI) Bilcavitch (6139671), both of Company B, 18th Infantry, 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 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, seven 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 397).



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

(Sentences as commuted ordered executed. GCMO 29, NATO, 4 Sep 1943)

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

AP0 534, U. S. Army.
16 August 1943.

Board of Review

NATO 402

UNITED STATES)	45TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private COMER D. TAYLOR (35110483), Company C, 157th Infantry Regiment.)	AP0 45, 16 July 1943. Dis- honorable discharge and con- finement at hard labor for life. Place of confinement not designated.

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 92nd Article of War.

Specification: In that Private Comer D. Taylor, Company C, 157th Infantry, did, at or near Santa Croce, Cemerina, Sicily, on or about July 13, 1943, forcibly and feloniously, against her will, have carnal knowledge of Signora Modica Giovanni di Raffaele.

CHARGE II: Violation of the 96th Article of War.
(Finding of not guilty.)

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: (Finding of not guilty.)

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He pleaded not guilty to the Charges and Specifications.. He was found guilty of Charge I and its Specification and not guilty of Charge II and its Specifications. Evidence of two previous convictions by special courts-martial, one for absence without leave, larceny and desertion and one for failure to obey a superior officer, 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 your life". The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$, without designating a place of confinement.

3. The evidence for the prosecution shows that on 13 and 14 July 1943, accused and two other American soldiers were on duty guarding a pill box and some ammunition at Santa Croce, Camerina, Sicily (R. 32,33,34), at a place about 200 yards distant from the residence of one Giovanni Modica and his family (R. 43). On 13 July 1943, accused came to the Modica home and was invited to enter. In the house at the time were Modica, his wife, Signora Modica Giovanni di Raffaele, their three sons and a daughter, Pasqualina, age 15 (R. 4). Inside, accused removed his helmet, laid down his rifle, sat down and took out two rations (R. 4) which he distributed among the members of the family (R. 5). He drank a little wine, behaved like a gentleman (R. 16), gave the family some silver coins (R. 25) and left.

The wife, Signora Monica, testified that accused did not return that day (R. 5), but that on the night of the following day, "Tuesday", while they were all asleep, she heard loud knocking on the door. She called her husband and upon his opening the door to see who it was, the accused entered. She testified that he had a handkerchief over his face; that he pointed a rifle of a carbine type "as though he was going to shoot us"; tried to pull Pasqualina out of the house (R. 5,6), but that she broke away from him and went upstairs. She further testified that accused then turned on her and, seizing her by the back, dragged her from the house and out into a field where he dropped his rifle, "gave a twist" which threw her on the ground, unbuttoned his pants and "got on top of me" (R. 7,8). She testified that he raised her dress and undergarment, inserted his penis into her vagina and completed the act of sexual intercourse with her. She struggled, resisted by tightening her legs and tried to force him away from her. She screamed but he covered her mouth. He hurt her chest, arms and back (R. 8,9). She testified accused was on her for two hours; "he was sleeping on me" but was unable to push him off and that "he would wake up every time I tried to get away" (R. 9). She weighed approximately 105 pounds (R. 9). At the expiration of the two hours "there was some airplanes flying overhead", whereupon accused got up, picked up his belongings, "shook" her that "she should go", and left. She testified that she went to a neighbor's home where she stayed for the rest of the night; that as soon as it was daylight she complained to the authorities (R. 11,12,13). Her clothes were badly torn (R. 11). She also testified that accused wore the handkerchief over his face all the time he was in the house and that

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it fell off when he had her in the field. It was around twelve o'clock and the moon shone (R. 7,11). He looked as though he was drunk. She could positively identify him as the same soldier who came on "Monday" (R. 10). She also testified that accused had locked the older members of the family in the house, which had no windows (R. 14). She testified that as she was being dragged out of the house, she called a next door neighbor's name, "Antonio, Antonio". He responded, looked out and asked, "Where is your husband?" Just then the accused put his hand over her mouth. She saw no one else who could give her any help (R. 14,15). During the occurrence in the field, accused tore her dress and underwear. Witness identified the torn garments in court (R. 13).

The husband, Giovanni Modica, testified that accused came to the house the second time and knocked on the door when the family had retired for the night; that when witness opened the door, accused entered without invitation; that accused wore a helmet, had a handkerchief over his face and a rifle in his hand (R. 16) and that he woke all the occupants, threw the safety off the rifle and pointed "the rifle at us" (R. 17). He further testified that accused grabbed Pasqualina by the wrist but that she succeeded in breaking the grasp and getting upstairs; that he thereupon seized the wife and took her outside. Witness testified that accused did not lock him or the family in the house and that the accused merely closed the door to the room upstairs, into which the members of the family had gathered (R. 18). Witness opened it as soon as accused had taken his wife out of the house, but did not follow them because, as he testified, "why would I go and be killed" (R. 19). He testified when asked if his wife cried out for help when accused was taking her out of the house, "she was saying in an ordinary voice 'John, help me'" (R. 19). Witness identified the damaged dress (Ex. A) and undergarment (Ex. B) as belonging to his wife and testified they were not ripped or torn before the accused came to the house that night (R. 19); that he saw them the next morning in that condition (R. 20). He testified that he was not jealous of his wife (R. 20). He "was scared he would come back and take my oldest daughter" (R. 21,22). Witness, under cross-examination, testified that he identified accused by his eyes (R. 22); that "I can identify him anywhere by his eyes" (R. 23). Thereupon, at the suggestion of the defense, "6 soldiers were called into the courtroom and the witness taken outside. These six soldiers and the accused put on helmets and handkerchiefs over their faces and the room was darkened to simulate candlelight. The witness was unable to identify the accused" (R. 23).

Pasqualina Modica testified the accused came to the house in the morning of July 13, 1943, and returned the following night "around 12 o'clock" (R. 23). She testified she heard the knock at the door; that her mother called to her father in "a very low tone of voice", who, with a lighted candle, went to the door and opened it (R. 24). Witness saw accused enter wearing a handkerchief over his face. He pointed his rifle at the occupants of the room and seized her hand. She became frightened (R. 25,28). During her cross-examination, she pointed out the accused

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from among eight masked soldiers sitting in a row in the courtroom (R. 32). A brother of Pasqualina identified accused in court as the person who entered the Modica house (R. 30, 32).

Private George W. Russell, Company C, 157th Infantry, testified that he had been assigned with accused to guard the "pill box" and some ammunition in Santa Croce, Camerina, Sicily, and that accused left his post on the "morning of July 13, 1943. Tuesday morning", and returned at about 5 o'clock. He left again and returned "about one or two in the morning", on Wednesday (R. 33). Witness slept near the accused's bed and knew when he got to bed that night. He did not smell liquor on the accused's breath (R. 34).

Accused testified that on the afternoon of the day "I am accused of this", he had a talk with Giovanni Modica, who invited him to his home where he had a drink of water and about two "fingers" of wine.

They later walked up the street together and then separated. Afterwards, in the early evening, Modica "came up" and again invited accused to the house. Accused went to the house where he ate "spaghetti or something" and while he did not know what time he left, he knew he got to his quarters before twelve o'clock (R. 36). "These people", he testified, wanted some money and he gave them "75 or 80 cents". They showed accused some Italian money and he in turn showed them some American \$10.00 bills, which were the smallest denominations he had. They wanted these and he would not give them any (R. 37, 38). Accused testified, "The old man wanted me to go somewhere and the old lady, and I wouldn't go with them" (R. 37). Under cross-examination, accused testified he was arrested the morning after he had wine with "these people" and was certain that one day did not intervene (R. 38). He testified that he did not have a white handkerchief, but had picked up a "white rag" while in jail (R. 41). He went to "these peoples" house and had a meal and "would not be safe" in saying at what time they ate. After talking a while outside, --he understands a few words of Italian, "not to speak but to understand it"-- he returned to his post, went to a pond for water, drank some wine with two soldiers and then went to bed. He testified that two other soldiers were in their bunks asleep (R. 43). Accused had once carried an "Italian rifle" that he had "picked up" (R. 42).

Parreco Vincenzo Di Quattro, parish priest, was sworn as a defense witness and when asked as to the reputation of Signora Modica for chastity, testified that "I wouldn't say she was exactly a prostitute but in ways. There are people who go and everyone else knows she has something to do with men". Asked as to her reputation for truth and veracity in the community in which she resides, he answered, "don't believe anything she says". He testified that her husband was a good man and tried to do what is right (R. 46).

Giovanni Modica was recalled by the court and testified that accused gave some money to his wife and to four or five of his children. He also

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stated that when his wife was taken from the house she was not struggling. "My wife made me open the door. He had given her money" (R. 48). In the afternoon he left the house four or five minutes after accused left and returned at about nine-thirty. He saw accused in town just before dark and then did not see him any more that night, until the time when accused entered the house masked (R. 49).

5. There is substantial evidence that on or about 13 July 1943, accused went to the home of Signora Modica Giovanni di Raffaele, armed with a rifle and his face masked with a white handkerchief; that he threatened the members of the family with his rifle and seized a fifteen year old daughter; that when the girl escaped, accused seized the mother, Signora Modica Giovanni di Raffaele, dragged her into a field, forced her to the ground and through force and without her consent had sexual intercourse with her. It shows that she struggled with him, tried to push him away, resisted with her legs and tried to scream. These are evidential facts from which the court could properly infer that the unlawful carnal knowledge of the woman was accomplished by force and without the woman's consent; the elements necessary to constitute the crime of rape (MCM, 1928, p. 165). Accused at least inferentially denied having had intercourse with the woman but it was within the province of the court to determine the probative sufficiency of the evidence adduced and, in its preferred position, to judge what weight should be given to the testimony of all the witnesses.

6. The defense offered the testimony of the parish priest as to the reputation of Signora Modica for truth and veracity in her community. The answer elicited from the witness was, "Don't believe anything she says". Literally this response was improper as impeaching evidence (MCM, 1928, sec. 124b), but, regardless of that and of the probable misinterpretation of the witness' answer through an interpreter, it is manifest that its admission accrued to the benefit of the accused rather than to his detriment. Witness was also asked as to the reputation of Signora Modica for chastity and his answer thereto was likewise beneficial to the interests of accused. But except as to the issue of the woman's consent to the act, chastity or a want of chastity on the part of the female is immaterial in a case involving the crime of rape. Carnal knowledge of a woman by force and without her consent constitutes rape whether she is "lewd, and immoral or unchaste, just the same as if she were of most spotless purity and virtue" (Wharton's Criminal Law, par. 696).

7. The evidence discloses an apparent discrepancy as to the exact date when the alleged crime was committed. This, however, is of no consequence and can be attributed to the fact that it is alleged to have happened just before or after midnight and to the difficulty in purveying words of a witness through the instrumentality of an interpreter.

8. During cross-examination of the husband of the victim, he was asked whether he objected to accused having sexual relations with witness' wife. The defense stated that the purpose of the question was to develop

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the wife's consent to the act charged (R. 20,21). An objection to the question was properly sustained. The husband's state of mind was not a material issue.

9. The court sentenced accused to confinement "for the rest of your life". It is clear that it was the intention of the court to adjudge a sentence to confinement for the term of the natural life of accused.

10. The accused is 29 years old. He was inducted into the service 21 November 1941, and had no previous military service.

11. 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 of guilty and the sentence. The offense of rape here involved is recognized as an offense of a civil nature and is so punishable by penitentiary confinement for more than one year by section 454, Title 18, United States Code.

James D. Hollingshead, Judge Advocate.
_____, Judge Advocate.
Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army,
13 August 1943.

Board of Review

NATO 403

U N I T E D S T A T E S)	HEADQUARTERS COMMAND, ALLIED FORCE
v.)	Trial by G.C.M., convened at
Private FRANCIS I. CREEKMORE)	Algiers, Algeria, 23 June 1943.
(6987113), Battery A, 68th)	Dishonorable discharge and
Coast Artillery (Anti-Aircraft).))	confinement for life. United States 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 92nd Article of War.

Specification: In that Private Francis I. Creekmore, Battery "A", 68th Coast Artillery (AA), did, at Cheregas, Algeria, on or about 9 June 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one First Sergeant Raymond F. Lavallee, Battery "A", 68th Coast Artillery (AA), a human being by shooting him with a rifle.

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

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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 9 June 1943, near Cheragaz, Algeria, accused shot and fatally wounded First Sergeant Raymond F. Lavallee (R. 16,18,54,56). The events leading up to the shooting were as follows:

Accused and Lavallee were members of Battery A, 68th Coast Artillery (Anti-Aircraft) which was stationed near Cheragaz, Algeria (R. 41, 42,45,72). The battery occupied an area "right out in the midst of a field" (R. 48) adjacent to a vineyard, separated from the vineyard by a wire fence which ran in front of a small pup tent and a large pyramidal tent in the "rear echelon" of the battery area. In the vineyard one hundred or one hundred fifty feet from the fence there was a house occupied by French civilians (R. 7). Accused had met a French woman named Madame Kay Perfetto about the middle of May (R. 63,72,73). She lived in Algiers (R. 71), but had visited with her sister-in-law who lived in the house in the vineyard. Accused visited Madame Perfetto there "a few times" and called on her once at her Algiers home (R. 69, 71). About two weeks before 9 June 1943, accused proposed marriage to her. She said "no", that she was married. He asked her if she wanted a divorce and she said "yes". She mentioned being older than he, to which he replied it did not make any difference (R. 68). Lavallee had visited Madame Perfetto "two or three times"; she had met him at the same time she met accused (R. 64). About a week or two prior to 9 June 1943, accused requested Lavallee to give him a pass to take the afternoon off, that he wanted to go swimming with Madame Perfetto (R. 42,48). Lavallee "kind of grinned a little bit, and said, 'Can't do it; there's work to be done'" (R. 42). Accused went to his work and "a short while after, Private Masser came running up to say to the first sergeant that there was a young woman down in the vineyard, down by Masser's tent, and she wanted to speak to the first sergeant" (R. 42). He "was gone about half an hour, three-quarters of an hour, *** When he came back, he *** mentioned the fact that the girl had asked him if he would go swimming with the family" (R. 43).

Madame Perfetto testified she had learned from accused that the first sergeant "forbade him to come" swimming; that she told Lavallee if he wanted to go along, "so long as the other one could come, it would be all right". She testified Lavallee replied "maybe he would come but not the other one" (R. 66). Later, "it must have been a couple of days prior; five or six days prior" to 9 June 1943, an "argument or some hard feelings arose" between accused and Lavallee; something was said about "laying off that woman" and Lavallee remarked "he was a married man and he didn't want to have anything to do with that woman" (R. 35,37). On the evening of 9 June 1943, Madame Perfetto was at the house in the vineyard, expect-

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ing accused to visit her (R. 67). She had not invited Lavallee to call but he went to the house about 1830 hours and asked her to go out with him. According to her, she declined (R. 65,67). She testified she gave Lavallee "to understand" she expected accused over that evening and asked the sergeant if he would give him the permission; Lavallee replied he would let accused go to the village, but not to see her (R. 68). At her insistence, Lavallee left about 2030 or 2100 hours. Shortly afterwards she heard a noise; she had gone in the house and did not know what it was but thought "it was something that fall down" (R. 65,67).

Accused had gone into Cherasas on a pass on the evening of 9 June 1943 (R. 22,23) and returned to camp about 2000 hours. He went to the "maintenance tent" in the "rear echelon" where he had been quartered up to three or four days before then (R. 23). Private William Masser was outside his tent next to the maintenance tent (R. 32). He asked accused to go after two bottles of wine and the latter left and returned in about ten minutes with the wine (R. 33,34). Accused went over near the house in the vineyard and had a conversation with a little girl after which he returned to the maintenance tent (R. 33). About a half an hour before the shooting, accused told Masser he was waiting for Lavallee (R. 32,33).

Accused and four other soldiers were in the maintenance tent eating at about 2030 hours. According to Private First Class Paul Adams, accused "looked normal" and was not seen to take a drink (R. 17). There was some wine and brandy in the tent. The tent flaps were folded back so from a sitting position, one could see outside (R. 24). Shortly before 2130 hours, accused loaded an M-1 U. S. rifle and about two minutes later, standing in the door of the tent, began shooting (R. 9,13,17). At the time, Lavallee was observed "coming from the direction of the house through the vineyard". Corporal Denton Mitchell testified:

"I heard a shot and looked around and saw Private Creekmore aiming a rifle and he fired again and I looked to see what he was shooting at and saw Sergeant Lavallee fall" (R. 8).

After three shots had been fired "pretty rapid" (R. 19) Adams, who was standing nearby, testified he tried to take the gun away from accused but the latter "kind of pushed me backwards with his left hand and brought the rifle down to his side and kept on firing". Accused seemed to be normal while firing the gun (R. 20).

Mitchell, who was corporal of the guard, went to the guard tent, got a rifle and as he returned accused, walking up to him, said "I surrender" and suggested that he be searched (R. 10,12). Shortly afterwards, accused made a voluntary statement to Captain Edwin F. Moody, his company commander (R. 54, 55). He declared:

"I killed the first sergeant. I think I

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have done the battery a great favor and I know the men in the battery will buy flowers for my grave. I have been thinking about this for two or three weeks. However, that isn't the only reason that I killed him" (R. 56).

He further said that he would not tell the other reason for the killing but it would come out at the trial (R. 56).

When this statement was made, Captain Moody testified accused

"appeared perfectly normal and he told me he had not been drinking, and he acted just the same as always; I could see no change in him. He did not seem excited at all; just the same as usual" (R. 57).

Lavallee was admitted at the 29th Station Hospital in Algiers about 2230 hours 9 June 1943 and died approximately fifteen minutes after midnight. His death, in the opinion of two medical officers, was caused by two gunshot wounds, one in the abdomen and the other in the right shoulder (R. 57,58,59,60,61).

Accused elected to make an unsworn statement.(R. 72). He said he met Madame Kay Perfecto (sic) about the middle of May, got to talking to her and "occasionally afterwards" made appointments to meet her. He "saw her several times after that". Before he met "this girl", he said the first sergeant

"treated me like the rest of the men in the battery, and I got along with him and never had any trouble with him *** After I met the girl, things changed *** For one thing he stayed on my ass too much and I began to have a little hatred for him" (R. 73).

He related the circumstances of Lavallee refusing him a pass to go swimming with Madame Perfecto and refusing twice to let him see the company commander (R. 73,74). He told of Lavallee looking for him one afternoon when he was taking a walk with the girl. He said he later told the first sergeant "If you'll stay off my ass, I'll let her alone; if you'll stay off my ass, if you'll let me alone, you can have her" (R. 74).

He stated that on 9 June 1943, he had a pass "from six to eight in the evening" and went to Charagas where he drank "with the boys", drinking muscatel and "a couple shots of banana whiskey". Upon returning to the battery area he drank "some red wine and some brandy", about a half canteen cup full of brandy mixed with lemonade and a half bottle of red wine "practically by myself" (R. 75). He saw Masser, who was on

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guard, and went over to one of the farm houses and got him a "couple of bottles of vino". He had planned to see Madame Perfetto but when he got to the house and found out from talking with a little girl outside that Lavallee was there he left (R. 76,77). He said he told master he "would wait until the first sergeant left before I would go over". He spent his time from 2030 hours to 2100 or 2150 hours in the maintenance tent, where he said he had more brandy and a half a bottle of wine. He ate tomatoes, onions, cucumbers and some bread. He went to the door and "saw the first sergeant coming from the house through the vineyard" (R. 77). He said,

"I seen him coming and I didn't feel exactly right and I turned around, seen the rifle in the rack, and ammunition, and I remember grabbing the rifle and loading it as fast as possible and I remember firing the first shot, but I didn't aim the rifle; I don't know why. I can remember firing the rifle" (R. 78).

He believed he fired the full clip but "I don't know" (R. 78).

On 15 June 1949, Captain Chester M. Raphael, Medical Corps, examined accused. His diagnosis medically was

"without psychosis, psychopathic personality with asocial and amoral trends" (R. 88).

Captain Raphael considered accused had sufficient mentality to understand the nature and consequence of his acts (R. 88).

Captain Moody, called by the defense, testified concerning accused that

"Previous to this time, I have not had much trouble with him; he was the battery carpenter and performing his duties all right. He has been over the hill a couple times, now and then drinking, and other than that, he has been all right" (R. 92,93).

4. It thus appears from the uncontradicted evidence that at the place and time alleged accused shot and wounded First Sergeant Raymond J. Lavallee, Battery A, 68th Coast Artillery (AA), a human being, with a rifle, and that Lavallee died from the effect of the wounds shortly thereafter. Accused stated that he had formed a hatred for the first sergeant growing out of a rivalry centering about a married Frenchwoman. He considered certain duties and restrictions Lavallee imposed upon him to be part of a plan to place him at a disadvantage in courting the woman to whom he had proposed marriage. There is evidence from which the court could fairly conclude that accused determined to kill his rival in consequence of this situation; that he armed himself and deliberately

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waited in the battery area for Lavallee to return from the house in the vineyard where he was visiting; that he had formed the specific intent to slay the first sergeant and in keeping with that intent, fired with fatal effect as soon as he observed his victim approaching.

Besides the impositions he claimed to have suffered at the hands of Lavallee, accused offered as an explanation of the shooting that he had been drinking heavily. There is evidence, however, that he acted normally before and during the shooting and that after his arrest he appeared "perfectly normal" to his company commander to whom he stated he had not been drinking. The court was fully warranted in concluding that the killing was willful, unlawful and deliberate, that accused acted with malice aforethought when he committed the offense, and that he was guilty of murder as charged (MCM, 1928, par. 148a; Winthrop, reprint, pp. 672,673).

5. Accused was twenty-one years eleven months old at the time of the trial. He enlisted in the United States Army at Fort Thomas, Kentucky, 13 December 1939 and had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offense involved. No errors injuriously affecting the substantial rights of accused were committed during the trial.

7. For the reasons stated, in the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. Penitentiary confinement is authorized for the offense of murder here involved, 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 D. McRae, Judge Advocate.
C. F. Smith, Judge Advocate.
Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army,
30 August 1943.

Board of Review

NATO 407

UNITED STATES)	XII AIR FORCE SERVICE COMMAND
V.)	Trial by G.C.M., convened at
Corporal PROFIT (NMI) RANSON)	Algiers, Algeria, 20 July 1943.
(39525214), Company B, 908th)	Dishonorable discharge and
Air Base Security Battalion.)	confinement for life.
)	United States 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 92nd Article of War.

242261

Specification: In that Corporal Profit Ranson, Company "B" 908th Air Base Security Battalion, did, at Air Force General Depot Number 2, on or about 9 July, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Theodus Lee Masters, Technician Fifth Grade, Army Serial Number 37209540, Headquarters Detachment, 908th Air Base Security Battalion, 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 allow-

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ances due or to become due, and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated 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 9 July 1943, accused was in charge of a half-track and a machine gun crew which was guarding a runway at Maison Blanche air field in Algeria (R. 20,40). The posting of this guard was occasioned by the unsuccessful attempt of an "escaped German pilot" to take off from the air port in an American plane. It had been directed that "The control tower was to clear all planes through the half-track and unless they had been cleared the gunner had orders to stop the plane if necessary by shooting it down" (R. 39,40). The men on this detail had been given instructions "to impress upon them the responsibility of the man in charge of the half-track, and also the importance of their job of being sure they were correct before they operated in any way, so as to prevent an accident occurring and the possible shooting down of our own planes". Unless the radio operator was in contact with the control tower at all times, the detail could not properly perform its functions (R. 40). Technician Fifth Grade Theodus Lee Masters, Headquarters Detachment, 908th Air Base Security Battalion, was the radio operator on the half-track (R. 6,8; Ex. A). He went on duty about 1900 hours, 9 July 1943 (R. 27), put on his earphones and in "a second or two he was asleep" in the cab of the truck (R. 22,28). A member of the detail "woke him up and tried to rouse him around, and he went right back to sleep" (R. 28).

Accused tried without success to awaken Masters (R. 22) and then reported the facts to an officer of the guard who approached at about that time. The officer being satisfied Masters was in no condition to continue on his post, told him and accused that the officer would go to headquarters and obtain a relief, whereupon he left (R. 19,22). After the officer had driven away, the door of the cab of the truck opened and Masters said to accused, who was standing outside, "You didn't have to white-mouth on me***because it didn't make you a bit more higher grade" (R. 23). A member of the detail testified that:

"Ranson says to him, 'You was asleep'; he said, 'I am taking the responsibility on myself, that is why I reported it'. So Masters said, 'you are just a white-mouth mother-fucker, that is all'. Ranson says. 'If you call me another white-mouth mother-fucker, I will blow your God-damned brains out', and Masters called it to him again.***Ranson reached and got the pistol.***^{**}Masters was sitting down on the right hand side. I was on the left in the driving seat ***Masters said, 'Don't play with the pistol'.*** I jumped out the truck, sir, on the left hand side and come around to stop him. I got to the right

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hand corner of the rear of the truck when one shot was fired. When he fired, I wheeled, sir, and Emmett Steele jumped off the back of the truck. I couldn't see Masters at the time the shot was fired, so I ran out. By the time I was going off, I heard four more shots. I ran about 100 yards. Emmett Steele was ahead of me, so we stopped and turned around, and we saw Masters fall out the left hand side of the driver's seat.***Ranson came around the right hand side of the truck with the pistol in his hand, sir* (R. 23).

Masters was not armed and was not seen to make any attempt to strike or menace accused and was not heard to make any threats (R. 24). The half-track was equipped with a .50 caliber machine gun mounted on a post in the center of the vehicle and there was an M-1 rifle about five or six feet from where Masters was sitting (R. 30,31). Masters had been drinking to some extent (R. 22,25).

Soon after the shooting, a medical officer went to the scene and there found Masters dead, lying on the ground by the driving compartment of the half-track with his left foot still hooked on the running board (R. 5,13). The medical officer asked what had happened and accused replied "that he had shot that man***and that he shot him with a pistol". From an examination of the body at that time and from a subsequent autopsy, it appeared that two bullets had entered Masters' body from the back (R. 6,15,16,17), one of which had struck the heart. Death had resulted from the wounds (R. 15).

During the course of an investigation, after he had been warned that he might remain silent and that what he said would be used against him (R. 34), accused stated:

"On July 9, I went on guard about 7:15 P.M., as well as I can remember. We was guarding the runway out there on the air port. We was about seventy-five yards from the runway. I relieved the guard who was on and the operator was there. He (the operator) was relieved about thirty minutes after I arrived, and the new operator who came on was the man who was shot. After he had came on, we had a radio short-wave set out there on the half-track and it was his job to receive calls and if it was any information to be given, it was to be given out to me, as I was the gunner. He was supposed to give me the calls if the information was important.. So he didn't use his earphones. He had earphones which he used to receive calls from the tower, but he was not using them, and I asked him a couple of times why he was not using the phones like he was supposed to. So he didn't seem to pay me any mind or anything, and we was kind of

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getting uneasy about it ---- why he did not use them. So a little later a truck came out there to bring us five gallons of gasoline, and the radio set had to be cut off before you could put gas in the half-track, and it seemed like he did not care whether he cut the radio off or not. One reason we was worried about the radio being cut off, Lt. Whitaker, his officer, had told us that if there was any gas being put into the half-track, if the radio was not cut off, it would blow the half-track all to pieces. So while they was putting the gas in, Henry Smith, he poured the gas into the half-track. Emmett Steele and myself, we walked away about ten or fifteen feet away from the half-track because we was not sure whether it (the radio) was cut off properly or not. A few minutes later, after the gas had been put into the half-track, Smith told us he guessed everything was allright, so we walked back to the half-track and Masters was still sitting in the position he was sitting in all the time, like he was when he first arrived and got in the half-track on the right hand side in the front seat. He had his head down something like he was asleep, with his hand on his head. I do not know whether he was asleep or not. And he still had not put his earphones on his ears, and I asked him again, was he gonna use the phones like he is supposed to, and he roused up and looked around and said he knew what he was doing." (Ex. B)

Accused then reported to the officer. The officer aroused the operator, told him he was not properly attending to his duties, and asked him if he had been drinking. The operator replied in the affirmative and the officer stated that he would secure a relief for him. The officer then left (R. 18,19). Accused continued:

"I was still standing around on the right-hand side of the half-track, and Masters turned around and started to calling me 'mother-fucker' and said I was a 'white mouth', no good corporal, and I asked him to quit calling me all of those names and he just repeated them. I asked him again to quit calling me a 'mother-fucker' and all those dirty names. And then he opened the door and say, 'I'll get out and break your God damned neck', and then when he say that, after he had opened the door, I pulled out my pistol, out of my holster, and I put a round in the chamber and he had turned about half-way facing me in the seat like he was going to get out and that was when I began starting shooting. After I shot him, he fell out on the left-hand side

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of the half-track and Henry Smith, he ran to the Company and I suppose he told someone about it, because the doctor and Captain Carson arrived a few minutes later, and they asked me what had happened, and I told them I had shot the operator." (Ex. B)

Accused did not testify or make an unsworn statement (R. 41).

4. It thus appears from the uncontradicted evidence that at the place and time alleged, accused killed Technician Fifth Grade Theodus Lee Masters, the person named in the specification, by shooting him with a pistol. Masters addressed insulting and abusive language toward accused, whereupon the latter threatened to kill him if the offending language was repeated. Masters repeated the language and accused at once drew his pistol, shot his victim twice and mortally wounded him. Accused asserted that Masters opened the door of the truck and said "I'll get out and break your God-damned neck", and turned partly towards accused as if to leave the truck just before accused fired the fatal shots. It is difficult to reconcile this assertion with the evidence that Masters was shot in the back. Whatever was the fact in this particular, there was no provocation adequate as a matter of law to reduce the unlawful killing to manslaughter. Insulting and abusive language, although coupled with a threat and movement by an unarmed man to commit a simple assault, does not constitute such conduct or provocation.

"The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide.

"In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm (Clark)" (MCM. 1928, par. 149a, p. 166).

There is no evidence that accused had any reasonable ground to believe himself in danger of losing his life or suffering great bodily harm. The court was justified in concluding that he did not act in self-defense. The time between the quarrel and the shooting was short, but the malice aforethought which characterizes murder need not exist for any particular time before the act. Malice must be inferred from the threat by accused followed shortly by his use of a deadly weapon to accomplish his avowed intent. The evidence is legally sufficient to

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support the findings of guilty of murder as alleged (MCM, 1928, par. 148a; Winthrop, reprint, pp. 672, 673).

5. Accused is 30 years old. He was inducted into the Army of the United States 6 July 1942. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed at 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. Penitentiary confinement is authorized for the offense of murder here involved, 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.

Frank D. O'Byrne, Judge Advocate.
O. J. Fde, Judge Advocate.
Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army,
26 August 1943.

Board of Review

NATO 412

U N I T E D S T A T E S)	HEADQUARTERS FIRST ARMORED
v.)	DIVISION
Private CLEO (NMI) WEAVER)	Trial by G.C.M., convened at
(38064521), Company A,)	APO 251, 21 July 1943. Dis-
6th Armored Infantry.)	honorable discharge and con-
)	finement at hard labor for
)	thirty years. Place of con-
)	finement not designated.

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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Cleo Weaver, Company "A", 6th Armored Infantry, did, at Maknassy, Tunisia, North Africa, on or about 3 April 1943, desert the service of the United States by absenting himself without proper leave with intent to avoid hazardous duty to-wit: actual combat with the enemy, and did remain absent in desertion until he surrendered himself at Ain M'lilla, Algeria, North Africa, on or about 8 May 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by special court-martial

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for desertion with intent to avoid hazardous duty, in violation of Article of War 58, 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 thirty (30) years. The reviewing authority approved 'the findings of guilty of the specification and Charge, except the words "at Ain M' lilla, Algeria", and substituting therefor the words, "to military control"', approved the sentence and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$, without designating the place of confinement.

3. The evidence shows that on 1 April 1943, Company A, 6th Armored Infantry Regiment, of which accused was a member, attacked the enemy on some hills northwest of Maknassy, Tunisia (R. 7,10). That night the company withdrew to a wadi about 4 miles west of Maknassy where it remained in "mobile reserve" until 8 April 1943 (R. 7,10,11). This location was not more than one and one-half miles from the enemy lines and was "more or less of a rest camp" (R. 7). The company had a "stand-to" at daylight, 3 April 1943, at which time accused was found to be missing. A search was made but accused, who had been present on 2 April, could not be found in the area and, as of that day at 0700 hours, he was entered on the morning report absent without leave (R. 8,9; Ex. A). He was not seen again until 8 May 1943 (R. 8). The accused had been with the company since it landed in Africa on 8 November 1942, and since that date had taken part in about four engagements with the enemy, including that of 1 April (R. 11).

Accused made a statement through counsel:

"That after his departure from the area on April 3rd, he spent approximately one month in confinement awaiting return to his organization, there being no transportation available and wishes the court to consider the fact that he has been engaged with the 6th Armored Infantry in every engagement from the original landing on November 8th until just before April 3rd. He also wishes the court to consider that the company at the time charged in the specification was in mobile reserve and was not in actual contact with the enemy and states to the court that he had no intention, at the time, to leave his organization for the purpose of avoiding hazardous duty but at all times intended to return for the continuation of the campaign to which he had served during all previous engagements but states to the court that he was apprehended in Constantine a short time after April 3rd and although desirous of returning to his unit was unable to be returned there until after hostilities had ceased" (R. 12).

4. It thus appears from the evidence that on the date alleged, accused absented himself without authority from his organization which was then in close contact with the enemy. His company had engaged the

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enemy two days before and was in mobile reserve. Instead of remaining at his place of duty, accused abandoned his company and remained absent therefrom until he was seen again on 8 May 1943. From the unauthorized absence under the circumstances, it was competent for the court to infer that accused quit his organization with intent to avoid hazardous duty, combat with the enemy, as alleged. There is substantial evidence to support the findings of guilty of desertion.

5. Confinement in a penitentiary is authorized by Article of War 42 for desertion in time of war.

6. Accused is twenty-five years old. He was inducted into the Army of the United States 29 January 1942. No previous service shown.

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.

James P. Holleyman, Judge Advocate.
D. T. Dill, Judge Advocate.
Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army,
7 September 1943.

Board of Review

NATO 415

U N I T E D S T A T E S)	MEDITERRANEAN BASE SECTION
v.)	Trial by G.C.M., convened at
Private HEZEKIAH (NMI) LOGAN)	Oran, Algeria, 7 July 1943.
(36174094), Company C, 384th)	Dishonorable discharge and
Engineer Battalion (Separate).)	confinement for 16 years.
)	United States Disciplinary
)	Barracks, Fort Leavenworth,
)	Kansas.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

241845

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 93rd Article of War.

Specification 1: In that Private Hezekiah Logan, Company "C", Three Hundred and Eighty-Fourth Engineer Battalion (Separate), did, at Oran, Algeria, on or about May 31, 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person Bey Mohamed Abderiahamane, of Oran, Algeria, seven hundred and fifty francs, the property of the said Bey Mohamed Abderiahamane, value about fifteen dollars.

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Specification 2: In that Private Hezekiah Logan, Company "C", Three Hundred and Eighty-Fourth Engineer Battalion (Separate), did, at Oran, Algeria, on or about May 31, 1943, with intent to do him bodily harm, commit an assault upon Sergeant Ernest Langley, by cutting him on the arm with a dangerous weapon, to wit, a knife.

CHARGE II: Violation of the 68th Article of War.

Specification: In that Private Hezekiah Logan, Company "C", Three Hundred and Eighty-Fourth Engineer Battalion (Separate), being engaged in a disorder among persons subject to military law and having been ordered into arrest by Corporal Luke Saddler, did, at Oran, Algeria, on or about May 31, 1943, refuse to obey the said Corporal Luke Saddler.

Accused 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 sixteen years. The reviewing authority approved the sentence; 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 about 1600 or 1630 hours on 31 May 1943, Bey Mohamed Abderiahamane, an Arab, was walking alone on a road near Oran, Algeria (R. 5). Accused came over and grabbed Abderiahamane by the arm, took a wallet from his inside pocket, took out the money consisting of 750 francs, value of about fifteen dollars, threw the wallet down and slapped Abderiahamane in the face (R. 5,6). Abderiahamane testified that "I just stood there because I was afraid" (R. 6).

With accused at the time were Private Ike Robinson, Company C, 384th Engineer Battalion, and a Private Brown. When the Arab tried to recover his property and said "gimmie, gimmie", Brown slapped him in the face. Robinson remonstrated with accused for taking the money and accused told him, "you are scared". Robinson then left Brown and accused (R. 7,8,11). (Specification 1, Charge I).

Sergeant Ernest Langley, 384th Engineer Battalion, and accused were quartered in the same tent at Oran and in the "night at about 1:30" of 31 May 1943, the latter entered when Langley was asleep, called Langley's name, pulled the mosquito bar off his bed, and said that this was his "night to howl" and that Langley was "no good". Langley smelled intoxicating liquor on accused and tried to get him to bed. Accused drew a knife and Langley threw his hand up. The knife struck him on the outside

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of the left arm, near the wrist. When Langley turned to go out the back of the tent, accused stabbed at him again. The knife cut the right sleeve of his shirt, near the armpit. Outside the tent accused attempted to stab Langley a third time (R. 11,12). Langley did not strike accused when he was trying to get accused to go to bed and testified that accused had been drinking but was not drunk. Accused was one of Langley's cooks and had had no previous trouble with him. Langley received treatment for the cut (R. 13,14). A medical officer testified that Langley had an incised wound on the left forearm, approximately one-half inch long and one-eighth inch deep. In his opinion, the wound was made by some instrument with a sharp edge (R. 14). (Specification 2, Charge I).

Corporal Luke A. Saddler, Company D, 384th Engineer Battalion (Separate), was a guard, wearing sidearms, on the afternoon of 31 May 1943. His duties were to patrol a bivouac area near Oran and "keep all the Arabs back and all the soldiers". He saw accused and a Private Brown coming up the road (R. 15), just after, as it appears, the accused had done some damage to a door at a nearby house. Saddler accosted accused and told him that he had to "go down and get that straightened out-- what happened at the house", which accused refused to do. Saddler then told accused and Brown they were under arrest and had to be taken to the guardhouse. They refused to go and accused "pulled a knife out" (R. 16, 17,18,19,21,23,24). A large crowd of Arabs and colored soldiers gathered around Saddler (R. 17,22). Brown and accused asked the soldiers "if they was going to let us do it that way" (R. 20). The soldiers remonstrated with Saddler and commenced throwing "rocks" at him. Saddler backed away and sent for Sergeant "Sheffield" (R. 17). Upon the arrival of the sergeant (Sheffield Rigsby, 384th Engineer Battalion (Separate)), the situation, as described by the testimony of Private Edward N. Harper, also of that Engineer organization, was that

"there was a crowd of soldiers out around Saddler and Logan. They were interfering and ganging up together trying to keep Corporal Saddler from arresting Logan and Brown. ***a bunch of soldiers got crowded about a gate and began advancing on Sergeant Rigsby and Corporal Saddler, and they were advancing back.*** Sergeant Rigsby asked them to get back about three times" (R. 22).

Saddler testified that the crowd "commenced to keep on crowding up and rocks commenced to sing around our heads" (R. 18). Rigsby testified that,

"nobody was talking much -- just a big excitement like*** a kind of noise like" (R. 24).

and that as accused and Brown were advancing Saddler told accused "he was going to come down to the guardhouse and see the Captain". Rigsby told him the same thing. The accused cursed and replied "he

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wasn't going nowhere" (R. 23,24). Accused and Brown were in the crowd (R. 18) and accused was observed throwing "rocks" (R. 20). Saddler finally got behind a fence, was hit in the chest with a "rock" and fired his pistol five times "in the direction towards the crowd -- in the air" (R. 18,19,22). (Specification, Charge II).

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

4. It thus appears from uncontradicted evidence under Specification 1 of Charge I, that at the time and place alleged, accused, in company with two other soldiers, accosted one Bey Mohamed Abderiahmane, forcibly grabbed him by the arm, reached into his inside pocket, withdrew his pocket book and accused extracted 750 francs. When Abderiahmane protested accused slapped his face. With the accused were two other soldiers, one of whom also slapped the victim. These facts clearly establish a larcenous taking. The concomitant circumstance of accused seizing the victim's arm in the presence of two companions whose exercise of their potential power of overcoming resistance could reasonably be expected, justified an inference that accused effected the larceny through intimidation as well as violence.

"Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. (Clark)" (M.C., 1928, par. 149f).

The amount of violence is immaterial; it is enough where it overcomes the actual resistance of the person robbed, or puts him in such a position that he makes no resistance. Every element necessary to constitute the offense of robbery is therefore shown.

It also appears that at the time and place alleged accused assaulted Sergeant Ernest Langley and lacerated his arm with a knife, accused using the knife in a manner likely to produce great bodily harm. The assault was willful and all the attendant circumstances justify the inference that accused had the specific intent of inflicting bodily harm on his victim (Dig. Op. JAG, 1912-1940, sec. 451 (10)). Accused was properly found guilty of the assault alleged in Specification 2, Charge I (M.C., 1928, par. 1491).

The evidence in support of Charge II and its Specification justifies the findings of the court that at the time and place alleged there existed a disturbance of a contentious character, with accused as an active participant, and that Corporal Saddler, in an effort to part and quell the disorder, gave an order placing accused under arrest, which the latter then and there disobeyed. While it appears that a marked disorder was occasioned by Corporal Saddler's order placing accused in arrest for failing to attend to some damage indicated to have been done

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by him to the door of a house, it is sufficiently disclosed by the evidence that such an order was again given by Saddler when the disturbance was at its height. But even with respect to his first order, it is reasonable to infer, from the suddenness with which its ominous character arose from among an apparent aggregation of Arabs and soldiers that a disorder, though in a less acute stage, was then extant. Either theory finds support in the evidence. It is clearly established that accused heard and understood the order and that he knew Saddler was a non-commissioned officer. With all the foregoing facts and circumstances present, accused was properly found guilty of violation of the 68th Article of War (MCM, 1928, par. 138a).

6. Accused is 28 years old. He was inducted into the Army 27 February 1942. He had no prior military 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.

Ramsey D. Holleyman, Judge Advocate.
O. Z. T. de, Judge Advocate.
Howard Thompson, Judge Advocate.

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

APO 534, U. S. Army,
18 August 1943.

Board of Review

NATO 416

UNITED STATES)

v.)

Private VIRGIL J. TUCKER
(14033014), Company A,
894th Tank Destroyer
Battalion.

FIFTH ARMY

Trial by G.C.M., convened at
Sidi-bel-Abbes, Algeria,
12 July 1943. Dishonorable
discharge and confinement
for life. United States
Penitentiary, Lewisburg,
Pennsylvania.

REVIEW by the BOARD OF REVIEW

Helmgren, 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 Specifica-
tions:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Virgil J. Tucker, Company "A"
894th Tank Destroyer Battalion, did at Sidi-Bel-Abbes,
Algeria, on or about 5 June 1943, with malice aforethought,
willfully, deliberately, feloniously and unlawfully kill
one, Francois Fernandez, a human being, by stabbing him
with a knife.

CHARGE II: Violation of the 93rd Article of War.

Specification 1: In that Private Virgil J. Tucker, Company "A"

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894th Tank Destroyer Battalion, did, at Sidi-Bel-Abbes, Algeria, on or about 5 June 1943, with intent to do him bodily harm, commit an assault upon Captain John Buleteau, by cutting him on the hand, with a dangerous instrument to wit, a knife.

Specification 2: In that Private Virgil J. Tucker, Company "A" 894th Tank Destroyer Battalion, did, at Sidi-Bel-Abbes, Algeria, on or about 5 June 1943, with intent to do him bodily harm, commit an assault upon Andre Liagre, by cutting him on the hand, with a dangerous instrument to wit, a knife.

He pleaded not guilty to and was found guilty of the Charges and Specifications, with the exception that the court substituted the word "back" for the word "hand" in Specification 2, Charge II. 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 50f.

Q. The evidence shows that as Gean Paul Bultean, "Captain of the Douairs", was walking with his wife along a street near the intersection of Rue Alfred Du Musset and Boulevard Denton in Sidi-bel-Abbes, Algeria, about 2000 hours on 5 June 1943, he noticed two American soldiers kicking a door. About the same time, three civilians, a man, lady and little girl, came around the corner and the "two American soldiers rushed across the street and tried to hit the civilians" (R. 5). Captain Bultean testified he went

"on up and one of the soldiers turned and tried to hit me on several occasions *** with a pocket knife, the blade of which was about four inches long *** By that time my wife had come to the place and she was scared and screaming. One of the soldiers turned to my wife and caught her by the back of her gown and tried to hit her *** I ran to my wife; I got hold of the soldier, caught his right arm with my left hand and tried to grab the knife away from him. I was holding the blade and the soldier jerked the knife and cut my finger" (R. 6).

The place where this cutting occurred was identified as point "A" on a map introduced in evidence and marked Exhibit A (R. 6,7). Captain Bultean testified the man who cut him had been drinking but was not drunk and identified accused as his assailant (R. 6,7,8).

When Captain Bultean went to the aid of his wife, Private Andre Liagre, a French soldier, also "went to help" (R. 6, 9). Liagre

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testified he saw a knife blade which "could have been about four fingers long" in the hand of an American soldier whom he tried to disarm (R. 9); that the soldier "succeeded in freeing the hand which was holding the knife and he hit me in the back"; that the blade penetrated his shirt and cut through his skin. Asked if the man who wielded the knife was present in the courtroom, Liagre testified, "I think it is the one sitting there", indicating accused (R. 10). Madame Jeanne Bulteau, the Captain's wife (R. 11,12), testified the man who cut her husband was "the young man in the middle (indicating accused), I think, but I find him changed and rather thin" (R. 12).

At about 2030 hours the same evening, in response to a "riot call", Corporal Robert M. Urdinarrain and Private First Class Andrew Hegedus, both of Company B, 101st Military Police Battalion, and two other soldiers proceeded in a "jeep" to the French Police Station. There they met an "English speaking French captain" who told them a French officer had been cut and "indicated the direction the soldiers had gone" (R. 13). Urdinarrain and Hegedus had followed the direction indicated for a few blocks, when, according to Hegedus' testimony, "Corporal Urdinarrain and I jumped out of the jeep and gave chase on foot" (R. 13,14).

Hegedus testified that, as he dismounted from the "jeep", he saw and pursued two soldiers dressed in United States Army "O. D." uniforms and overseas caps; that they went in a northerly direction and he lost sight of them at a bend in the creek but they reappeared on the railroad track whereupon he fired three shots in the air. The soldiers fled along the railroad track across a trestle and again disappeared. Hegedus indicated point "B" on the map (Exhibit A) as the point he first saw the soldiers he was pursuing. He indicated point "C" as the place the soldiers reappeared on the railroad track and point "D" as where he lost sight of them after he saw them on the railroad bridge (R. 14,15,18). Hegedus testified further that he followed past the creek and along the railroad track, came to a grade crossing and had "stopped a few seconds" when a woman screamed about three hundred yards below him. He ran from the railroad down a dirt road and found the woman who was screaming. It is shown inferentially, but not directly, that this position is indicated as point 12 on the map (R. 54,55). "There were a few children around and a man lying on the ground" (R. 15). He did not stop at the house (R. 18), but continued running, "but not fast", down the road to a house by "this creek", where he stopped "one or two seconds", then crossed the creek where he saw "some kids" who were saying, "No, down this way". He proceeded down the dirt road, crossed the creek, commandeered a bicycle and following the direction he had been given, reached the Tlemcen highway where he came upon two soldiers trying to get through a barbed wire fence between them and the highway (R. 16,19). He took these men into custody. He testified one of the two was accused (R. 16); that he was sure the soldiers he arrested were the same ones he had pursued across the creek and along the railroad track because "They were the only two soldiers in the area" (R. 18). Hegedus marked with a red pencil and initialed (A.H.) on the map (Exhibit A) the route he had taken during the chase (R. 17).

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One Abdelkader Bouchoucha, a mill worker who chanced to be near the railroad at about 2030 hours on 5 June 1943, testified he "noticed two Americans running away and police was shooting at them and they passed within about 30 meters of me". He identified accused as one of the two soldiers (R. 25). He testified the fleeing men turned left, running, but "not too fast"; that he next saw them "after they crossed the farm and passed on down the Oued, the other side of it"; that they were the same man who first passed him (R. 26); that he went on to the Tlemcen road where he saw the police and "about thirty Americans had their hands up"; that he pointed out accused and companion among this group (R. 27).

Hegedus described accused at the time of his arrest as follows: "His shirt was open. He looked tired. His cap was on the back of his head. *** He was perspiring freely (R. 16). Second Lieutenant Thomas F. Berteau, Company C, 101st Military Police Battalion, who saw accused after he had been arrested, testified his physical appearance was "That of flushed face, heavy breathing, and all around appearance of exhaustion *** At the time he was sober. He was not drunk". It was then between 2130 and 2145 hours, "just before dark" (R. 28,29). Lieutenant Berteau testified he "saw an abrasion on the top part of the forehead of one of the men", he did not recall whether it was accused or his companion (R. 30).

In the meantime, about five minutes after the "riot car" had been sent out by Military Police, "another call came through" and Lieutenant Berteau, accompanied by Sergeant Ludwig H. Schreiner, Company C, 101st Military Police Battalion, followed the first "jeep". Schreiner left the car at an irrigation ditch, went "to the stream nearest the railroad track" and saw two men in "OD's" running to the railroad. He testified he fired three or four shots in the air but the men did not halt (R. 31); that they continued to a little railroad bridge which was about one hundred and fifty yards from where he first saw them; that he followed to the bridge and observed that the soldiers "were headed towards a farm house". Schreiner said, "I ran towards the farm house and the women there were screaming. I saw a man lying on the ground and there was a cut below his left breast. *** Right below the heart" (R. 32). Schreiner did not recognize the two soldiers (R. 33).

At about 2100 hours on 5 June 1943, Francois Fernandez, his wife, mother and father, who was also named Francois Fernandez, were outside their house on "the great farm" when they heard the report of guns from a place near where the river and the railroad come together. After these shots were heard, two Americans came by, one of whom struck the elder Fernandez in the heart with a knife. The wounded man died two or three hours later (R. 34,35). The younger Fernandez testified he did not see the face of the man who stabbed his father; that the assailant had a knife with a blade about four inches long; that his father said nothing to the American soldiers as they came along, "he was looking at a trash can and the Americans came and struck him"; that the soldier did not stop after stabbing his father but continued running (R. 35,36,37). Herminie, wife of the younger Fernandez, also saw the two Americans coming; she

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testified, "They came towards me to hit me. I was frightened and ran away, so they turned to my father-in-law and after they hit him ran away". After the stabbing, the assailant ran away along the garden path (R. 38,39,40). She identified accused as the man who stabbed her father-in-law (R. 39).

First Lieutenant Chapus Mauric, Medical Corps, French Army, performed an autopsy on the body of Francois Fernandez on 7 June 1943, and was of the opinion that

"death was caused by a sharp and cutting instrument which punctured the stratum at its base. The hide, the heart muscle at the level of the right ventricle were also punctured" (R. 43,44).

He testified Fernandez probably died the day before he made the autopsy (R. 44). Captain Louis M. Weiner, Medical Corps, 64th Station Hospital, testified that he witnessed the autopsy by Doctor "Chapus" at the French Hospital and that he is of the same opinion as to the cause of death (R. 44).

For the defense, Madame Marie Sanchez testified she lived at the Collet Farm (see point 14 on map, Exhibit A), that on 5 June 1943, she heard two reports, she did not know if they were guns or pistols, and soon afterwards two American soldiers passed her door; they went by quietly. She thought they were taking a walk. After they passed she saw a man holding a pistol in his left hand; he went slowly through the garden (R. 45, 46).

After the arrest of accused, knives were taken from him and his companion, each having a blade two and one-half or three inches long (R. 47). Inconclusive tests of stains on the blades of these knives were made; the spots might have been blood, rust, wine, or some other substance (R. 49,50).

Upon cross-examination of Herminie Fernandez and by testimony of Captain Ralph D. Crosby, 894th Tank Destroyer Battalion, it was shown that on the day following the stabbing, she failed to identify accused among a group of soldiers lined up at the French Police Station. She testified, "They told me to look. I did not know why, but I could not see either one" (R. 40,48). It was further developed that about fifteen days later, at a time before the trial, she was interrogated in a room in which were present an American captain, a reporter, accused, his brother, and another unnamed person; thereafter, she went to "the tribunal in town" and recognized "the two". At that time they were "mixed with other soldiers" (R. 41,42,57).

Captain Murray Richards, Headquarters Fifth Army, Defense Counsel, testified that he traced the route taken by Hegedus, according to his testimony, beginning at the scene of the homicide and ending at the Tlemcen Road. He testified this distance was seven hundred sixty steps. He testified that the route, which he argued must have been taken by the assailant to the Tlemcen highway, was eleven hundred twenty-five steps (R. 55,56).

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His company commander testified accused had performed his duties in an excellent manner (R. 49) and the first sergeant of his company testified he had an excellent reputation (R. 51).

Accused elected to make the following unsworn statement, through counsel:

"I do not wish to make a sworn statement, because I do not want to make any statement that could be used against my brother as I understand they are still holding him a prisoner in case they can get something to charge him with out of this trial. I want to make an unsworn statement to explain away the evidence that has been brought against me. I will not refer to my brother. At about eight forty P. M. on June 5th I was walking in Sidi-bel-Abbes westerly along the south side of a small irrigation canal, that runs from Rue Ancelot across Rue Massera and in front of the Collet farm. I continued as far as Rue Massera and then for the first time crossed this canal at Rue Massera and went into the vineyard to the north of the Collet farm between the farm and the creek. I stayed there for a short time but never crossed the creek. Presently I heard shots to the north and sometimes thereafter I went around the west side of the Collet farm, right in front of the farm, a short distance south down a road leading to the farm from the Tlemcen road, left again in front of the Gonzales farm near the barbed wire fence to a point near the corner of Rue Massera and the Tlemcen road. Because of my brother's position I am, on advice of counsel, making no further statement whatever" (R. 58).

4. It thus appears from the uncontradicted evidence that at the place and time alleged, accused stabbed Francois Fernandez, a human being, in the heart with a knife and that shortly thereafter, Fernandez died from the effects of the wound. Accused was identified as Fernandez' assailant by the daughter-in-law of the slain man. Accused admitted in his unsworn statement that he was in the general vicinity of the Fernandez house when the fatal stabbing occurred. In that statement, he did not deny his guilt. When apprehended, he was out of breath, disheveled and exhausted, as if he had been running. No clear motive was shown for the stabbing. However, the evidence shows that shortly before Fernandez was attacked, accused had made an unprovoked demonstration of violence against three French civilians; he had threatened the wife of a French captain and had cut the captain with a knife when the latter went to his wife's aid; he had stabbed a French soldier who tried to help the captain; he had fled from the scene and when he approached the Fernandez home, advanced as if to hit a woman and when she fled, plunged a knife into the heart of Francois Fernandez.

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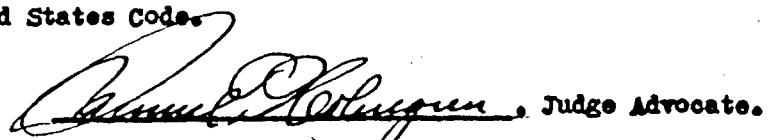
Whether or not motivated by a desire to avoid detection and capture following the previous assaults, the stabbing was shown to have been wanton, willful, deliberate and unlawful. It was committed without provocation and without legal justification or excuse. Malice must be inferred from the generally lawless, depraved and violent disposition of accused as manifested by his repeated threats and assaults upon various persons culminating in the fatal attack. There is no evidence that accused was intoxicated or otherwise deprived of the control of his faculties. The court was fully warranted in finding accused guilty of murder as alleged in Charge I and its Specification (MCM, 1928, par. 148a; Winthrop's, reprint, pp. 672,673).

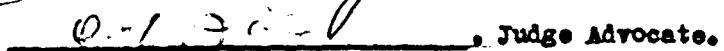
It further appears from the uncontradicted evidence that at the place and time alleged, accused assaulted Captain John Bulteau (Buleteau in the Specification) and Andre Liagre by cutting them on the hand and in the back, respectively, with a dangerous instrument, to wit, a knife. Intent to do bodily harm was properly inferred from the events surrounding these assaults, the nature of the weapon used and the character of the wounds inflicted (Dig. Op. JAG, 1912-1940, sec. 451 (10); MCM, 1928, par. 149m). The evidence fully supports the findings of guilty of Charge II and its Specifications.

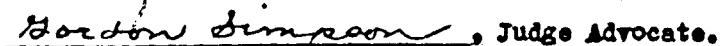
5. It is noted that Captain Bulteau's name was spelled "Buleteau" in Specification, Charge I. The law does not regard the spelling of names so much as their sound. These two names are sounded alike in the English language and the variance in the spelling is immaterial (45 C. J. 383).

6. Accused was twenty-six years old at the time of the trial. He enlisted in the United States Army 29 October 1940, and had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses involved. 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. Penitentiary confinement is authorized for the offense of murder as alleged in the Specification, Charge I, 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. Likewise, penitentiary confinement is authorized for the offenses of assault with intent to do bodily harm with a dangerous weapon as alleged in Specifications 1 and 2, Charge II, also recognized as offenses 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.


_____, Judge Advocate.


_____, Judge Advocate.

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

APO 534, U. S. Army,
11 August 1943.

Board of Review

NATO 419

UNITED STATES)

v.)

Private JEREMIAH (NMI) ADDISON
(14081516), 424th Engineer
Company (Dump-Truck).)

EASTERN BASE SECTION

Trial by G.C.M., convened at
Mateur, Tunisia, 25 June 1943.
Dishonorable discharge and
confinement for life. United
States Penitentiary, Lewisburg,
Pennsylvania.

HOLDING 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 92nd Article of War.

Specification: In that Private Jeremiah Addison 424th Engineer Company (Dump-Truck) did, at Roumes Souk, North Africa, on or about 29 May 1943 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corporal Robert W. Grove, a human being by shooting him with a rifle (30 cal. M1903).

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction for being drunk and disorderly, in violation of Article of War 96, was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence, recommended it be commuted to imprisonment for life and for

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warded 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, 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 the natural life of 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 50½.

3. The evidence shows that on the evening of 29 May 1943, in the vicinity of a rock crusher near a village about fifteen miles from Tabarka, Tunisia (R. 7), accused and a Private Vernon D. Williams were at work and were talking about "First Aid" when a Corporal Grove, a man on "First Aid" duty, came to them, asked Williams what he was doing there and began drinking water out of a canteen. Accused said to Grove: "I am going to kill you" and with that remark, picked up his rifle and fired, the bullet striking Grove in the neck (R. 6,9,15,16,17). Grove started to run, staggered, and continued his flight. As he reached a distance variously estimated at from thirty feet (R. 16) to twenty steps from accused (R. 7,8,9,10); the latter took three or four paces forward (R. 7,8,9,10,11), again raised his rifle to his shoulder, took aim, and fired, apparently at the back of the retreating soldier (R. 7,9,10,13,15,16,17). Accused used a thirty calibre, Springfield rifle (R. 7,18) which he set down by a box after the shooting (R. 9,17). Grove was unarmed (R. 7,17).

Report of the shooting was made to First Lieutenant Clifton Sanner, Dental Corps, who went at once to the scene and helped remove Grove to the dispensary where he inspected the injured soldier's wounds. He found a wound "in the neck at the midline and a wound in his back above the right scapula". He testified Grove died as a result of these gunshot wounds en route from the dispensary to the 11th Evacuation Hospital where he was being taken (R. 5,6). It had been stipulated that Lieutenant Sanner was qualified to testify as to the cause of Grove's death (R. 5).

Accused elected to testify under oath. He testified that on the night of 28 May 1943, after he had gone to sleep, Corporal Grove came to his tent, pretended he was drunk, cautioned him to remain quiet and "told me he loved me and wanted to have me because I was young" (R. 20). Accused ordered him out of the tent but Grove pulled out a dagger, "an Arab knife with a bow in the blade, a long blade" (R. 20,21), and "in a compelling way" said "I mean business". Grove threatened his life but "I had no weapon with which to challenge him. I was with my shorts on and then he carefully unbuttoned my shorts and he takes my penis out and sucked it until thoroughly satisfied *** He told me just before he left, that in case I should tell he would kill me" (R. 20). Corporal Earl Lorio was in accused's tent the night of this occurrence (R. 19). Accused testified that Lorio was asleep or "pretending to be asleep" but later awoke, went out to urinate and then "went to bed *** During the time while he was up Grove moved and sits by the door of the tent. Then after Lorio had gone

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to sleep--I suppose he was asleep, Grove challenged me again". The next day the "boys" ridiculed accused. Accused also testified, "Well, no one made fun of me because I told them that I objected to it" (R. 21, 22). Grove weighed about one hundred seventy pounds and "I knew I couldn't man-handle him". Accused was afraid when Grove pulled the knife (R. 21). He shot Grove with the rifle but did not intend to kill him. He fired a second shot but did not "shoot him the second time". He put five rounds of ammunition in his rifle and had decided to kill Grove "about fifteen or twenty minutes before he came up" (R. 21,23).

Lorio testified for the defense that he did not see Grove pull a knife on accused or make any threats "that night" (R. 19).

The commanding officer of Grove's company testified for the prosecution that he had known Grove since 28 April 1941 and had never noticed any peculiarity or sexual perversion about him; that Grove's reputation and morals were good (R. 23,24).

Both accused and Grove were colored soldiers (R. 12). Accused had not been drinking and appeared normal at the time of the shooting (R. 19).

4. It thus appears from the uncontradicted evidence that at the time and about the place alleged accused willfully, deliberately and with premeditation killed Corporal Grove, a human being, by shooting him with a rifle. Accused declared as a witness that about fifteen or twenty minutes before the shooting, he had decided to kill his victim. He procured a rifle, loaded it with five rounds of ammunition, and after preparation, fired the fatal shots. Grove was unarmed and did not give his assailant any visible provocation at the time of or immediately before the shooting.

The accused admitted the act of shooting the deceased but inconsistently both denied and admitted that he intended to kill him. He claimed that in the preceding night the deceased had forced accused to submit to an unnatural sexual act and had threatened to kill him if he should say anything about it. While serving as a probable explanation for the accused's act, this related incident even though it be accepted as true, could not be regarded as a legal justification for the killing or a provocation sufficient to reduce the offense to that of voluntary manslaughter. Appropriately stated, "The killing may be manslaughter only, even if intentional; but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists" (MCM, 1928, page 166). Here the killing was shown to have been coolly and deliberately planned, with a specific and malicious intent to kill having been formed about fifteen minutes before the shooting occurred. In the instant case the attendant circumstances must exclude any theory of death caused by heat of sudden passion or adequate provocation and malice is presumed from the circumstances and the declaration of a specific intent to kill. This intention manifestly existed at the time the act was committed.

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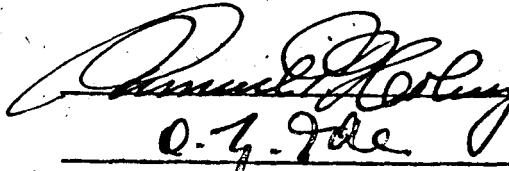
It follows that every element necessary to constitute the offense of murder is clearly shown (LHM, 1928, p. 164).

5. The proof shows that the murder was committed in an unnamed village near Tabarka, but not at Roum es Scük, North Africa, as alleged. The absence of this proof does not affect the validity of the findings. The jurisdiction of the court did not depend upon any consideration of geography and the precise place where the act occurred is obviously not of the essence of the offense charged. Accused was not misled nor prejudiced by the failure to make this proof and its omission is inconsequential (See Dig. Op. JAG, 1912-40, sec. 416 (10); Winthrop's, reprint, p. 138).

6. The Specification alleges that accused killed "Corporal Robert W. Grove". The evidence only identifies deceased as "Corporal Grove". His surname being thus established and his occupation shown, his identity was sufficiently proved (30 C.J. 289).

7. Accused was twenty years of age. He enlisted in the United States Army 1⁴ April 1942, with no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense involved. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review holds the record of trial legally sufficient to support the sentence as commuted. Penitentiary confinement is authorized for the offense of murder here involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Sec. 454, Title 18, United States Code.


Daniel O'Hollingsworth, Judge Advocate.
O. T. Gde, Judge Advocate.

Gordon Simpson, Judge Advocate.

NATO 419 1st Ind.
Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army.
11 August 1943.

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

1. In the case of Private Jeremiah Addison (14081516), 424th Engineer Company (Dump-Truck), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence as commuted, which holding is hereby

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NATO 419, 1st Ind.,
11 August 1943 (Continued).

approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have the authority to order the execution of the sentence as commuted.

2. After publication of the general court-martial order in the case, six 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 419).

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HUBERT D. HOOVER
Colonel, J.A.G.D.

Assistant Judge Advocate General.

(Sentence as commuted ordered executed. GCMO 25, NATO, 11 Aug 1943)

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

APO 534, U. S. Army,
9 August 1943.

Board of Review

NATO 420

UNITED STATES)
v.)
Private DAVID (NEI) WHITE)
(34400884), Company C,)
249th Quartermaster Battalion.)

II CORRS

Trial by G.C.M., convened at
Caltanissetta, Sicily, 21
July 1943. To be hanged by
the neck until dead.

HOLDING 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private David White, Company C, 249th Quartermaster Battalion, did, at Marretta, near Gela, Sicily, on or about 17 July 1943, forcibly and feloniously against her will, have carnal knowledge of Giovianana Incatasciato Morana.

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. The reviewing authority approved the sentence and "pursuant to Article of War 50½". Transmitted the record of trial to the confirming authority. The confirming authority treated the record of trial as though it had been properly forwarded under Article of War 48, confirmed the sentence and forwarded the record of trial under Article of War 50½.

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3. The evidence shows that, at some time between 1300 and 1400 hours, 17 July 1943, accused and three other American soldiers, all armed with rifles, came to the home of Giovanni Morana, in a small village called Marretta, near Cefalù, Sicily (R. 7,12,13). In the house were Morana, his wife, Giovanna Incatassata Morana, her mother, a sister-in-law, a nephew and a "small child" (R. 6,14). All occupants testified as witnesses except the mother, sister-in-law and the child.

The accused and two of the other soldiers entered the house while the fourth remained outside the door (R. 7,8,9,12). They looked about and accused, upon seeing Mrs. Morana, grabbed her by the arm (R. 5,8,11). She broke away from his grasp and succeeded in getting under the bed. Accused dragged her out and, after handing over his rifle to one of his companions in the room, removed her clothes (R. 5,8,16,15), threw her down upon a bed against her will and there had sexual intercourse with her (R. 5,6). She resisted, screamed, called for help and tried to scratch him (R. 5,6,13,14,15). She had bruises on her arm, which were shown to the court (R. 7,3). She testified positively to the fact of penetration, completion of the sexual act and her non-consent (R. 5,6,15). Her husband, who was holding the child, was meanwhile restrained in the room by one of the other soldiers who, having forced him to face the wall, kept a rifle pointed at him (R. 6,9,15). The third soldier in the room was "fooling around with the bolt of his rifle" (R. 11). Morana's position in the room did not enable him to see in detail what was being done to his wife, but he saw exposed penises of accused and the other soldiers, who, he testified, were "exchanging the act" (R. 9,10,11). He heard his wife struggling and calling for help and tried to "appose" accused (R. 10). The nephew, Federico Boecadifuccio, 18 years of age, made an unsuccessful attempt to run away from the house (R. 19), and was kept covered by a rifle just outside the door (R. 9,10,11,13). He could see the three soldiers in the room, heard his aunt scream and call for help, but was unable to see what accused was doing (R. 13).

Each witness identified accused (R. 4,8,12). In addition, prosecution showed that prior to the trial accused was identified separately by Mr. and Mrs. Morana out of a line-up of twelve soldiers from Company C, 249th Quartermaster Battalion (R. 4).

Accused did not testify or make any statement to the court and no evidence was introduced in his behalf.

4. The law, with respect to the offense here involved, is adequately set forth in the Manual for Courts-Martial, 1928, page 165, as follows:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent."

"Any penetration, however slight, of a woman's genitalia is sufficient carnal knowledge, whether emission occurs or not."

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"The offense may be committed on a female of any age.

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"More verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent."

5. It is shown by uncontroverted evidence that at the time and place alleged, the accused entered the dwelling of Giovianana Inostasciato Morena and, while her husband was kept under restraint at the point of a companion's rifle, unlawfully, forcibly and without consent had sexual intercourse with her. Every element necessary to constitute the offense of rape is clearly shown. The woman resisted the force applied by accused to the full extent of her ability and her want of consent is plainly established by her testimony and from all the other circumstances in evidence. The court was amply justified in finding that accused had unlawful carnal knowledge of the woman by force and without her consent.

6. It is questionable whether the proof that accused, before the trial, was identified by Mr. and Mrs. Morena should have been considered by the court (CM 187116, Martinovitch; Gray v. State, 137 S. W. (2) 777, 133 Tex. Cr. R. 587). The identifications of accused in court were, however, positive and unequivocal. They were not controverted. It is inconceivable that consideration of the testimony as to prior identifications could have influenced the findings of the court or, if error, could have otherwise injuriously affected the substantial rights of accused.

7. The charge sheet shows that accused is 24 years of age. He was inducted into the military service at Camp Blanding, Florida, 3 September 1942.

8. The court was legally constituted and had jurisdiction of the person and offense involved. No errors injuriously affecting the substantial rights of accused were committed during the trial. The death penalty is authorized upon conviction of Article of War 92. The Board of Review holds the record of trial legally sufficient to support the sentence.

John T. Molinari, Judge Advocate.

John T. Molinari, Judge Advocate.

John T. Molinari, Judge Advocate.

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NATO 420 1st Ind.
Branch Office of The Judge Advocate General, NATOUCA, APO 534, U. S. Army,
9 August 1943.

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

1. In the case of Private David (MM) White (34400884), Company C, 249th Quartermaster Battalion, 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 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, six 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 420).

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

(Sentence ordered executed. GCMO 23, NATO, 9 Aug 1943)

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

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APO 534, U. S. Army.
9 August 1943.

Board of Review

NATO 421

UNITED STATES)	II CORPS
V,)	Trial by C.C.M., convened at
Private WILLIE A. PITTMAN)	APO 302, U. S. Army, 21 July
(34400976), Company C, 249th)	1943. To be hanged by the
Quartermaster Battalion.)	neck until dead.

HOLDING 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private WILLIE A. PITTMAN, Company C, 249th Quartermaster Battalion, did, at Marretta, near Gela, Sicily, on or about 17 July 1943, forcibly and feloniously, against her will have carnal knowledge of Giovianana Incataasciato Morana.

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. The reviewing authority approved the sentence and "pursuant to Article of War 50%", transmitted the record of trial to the confirming authority. The confirming authority treated the record of trial as though it had been properly forwarded under Article of War 48, confirmed the sentence and forwarded the record of trial under Article of War 50%.

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3. The evidence shows that between 1330 and 1400 hours on 17 July 1943, accused and three other American soldiers entered the home of Giovanni Morana in Marretta, near Gela, Sicily (R. 6,8,11). In the house were Morana, his wife, Giovanna Incatasciato Morana, her nephew and a small child (R. 6,10,11).

After entering the house, accused went outside where he acted as a sentinel "so that nobody could go near" (R. 9) and at the same time kept a rifle pointed at Morana and the nephew (R. 11). Accused was subsequently relieved by one of his companions and, upon reentering the house and after handing over his rifle to another soldier, he seized hold of Mrs. Morana, forced her upon a bed against her will and there had sexual intercourse with her (R. 6,7,9,11). His penis penetrated her vagina (R. 7). She screamed, cried and tried to keep accused away with her hands (R. 6,7). Meanwhile her husband, held in restraint by a rifle, was pleading with accused not to touch her (R. 7).

Morana testified that accused, after acting as a sentinel, entered the house, physically took hold of the wife and "tossed her on the bed" (R. 9). Witness was sitting between the door and the bed with a baby on his knees, with his "hands up at the muzzle of the gun". His wife was calling for help "but she was quite tired". He could not see what transpired on the bed but saw accused "with the bare penis coming out from the bed" (R. 10).

The nephew, Federico Doccadifucco, eighteen years old, testified that he first saw accused while he was acting as a sentry outside the house. He held a rifle pointed at him and his uncle, Morana. Accused was subsequently relieved, whereupon witness saw him enter, take "my aunt and put her on the bed". He testified that his aunt was "calling for help" but "didn't see anything" (R. 10,11).

Accused was identified by each witness (R. 6,8,10). Major Mitchell A. McHardy, Headquarters, II Corps, testified that in his presence, on 18 July 1943, prior to the trial, accused was identified separately by Mr. and Mrs. Morana (R. 5).

The accused elected to make an unsworn statement. He stated that he did not have a rifle with him in the Morana house, that he did not "see Mrs. Morana crying" and that she did not put up any struggle. He also stated that he did not see "any member who was with" him point a rifle at Mr. Morana and that he had no recollection of ever having seen the "young man, Federico" prior to the trial (R. 12).

4. The law with respect to the offense here involved is set forth in the Manual for Courts-Martial, 1928, page 165, as follows:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent."

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"Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

"The offense may be committed on a female of any age.

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent."

5. It thus appears from the evidence that at the time and place alleged, the accused entered the home of Giovanni Morana and, while the latter was kept under restraint at the point of a companion's rifle, unlawfully and forcibly had sexual intercourse with the wife, Giovianana Incatesciato Morana. Every element necessary to constitute the offense of rape is clearly shown. The woman resisted the force applied by accused to the full extent of her ability and her want of consent is plainly inferable from her resistance and from all the other circumstances in evidence. The court was amply justified in finding that accused had unlawful carnal knowledge of the woman by force and without her consent.

6. It is questionable whether the proof that accused, before the trial, was identified by Mr. and Mrs. Morana should have been considered by the court (CM 187116, Martincovich; Gray v. State, 137 S. W. (2) 777, 138 Tex. Cr. R. 587). The identifications of accused in court were, however, positive and unequivocal. They were not controverted; a view also consistent with the unsworn statement of accused. It is inconceivable that consideration of the testimony as to prior identifications could have influenced the findings of the court or, if error, could have otherwise injuriously affected the substantial rights of accused.

7. The charge sheet shows that accused is 24 years of age and was inducted into the military service at Camp Blanding, Florida, 6 September 1942.

8. The court was legally constituted and had jurisdiction of the person and offense involved. No errors injuriously affecting the substantial rights of accused were committed during the trial. The death penalty is authorized upon conviction of Article of War 92.

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The Board of Review holds the record of trial legally sufficient to support the sentence.

GENERAL T. HOLMSTROM, Judge Advocate.

O. Z. IDE, Judge Advocate.

GORDON SIMPSON, Judge Advocate.

NATO 421
1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army,
9 August 1943.

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

1. In the case of Private Willie A. Pittman (34400976), Company C, 249th Quartermaster Battalion, 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 50 $\frac{1}{2}$ of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. The records of this office show that prior to the trial of this accused the court by which he was tried had completed the trials of three other soldiers for rape of the same woman at the same place and at about the same time. There is evidence of general concert of action between accused and the other soldiers. The defense did not interpose any challenge to any member of the court who participated in the trial, and the defense counsel, who had appeared for the other soldiers in the previous cases, expressly stated that accused did not object to any member of the court as constituted (R. 3).

Paragraph 50g of the Manual for Courts-Martial lists as a ground of challenge for cause of a member of a court-martial 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 among several examples of such facts:

"that he participated in the trial of a closely related case."

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NATO 421, 1st Ind.,
9 August 1943 (Continued).

The circumstance that the members of the court participated in the previous related trials did not affect their eligibility, statutory or otherwise, to sit as members in the later case (Sec. 375 (2), Dig. Op. JAG, 1912-1940). Their disqualification, if any, lay in the possibility of a lack of fairness and impartiality suggested by their previous knowledge and action incident to participation in the previous cases. This possible disqualification was subject to waiver through withholding challenge (Par. 57b, ACM, 1928; Par. 127, ACM, 1921; 35 C. J. 364, 365).

The offense of this accused, though related in time, place, and concert of action to the similar offenses of the previously tried soldiers, was distinct from the other offenses and guilt of accused as proved was not inferable from such acts of the other soldiers as were proved at their trials. It must be presumed that the defense, fully cognizant of the participation by the members of the court in the previous cases, believed that the members were fully competent to try accused and that they would fairly and impartially determine his guilt or innocence solely upon the evidence presented at his trial. Without doubt the defense intended to waive its right to challenge. It effectively did so. No improvidence appears.

The trial of accused was fair, impartial and free of substantial error. The findings and sentence are legal and just.

3. After publication of the general court-martial order in the case, six 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 421).

HURETT S. HOOVER
Colonel, J.A.G.C.
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 24, NATO, 9 Aug 1943)

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

APO 534, U. S. Army,
7 August 1943.

Board of Review

NATO 422

U N I T E D S T A T E S)	II CORPS
v.)	Trial By G.C.M., convened at
Private ARMSTEAD (NMI) WHITE)	Caltanissetta, Sicily, 21
(34401104), Company C, 249th)	July 1943. To be hanged by
Quartermaster Battalion.)	the neck until dead.

HOLDING 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Armstead (NMI) White, Comapny C, 249th Quartermaster Battalion, did, at Marretta, near Gela, Sicily, on or about 17 July 1943, forcibly and feloniously against her will, have carnal knowledge of Giovianana Incatasciato Morana.

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. The reviewing authority approved the sentence and "pursuant to Article of War 50 $\frac{1}{2}$ ", transmitted the record of trial to the confirming authority. The confirming authority treated the record of trial as though it had been properly forwarded under Article of War 48, confirmed the sentence and forwarded the record of trial under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that at sometime between 1330 and 1400 hours on 17 July 1943, accused and three other American soldiers, all armed with rifles, came to the home of Giovanni Morana in Marretta, a small village near Gela, Sicily (R. 10). In the house were Morena, his wife, Giovanna Incatasciato Morana, her mother, a sister-in-law, a nephew and a "small child" (R. 7). All occupants testified except the mother, sister-in-law and the child.

Three of the soldiers entered the house. Inside, accused threatened and for a time held Morana in restraint at the point of his rifle (R.10), while the other two successively committed acts of violence against the wife, Giovanna Morana (R. 6). When the second was through, accused handed his rifle to one of the others, grabbed Mrs. Morana, who was standing, forced her down upon a bed, against her will, and there had sexual intercourse with her (R. 5,6). She resisted with all her strength. To verbal expressions of accused, which she interpreted from his "mimicing" and gestures as meaning, "I too want it"; "I too must continue"; "no, no, I too", she exclaimed in her own tongue, "Leave me alone"; "Let me go" (R. 5,6,7). She testified to the penetration of accused's penis in her vagina, for about five or six minutes, and to the completion of the sexual act (R. 5,6). Her husband, she testified, was "at the barrel of gun", unable to do anything to prevent the assault (R. 6). In the room at the time were the other two soldiers, her husband and the child (R. 7). Mrs. Morana had never seen accused prior to the concurrence described (R. 4,5).

Morana testified accused at first held a rifle pointed at him and that after the other two soldiers had violated his wife, accused "took hold of my wife, put her on the bed and did the act" (R. 8,9). Another soldier was then "holding the gun on me" (R.9). His wife "resisted but her strength was too much for her ability". She was "calling for help" (R. 9). While witness did not see in detail the act of intercourse, he saw "accused with the corner of the eye" and observed that his pants were open. His wife was "excited because two others had passed through" (R. 9). The nephew, Federico Boccadifucco, age 18, first saw accused while he was pointing the rifle at his uncle. Later he saw that he "took hold of my aunt and took her to bed. My aunt was objecting but the soldier said "I too should like to do this ". He could not see what then transpired but heard her screaming. He wanted to help her but a soldier with a rifle restrained him (R.10,11).

- Accused was identified by each occupant of the room who testified (R. 4,8,10). Major Mitchell A. Mabardy, Headquarters, II Corps, testified that in his presence, on 18 July 1943, prior to the trial, accused was identified separately by Mr. and Mrs. Morana (R. 4).

Accused did not testify or make any statement to the court and no evidence was introduced in his behalf.

4. The law, with respect to the offense here involved, is adequately

set forth in the Manual for Courts-Martial, 1928, page 165, as follows:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

"Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

"The offense may be committed on a female of any age.

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent."

5. It is shown by uncontroverted evidence that at the time and place alleged, the accused entered the home of Giovanni Morana and, while the latter was kept under restraint at the point of a rifle, unlawfully and forcible had sexual intercourse with the wife, Giovianana Incatasciato Morana. Every element necessary to constitute the offense of rape is clearly shown. The woman resisted the force applied by accused to the full extent of her ability and her want of consent is plainly inferable from her resistance and from all the other circumstances in evidence. The court was amply justified in finding that accused had unlawful carnal knowledge of the woman by force and without her consent.

6. It is questionable whether the proof that accused, before the trial, was identified by Mr. and Mrs. Morana should have been considered by the court (CM 187116, Martinovitch; Gray v. State, 137 S.W. (2) 77, 138 Tex. Cr. R. 587). The identifications of accused in court were, however, positive and unequivocal. They were not controverted. It is inconceivable that consideration of the testimony as to prior identifications could have influenced the findings of the court or, if error, could have otherwise injuriously affected the substantial rights of accused.

7. The charge sheet shows that accused is 26 years of age. He was inducted into the military service at Camp Blanding, Florida, 5 September 1942.

8. The court was legally constituted and had jurisdiction of the

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person and offense involved. No errors injuriously affecting the substantial rights of accused were committed during the trial. The death penalty is authorized upon conviction of Article of War 92. The board of Review holds the record of trial legally sufficient to support the sentence.

/S/ Samuel T. Holmgren, Judge Advocate.
/S/ O.Z. Ide, Judge Advocate.
/S/ Gordon Simpson, Judge Advocate.

NATO 422 1st Ind.
Branch Office of The Judge Advocate General, NATCUSA, APO 534, U.S. Army,
7 August 1943.

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

1. In the case of Private Armstead (NMI) White (34401104), Company C, 249th Quartermaster Battalion, 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 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. The records of this office show that prior to the trial of this accused the court by which he was tried had completed the trials of two other soldiers for rape of the same woman at the same place and at about the same time. There is evidence of general concert of action between accused and the other soldiers. The defense did not interpose any challenge to any member of the court who participated in the trial, and the defense counsel, who had appeared for the other soldiers in the previous cases, expressly stated that accused was "satisfied" with the court as constituted (R. 3).

Paragraph 58c of the Manual for Courts-Martial lists as a ground of challenge for cause of a member of a court-martial 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 among several examples of such facts:

7 August 1943 (Continued).

"that he participated in the trial of a closely related case".

The circumstance that the members of the court participated in the previous related trials did not affect their eligibility, statutory or otherwise, to sit as members in the later case (Sec. 375 (2), Dig. Op. JAG, 1912-1940). Their disqualification, if any, lay in the possibility of a lack of fairness and impartiality suggested by their previous knowledge and action incident to participation in the previous cases. This possible disqualification was subject to waiver through withholding challenge (Par. 57b MCM, 1928; Par. 127, MCM, 1921; 35 C.J. 364, 365).

The offense of this accused, though related in time, place, and concert of action to the similar offenses of the previously tried soldiers, was distinct from the other offenses and guilt of accused was not inferable from such acts of the other soldiers as were proved at their trials. It must be presumed that the defense, fully cognizant of the participation by the members of the court in the previous cases, believed that the members were fully competent to try accused and that they would fairly and impartially determine his guilt or innocence solely upon the evidence presented at his trial. Without doubt the defense intended to waive its right to challenge. It effectively did so. No improvidence appears.

The trial of accused was fair, impartial and free of substantial error. The findings and sentence are legal and just.

3. After publication of the general court-martial order in the case, six 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 422).

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

(Sentence ordered executed. GCMO 21, NATO, 7 Aug 1943)

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

AFO 534, U. S. Army,
9 August 1943.

Board of Review

NATO 423

UNITED STATES)
v.)
Private HARVEY STRoud
(33215131), Company C, 249th
Quartermaster Battalion.)

II CORPS

Trial by C.C.M., convened at
AFO 302, 21 July 1943. To
be hanged by the neck until
dead.

HOLDING by the BOARD OF REVIEW

Halnagren, 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private HARVEY STRoud, Company C, 249th Quartermaster Battalion, did, at Marretta, near Cela, Sicily, on or about 17 July 1943, forcibly and feloniously, against her will have carnal knowledge of Giovanna Inostacciate Morena.

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. The reviewing authority approved the sentence and "pursuant to Article of War 50!" transmitted the record of trial to the confirming authority. The confirming authority treated the record of trial as though it had been properly forwarded under Article of War 48, confirmed the sentence and forwarded the record of trial under Article of War 50!.

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3. The evidence for the prosecution shows that on 17 July 1943, accused and three other American soldiers armed with rifles entered the home of Giovanni Morana at Marretta in the Comune of Cela, Sicily (R. 7,9,10,13). In the home at the time were Morana, his wife, Giovanna Incatacisto Morana, her nephew, age eighteen, and the three year old daughter of the Moranas (R. 7,9,10,11,12). One of the four soldiers went outside the entrance where he held his rifle "at port arms" (R. 13), while another soon placed the nephew and Morana under restraint by pointing a rifle at them, the nephew just outside the door and Morana on the inside with the child on his knees (R. 10, 12,15). After one of the other soldiers had committed an act of violence against the wife, accused seized her, forced her down on a bed, beside which she had been standing, and there had sexual intercourse with her (R. 7,8). She testified that she screamed and that she resisted with all her strength (R. 8,9). He completed the sexual act and had bodily possession of her for about five or ten minutes (R. 8,9). Her husband, she testified, "tried his best to prevent" the assault but he "was guarded with a rifle and was not able to move" (R. 8). Mrs. Morana had never seen accused prior to the occurrences described (R. 7).

Morana testified that his wife was seized and forcibly placed on the bed by accused. He saw the sexual act and the exposed penis of the accused (R. 11). His wife struggled, called for help and "did everything in her power to prevent this man but his superior strength she had to submit" (R. 11,12). He testified, "I was seated with raised hands and the child was seated on my knees. My wife was calling for help but I was not able to help because the gun was pointed at me" (R. 10).

The nephew, Federico Boccadifucco, testified he saw accused seize and throw his aunt on the bed (R. 13,14), and heard her screaming for help (R. 13). Because of an obstructed view from the place where he was kept at the "muzzle of the gun", he could not see just what accused did with her on the bed (R. 14,15).

Accused was identified by each of the prosecution witnesses (R. 7,9,12). Major Mitchell A. Murphy, Headquarters II Corps, testified that in his presence, on 18 July 1943, prior to the trial, accused was identified separately by Mr. and Mrs. Morana out of a line-up of twelve soldiers from Company C, 249th Quartermaster Battalion (R. 5,6).

Accused elected to testify under oath. He said:

"As soon as I stepped in the door I handed my rifle to Armistead White. That was right at the door. I went over and sat on the table. I went round the bed behind the door and David White was still on top of her. I stood there and waited until he got off and she laid up there with her legs open and her hands in back of her head. She was rambling but she was not hollering for help. She was laying on the bed with

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her hands behind her head. She was mumbling but I couldn't understand what she was saying and it wasn't loud enough to be heard outside of the room. I got on her and started and I realized what I was doing after it was too late. I got down without discharging. I took my rifle from Amstead White and walked down to the well by the water trough. I didn't return to the house. I sat out there and waited for the others. After all of them came out of the house we started back across the hill." (R. 16,17)

Accused testified that Mr. Morena was sitting "cornered with one foot out of the doorway" with his back to the bed holding a child in his lap (R. 17). He said he did not see David White throw Mrs. Morena on the bed; that he came in one and one-half to two minutes after David White; that the soldier with the rifle was not pointing it at Morena, he was "just sitting on the table with his rifle laying on his shoulder pointed toward the top of the house" (R. 18). He said further that Mrs. Morena did not scream nor talk above a "mumble"; that she did not make any attempt to keep him from having sexual intercourse with her; that she was saying something but he did not know what it was. He did not know whether she consented to the act (R. 18). He said, "When I got in she raised both her legs up high and just laid there and moved her head". He said he was "on her" about one and one-half to two minutes. He did not pay her nor her husband any money (R. 19,20,27).

Accused and his companions had been "just walking around", across the hills when one of their number suggested going to the Morena house where somebody asked for "vino"; that he had "a couple of small glasses" of "vino", perhaps "two or three" but not at the Morena house (R. 19,20,27). There had been three women in the house but as they approached two women were observed running away (R. 22).

Major Mabardy testified in rebuttal that he interviewed accused immediately after arrest and that in a voluntary written statement the latter declared he had seen David White push "the woman on the bed" and that he "saw David White on the woman" (R. 24,25).

Accused was recalled and denied he had made the statements attributed to him by Major Mabardy and testified that he did not know what was in the "paper" he signed "because he was rushing me so" (R. 26,27).

Mrs. Morena, in rebuttal, testified that she was standing when accused approached her, that he forced her on to the bed and that she resisted and called for help "but I was not able to receive any help" (R. 28). Immediately after the soldiers left, she and her husband went out to call for help and there was soon an excited crowd in the neighborhood (R. 28,29).

Technical Sergeant George Vogt, Headquarters Company, 1st Infantry

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Division, a witness for the prosecution, testified in rebuttal that at about 1500 hours, 17 July 1943, "a native" on horseback excitedly approached the bivouac area of Headquarters Company of the 1st Infantry Division about twenty miles out of Gela and reported that "colored soldiers up in his home raped his wife at gun point" (R. 29). A search ensued and later accused and three other men suspects were brought into the bivouac area (R. 29,30). Eight other soldiers were also taken into custody (R. 30).

4. The law with respect to the offense here involved is set forth in the Manual for Courts-Martial, 1928, page 165, as follows:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

"Any penetration, however slight, of a woman's genitalia is sufficient carnal knowledge, whether emission occurs or not.

"The offense may be committed on a female of any age.

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"Where verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent."

5. It thus appears from the evidence that at the time and place alleged, accused entered the home of Giovanni Morana and, while the latter was kept under restraint at the muzzle of a rifle, unlawfully and forcibly had sexual intercourse with Morana's wife, Giovanna Incastasciato Morana. Every element necessary to constitute the offense of rape is clearly shown. The woman resisted the force applied by accused to the full extent of her ability and her want of consent is plainly inferable from the resistance and from all the other circumstances in evidence. The court was amply justified in finding that accused had unlawful carnal knowledge of the woman by force and without her consent.

6. It is questionable whether the proof that accused, before the trial, was identified by Mr. and Mrs. Morana should have been considered by the court (CM 137116, Martincovich; Gray v. State, 137 S. W. (2) 777, 138 Tex. Cr. R. 587). But their testimony was clearly

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inconsequential in this case. The identity of accused was not a controverted issue.

7. The rebuttal witness, Sergeant Vogt, should not have been permitted to testify to the declaration by the person described as "a native" that colored soldiers had raped his wife. The "native" was not identified as Koreana, but even if he had been so identified, his statement was hearsay and incompetent. In view of the direct and compelling testimony by Koreana and the other witnesses as to the events connected with the assault upon Mrs. Koreana, it is manifest that the reception of this declaration could not have influenced the findings of the court and could not otherwise have injuriously affected the substantial rights of accused within the meaning of Article of War 37.

8. Accused is twenty-two years of age and was inducted into the United States Army at Roanoke, Virginia, 17 October 1942.

9. The court was legally constituted and had jurisdiction of the person and offense involved. No errors injuriously affecting the substantial rights of accused were committed during the trial. The death penalty is authorized upon conviction of Article of War 92. The Board of Review holds the record of trial legally sufficient to support the sentence.

SAMUEL T. HOLMGREN

, Judge Advocate.

G. E. MURKIN

, Judge Advocate.

ROBERT W. HARRIS

, Judge Advocate.

JATO 423

1st Ind.

Branch Office of The Judge Advocate General, NATCUSA, APO 534, U. S. ARMY,
9 August 1943.

To: Commanding General, NATCUSA, APO 534, U. S. ARMY.

1. In the case of Private Harvey Stroud (33215131), Company C, 249th Quartermaster Battalion, 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 501, you now have authority to order execution of the sentence.

2. The records of this office show that prior to the trial of this accused the court by which he was tried had completed the trial

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of another soldier for rape of the same woman at the same place and at about the same time. There is evidence of general concert of action between accused and the other soldier. The defense did not interpose any challenge to any member of the court who participated in the trial, and the defense counsel, who had appeared for the other soldier in the previous case, expressly stated that accused did not object to any member of the court as constituted (R. 3).

Paragraph 58g of the Manual for Courts-Martial lists as a ground of challenge for cause of a member of a court-martial 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 among several examples of such facts:

"that he participated in the trial of a closely related case."

The circumstance that the members of the court participated in the previous related trial did not affect their eligibility, statutory or otherwise, to sit as members in the later case (See. 375 (2), Dig. Op. JAG, 1912-1940). Their disqualification, if any, lay in the possibility of a lack of fairness and impartiality suggested by their previous knowledge and action incident to participation in the previous case. This possible disqualification was subject to waiver through withholding challenge (Par. 57B, MCM, 1928; Par. 127, MCM, 1921; 35 C. J. 364, 365).

The offense of this accused, though related in time, place and concert of action to the similar offense of the previously tried soldier, was distinct from the other offense and guilt of accused as proved was not inferable from such acts of the other soldier as were proved at his trial. It must be presumed that the defense, fully cognizant of the participation by the members of the court in the previous case, believed that the members were fully competent to try accused and that they would fairly and impartially determine his guilt or innocence solely upon the evidence presented at his trial. Without doubt the defense intended to waive its right to challenge. It effectively did so. Irprovidence appears.

The trial of accused was fair, impartial and free of substantial error. The findings and sentence are legal and just.

3. After publication of the general court-martial order in the case, six copies thereof should be forwarded to this office with the foregoing holding and this endorsement. For convenience of reference

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NATO 423, 1st Ind.
9 August 1943 (Continue^r).

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 423).

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

(Sentence ordered executed. GCMO 22, NATO, 9 Aug 1943)

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

APO 534, U. S. Army,
9 October 1943.

Board of Review

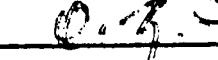
NATO 437

U N I T E D S T A T E S) EASTERN BASE SECTION
)
v.)
JAM DE JONGE, First)
Assistant Engineer,)
S. S. Mark Twain.)

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

The record of trial in the case of the accused named above, having been examined in the Branch Office of The Judge Advocate General, NATOUS, and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review. The Board of Review holds the record of trial legally sufficient to support the sentence.

 Samuel T. Holmgren, Judge Advocate.
 O. R. Ide, Judge Advocate.
 C. E. Simpson, Judge Advocate.

Branch Office, JAG, NATOUS, Board of Review, 9 October 1943.
TO: The Assistant Judge Advocate General, NATOUS.

For his information.

 SAMUEL T. HOLMGREN
Colonel, J.A.G.D.
Chairman, Board of Review
263734

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9 October 1943.

NATO 437

MEMORANDUM:

SUBJECT: Record of trial in the case of First Assistant Engineer JAM DE JONGE, S. S. Mark Twain.

1. It was charged that accused behaved himself with disrespect toward the Master of the S. S. Mark Twain in violation of Article of War 63 and that he wrongfully disposed of property of the United States Government by giving it to an unauthorized person in violation of Article of War 94. He was found guilty as charged and his punishment, as mitigated and approved by the reviewing authority, was fixed at a fine of \$300.00.

The record of trial has been examined in the Branch Office of The Judge Advocate General with the North African Theater of Operations and there found not legally sufficient to support the findings and the sentence.

2. Accused was shown to have been a ship's officer on a vessel owned by the United States Government and operated by the War Shipping Administration and at the time of the commission of the offenses alleged, the ship was carrying supplies of subsistence stores, gasoline, oil, grease and liquid smoke consigned to the United States Army. In addition to its maritime crew, the vessel carried a Second Lieutenant, Transportation Corps, as cargo security officer, whose duty it was to see that the cargo was safely delivered. Under the circumstances of this case, accused was a person subject to military law and properly triable by court-martial (AW 2; Dig. Op. JAG, 1912-40, sec. 359 (9) (11) (12); Bull. JAG, Vol. I, No. 1, January-June 1942, sec. 359 (12); idem, Vol. I, No. 7, Dec. 1942, sec. 359 (11) (12); idem, Vol. II, No. 4, April 1943, sec. 359 (11)).

3. There is substantial proof from which the court might reasonably conclude that at the place and time alleged in Charge I and its Specification, accused was disrespectful as alleged to the master of the ship on which he was a subordinate officer. This disrespect does not fall within that class of offenses denounced by Article of War 63 because the master of the ship was not accused's superior officer in the sense that term is employed in the statute. However, the misconduct of accused as alleged and proved did have a direct and palpably adverse effect upon the operation of the army and amounted to a disorder to the prejudice of good order and military discipline, violative of Article of War 96.

4. Accused admitted that at the place and time alleged in Charge II and its Specification, he gave to a British seaman a quantity of butter, about half a pound, property of the United States. This act was unquestionably wrongful. It was not shown that the property so given away was issued

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for use in the military service of the United States. In the absence of pleading and proof of this element, accused could not be found guilty of violating Article of War 94. However, this unauthorized and wrongful giving away of property of the United States Government by one subject to military law was likewise a disorder prejudicial to good order and military discipline, in violation of Article of War 96.

5. Maximum limits of punishment prescribed by paragraph 104, Manual for Courts-Martial, 1928, apply only to enlisted men. There is no maximum punishment prescribed for the offenses of which accused is shown to have been guilty. The fine of \$300.00 as approved by the reviewing authority and ordered executed is legal and the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence.

 Daniel O'Dwyer, Judge Advocate.
O. J. Tad, Judge Advocate.
T. M. S., Judge Advocate.

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

APO 534, U. S. Army,
1 September 1943.

Board of Review

NATO 439

U N I T E D S T A T E S)	NORTHWEST AFRICAN AIR FORCES
v.)	Trial by G.C.M., convened at
Private WILLIAM D. HUNT (34223188), and Private ROY C. MARSHALL (33192304), both of Company B, 908th Air Base Security Battalion.)	Algiers, Algeria, 26 June 1943. Dishonorable discharge and con- finement at hard labor for life. United States 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. The accused were jointly tried upon separate Charges and Specifications as follows:

As to Hunt:

CHARGE I: Violation of the 93rd Article of War.

Specification: In that Private William D. Hunt, Company "B" 908 Air Base Security Battalion, Army Air Force General Depot number 2, Army Post Office number 528, in conjunction with Private Roy C. Marshall, Company "B" 908 Air Base Security Battalion, Army Air Force General Depot number 2, Army Post Office number 528, did at Le

17. 1. 43.

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Hamiz, Algeria, on or about 30, April 1943, in the nighttime feloniously and burglariously break and enter the dwelling house of Achemi Oucine Ben Takadak, with intent to commit a felony, viz rape therein.

CHARGE II: Violation of the 92nd Article of War.

Specification: In that Private William D. Hunt, Company "B" 908 Air Base Security Battalion, Army Air Force General Depot number 2, Army Post Office number 528, did at Le Hamiz, Algeria, on or about 30 April, 1943 forcibly and feloniously, against her will, have carnal knowledge of Mait Sliman Tacut Bent Ali.

ADDITIONAL CHARGE: Violation of the 93rd Article of War.

Specification: In that Private William D. Hunt, Company "B", 908th Air Base Security Battalion, Army Post Office 528, did, at Le Hamiz, Algeria, on or about 30 April, 1943, with intent to commit a felony, viz, rape, commit an assault upon Mait Sliman Ounissa Bent Ali by willfully and feloniously seizing the said Mait Sliman Ounissa Bent Ali, dragging her from under a bed, lifting her to her feet, and by force and violence pushing her into another room, and then throwing her upon a bed with force and violence.

As to Marshall:

CHARGE I: Violation of the 93rd Article of War.

Specification: In that Private Roy C. Marshall, Company "B" 908 Air Base Security Battalion, Army Air Force General Depot number 2, Army Post Office number 528, in conjunction with William D. Hunt, Company "B" 908 Air Base Security Battalion, Army Air Force General Depot number 2, Army Post Office number 528, did at Le Hamiz, Algeria, on or about 30 April, 1943, in the nighttime feloniously and burglariously break and enter the dwelling house of Achemi Oucine Ben Takadak, with intent to commit a felony, viz rape therein.

CHARGE II: Violation of the 92nd Article of War.

Specification: In that Private Roy C. Marshall, Company "B" 908 Air Base Security Battalion, Army Air Force General Depot number 2, Army Post Office number 528, did at Le Hamiz, Algeria, on or about 30 April, 1943, forcibly and feloniously, against her will, have carnal knowledge of Mait Sliman Tacut Bent Ali.

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Each accused pleaded not guilty to and was found guilty of the Charges and Specifications pertaining to him. No evidence of previous convictions was introduced as to either accused. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for life. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and transmitted the record for action under Article of War 50½.

3. The evidence shows that about 2100 hours on 30 April 1943, the two accused, accompanied by three unidentified colored American soldiers, entered the home of Achemi Oucine Ben Takadak in the village of Le Hamiz, Algeria (R. 20,21,22,24,25). The dwelling was one story and consisted of two bed rooms and a kitchen which with a court, enclosed by a five-foot wall, formed a square (Ex S-1). In the house at the time among others were Achemi, his wife, Mait Sliman Taout Bent Ali, aged 23 years, and her 14 year old sister, Mait Sliman Ounissa Bent Ali (R. 26,27,31). The wife was pregnant about four months (R. 24). Accused Marshall asked Achemi for some "vino" (R. 24,25). Achemi informed the soldiers he had no wine and offered to point out to them a place in town where wine could be procured, whereupon the three unidentified soldiers departed and sat down outside the house (R. 20,21,25,26,28). Accused were requested to leave but remained in the dwelling (R. 26). Achemi went next door to the home of a Spanish friend in an attempt to procure some wine for the soldiers so they would leave (R. 21). His neighbor had no wine so he and Achemi started to look for the police when one of the unidentified soldiers fired a shot and accused came out of Achemi's house, apparently to see what had happened (R. 21,22,26,28).

In compliance with shouted instructions from Achemi, his wife immediately locked the courtyard gate, the door to her room, and extinguished all lights. Shortly thereafter accused, apparently having scaled the courtyard wall, pounded on her door and yelled "Madame, Madame". When Mait Sliman Taout did not reply accused broke down the door and Hunt and then Marshall, in turn, had sexual intercourse with her. Concerning Hunt, the woman testified:

"He then proceeded to jig-jig me. What could I do. I am ill and I couldn't resist them." (R. 28).

Accused Hunt had a rifle which he placed next to the bed. When asked on the witness stand if she resisted Mait Sliman Taout replied, "I was afraid of the gun. What would you expect me to do? I was afraid for my life. The soldier had the gun with him and I didn't do anything as I was scared". (R. 28,29,30). She testified that each accused "put his Peter in my vagina" (R. 29). After assaulting Mait Sliman Taout and, while Marshall was having intercourse with the woman, accused Hunt pulled her young sister, Mait Sliman Ounissa, from under the bed and carried

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her to another bedroom (R. 29,32). Marshall pointed the gun at Hunt and apparently protested his actions (R. 30). Mait Sliman Ounissa testified it was dark, that accused Hunt "pulled me from underneath the bed, carried me to bedroom No. 2, and had me by the chest and wanted to 'jig-jig' me, but I put my knees together and wouldn't let him" (R. 32). Hunt was "holding her hand and pushing her around" (R. 30,32). Immediately upon her husband's return, Mait Sliman Tacut informed him as to what had occurred (R. 23,31).

The defense presented two witnesses who testified that on two occasions wine had been purchased at the house in question, or at a similarly described building in that vicinity (R. 33,34,35,36,37,38). A defense medical witness testified that an examination of Mait Sliman Tacut the day after the alleged offense did not disclose any discharge of blood from the vagina or bruises of any kind, and that since prosecutrix had had two children, there was no way to tell whether she had recently had intercourse (R. 39).

Neither accused testified or made an unsworn statement.

4. a. "Burglary is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein". (MCM, 1928, par. 149d).

Burglary is an offense not so much against property as against the peace and security of the habitation (Winthrop, reprint, 682). The essential elements of proof are (a) that accused broke and entered a certain dwelling house of a certain other person; (b) that this occurred in the nighttime; and (c) that such breaking and entering were done with the intent to commit a felony therein. There must be a breaking, actual or constructive. Opening a closed door is sufficient. So also is the breaking of an inner door by one who has entered the house without breaking (MCM, 1928, par. 149d).

That accused broke and entered the dwelling house of Achemi Oucine Ben Takadak in the nighttime was clearly established by the uncontested evidence. In addition, to sustain a conviction, it was necessary to prove a specific intent to commit a felony at the time of entry. Specific intent must be established either by independent evidence, as for example, words proved to have been used by the offender or by inference from the act itself (MCM, 1928, par. 126a). Intent in burglary, as in other criminal offenses, is to be inferred from facts. If the accused actually committed a felony while in the house this gives a strong inference that their entrance was with intent to commit the felony (Wharton's Crim. Law, 12th Ed. 1310, sec. 1027). Evidence of actual commission of a felony by an accused after entry is admissible as tending to show that he intended to commit it at the time of breaking and entering (9 C.J. 1068, sec. 125).

The uncontested evidence shows that accused, after having been

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informed that there was no wine available, knowing that the husband of prosecutrix was absent, and after having been locked out of the house and the courtyard, returned with a rifle, broke down prosecutrix's bedroom door, and each in turn ravished her. These facts amply support the conclusion that the entry was made with intent to commit rape as alleged.

b. "Rape is the unlawful carnal knowledge of a woman by force and without her consent." (MCM, 1928, par. 148b).

The essential elements of proof are (a) that accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent (MCM, 1928, par. 148b).

Proof of rape by each accused was clearly established. Mait Sliman Taout Bent Ali testified that each accused "put his peter in my vagina". The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par. 148b). The medical testimony presented by the defense tending to show that the prosecutrix was not bruised was obviously offered in an effort to raise an issue as to consent and lack of resistance on the part of prosecutrix. The woman testified that accused Hunt had a gun, that he placed it near the bed, that she was afraid of her life. Acquiescence through fear does not in law constitute "consent" and the consummated act is rape (Wharton's Crim. Law, 12th Ed. 942, sec. 701; Winthrop, reprint, 678). Lack of consent was clearly inferable.

c. Accused Hunt was charged with and found guilty of having committed an assault with intent to commit rape upon Mait Sliman Ounissa Bent Ali, shown by the evidence to be a child of 14 years.

"An assault with intent to commit rape is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished." (MCM, 1928, par. 1491).

The assault must be made with the intent to have carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 1491; 52 C.J. 1026, 1028).

The uncontroverted evidence shows that accused Hunt dragged Mait Sliman Ounissa from her hiding place under a bed, carried her into another bedroom, had her by the chest and, according to prosecutrix, "wanted to jig-jig me, but I put my knees together and wouldn't let him".

That Hunt committed an assault upon Mait Sliman Ounissa was clearly established. That he intended to ravish her was shown by his actions in dragging her from under the bed, where she was in no way interfering with him or his confederate, and carrying her into another bedroom, where the action of Mait Sliman Ounissa in putting her knees together alone prevented the consummation of the act. That he desisted creates no legal

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presumption that he did not intend to have intercourse with her (Winthrop, reprint, 688; 52 C. J. 1035, sec. 49). The finding has ample support in the evidence.

5. The record discloses that neither accused testified or offered an unsworn statement. It does not affirmatively appear that the rights of accused with reference to remaining silent, testifying or offering an unsworn statement were explained by the President or Law Member of the court. Such explanation is permissive and not mandatory. MCM, 1928, paragraph 75a provides:

"The court may in its discretion (through the president, or the law member if the president so directs) explain to the accused his right as to each specification, to remain silent, or to testify as a witness, or to make an unsworn statement."

Furthermore it is presumed that defense counsel advised accused of their rights in this regard, as he was required to do (MCM, 1928, par. 45b).

6. Accused Hunt is twenty years old and has served in the Army of the United States since 5 June 1942. Accused Marshall is twenty-seven years old and has served in the Army of the United States since 3 July 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The penalty of death or imprisonment for life is mandatory upon conviction of rape under Article of War 92. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences. Confinement in a penitentiary is authorized by Article of War 42 in each case 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 O'Dwyer, Judge Advocate.
O. G. Gold, Judge Advocate.
Gordon Simpson, Judge Advocate.

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WAR DEPARTMENT

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

APO 534, U. S. Army,
20 September 1943.

Board of Review

NATO 440

UNITED STATES)	NORTHWEST AFRICAN AIR FORCES
v.)	Trial by G.C.M., convened at
Private ELBERT J. GILBERT (33123583), Company B, 910th Air Base Security Battalion.)	Casablanca, French Morocco, 17 June 1943. Dishonorable discharge and confinement for ten (10) 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 92nd Article of War.

Specification: In that Private Elbert J. Gilbert, Company B, Nine Hundred Tenth Air Base Security Battalion, did, on or about March 21, 1943, at the small Arab village adjacent to Cazes Airport, with malice aforethought, willfully, deliberately, unlawfully, feloniously, and with premeditation, kill one Abdullah Ben Smain, a human being, by shooting him with a pistol.

He pleaded not guilty to the Charge and Specification. Of the Specification, he was found guilty except the words "with malice aforethought", "deliberately" and "and with premeditation" and inserting the word "and" between "feloniously" and "unlawfully", of the excepted words not guilty, or the substituted words guilty. Of the Charge, not

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guilty, but guilty of violation of the 93rd Article of War. Evidence of one previous conviction for violation of the 61st Article of War was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory at Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that about 2000 hours on 21 March 1943, accused and two other colored American soldiers were in the small Arab village of derb Bascho, near the Cazes Airport, French Librocco, where they met an unidentified Arab who inquired if they desired some "vino" and "skin" (R. 8,9,20,33). According to the testimony of one of the witnesses "skin" means "a girl for sexual intercourse" (R. 13). The soldiers indicated their assent whereupon the Arab directed that they "squat" in a nearby field, collected 100 francs from each of them and disappeared into a house, ostensibly to make the necessary arrangements (R. 9,20). After waiting about half an hour, accused and his companions concluded the Arab would not return and proceeded to the house which he had entered. Three other Arabs came to the door but, because of linguistic difficulties, the soldiers were unable to converse satisfactorily with them or locate the Arab to whom they had given the money. Accused thereupon said "We will get a gun and scare them and perhaps they will give us our money then" (R. 9,10,17,20). They accordingly returned to their nearby company area where accused procured a .45 caliber pistol and his two companions secured their service rifles. There is testimony in the record to the effect that the pistol was not loaded at this time. The three soldiers then returned to the Arab house and knocked on the unlatched door which opened and accused entered. He had a flashlight (R. 10,11). Shortly thereafter two shots were heard whereupon one of the other soldiers entered the house, went up the stairs, and called to accused who replied, "Get out, there are Arabs up there that may have knives" (R. 11). The soldier retreated down the stairs and rejoined his companion in the yard. In a minute or two accused appeared and said he had fired into the ground "to keep the Arabs back" (R. 11,12,21). Accused had the pistol in his possession as the three returned to their company area (R. 13). There is conflict in the testimony as to whether accused had been drinking (R. 17,21, 22).

At the place and time in question Abdullah ben Smain received a gunshot wound which resulted in his death four days later (R. 30,34,38,39, 40). A medical witness testified that the wound was caused by a "large" bullet which entered under deceased's heart and went out through his back (R. 38,39).

The youthful son of the victim testified that on the day of the shooting, when he saw a light, he ran under the bed and after hearing three shots heard his father say to witness' uncle "I am shot" (R. 27,30). The brother of the victim testified that he was with the deceased on the

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occasion of the shooting, that none of the occupants of the hut had any gun or arms whatever (R. 33) and that

"After I put my brother on the floor he told me an American soldier killed him and I called for help" (R. 34).

A member of the Criminal Investigation Division of the Provost Marshall's office testified that accused made a statement to him after having been "informed of his rights under the Articles of War". Over objection of defense, on the ground that it had not been shown how accused was advised of his rights, the witness testified that:

"The statement made to me was that he and two of his company buddies went to the Arab village where the man was found for the purpose of obtaining women and wine. They had passed over three hundred francs to this particular Arab for that purpose. Prior to that, however, there had been some card playing and some drinking. They had also smoked this 'keef' which is native marihuana. The Arab left with the three hundred francs but did not return, so they decided to get their money back. They couldn't find him so they went back to their company area where they borrowed through Private Neal a pistol--a .45 calibre pistol--no, it was Lloyd that borrowed the pistol from Private Neal and Lloyd passed the pistol to Gilbert. The other two boys carried their own weapons without any ammunition. They proceeded to this Arab village, went down to the domicile of the Arab in question, towards the rear of the building, and they found a terrace--a doorway with a stairway leading to a roof which overlooks a courtyard just at the entrance to this Arab house that these people occupied. Gilbert, the accused, entered and went to the balcony or terrace on the roof and it was quite dark. There his story is--I don't know--that he had reached the end of the roof and saw--he fell into the courtyard. He became excited. He imagined or actually was attacked and that he fired the weapon and then he fled" (R. 44,45).

At the conclusion of the above testimony, the law-member ruled:

"The statement of this witness is admitted not for the purpose of proof but to show the accused's statement" (R. 45).

Accused testified substantially to the same facts as were adduced by the prosecution witnesses (R. 47,48,49), adding that when he mounted the stairway in the house he saw that "something was in the corner". It was dark and with his flashlight in his left hand "flashed the light and stepped over". He fell down on his knee and elbow. He testified "I was excited and the gun fired", got out of the place, rejoined Lloyd and

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Francis to whom he said "I don't know what happened" and returned to the area (R. 43,49).

Upon cross-examination accused in answer to a question whether he saw "any Arabs there with knives", testified

"Well, it being dark I couldn't say it was a knife but they both had something. The first one had something large in his hand and the other had his hand up" (R. 50).

Thereupon the following questions and answers were given:

- Q. How far was that from you?
A. About, I would say, six feet. I would say that is about the distance.
- Q. How long after you saw them did you shoot?
A. I couldn't exactly state the time because I was excited.
- Q. Was it longer than ten seconds?
A. I would say it was, sir.
- Q. Then it wasn't when you jumped and fell. You didn't start firing the gun when you fell?
A. After that happened I was stunned and I don't know what happened.
- Q. When did you see the Arabs?
A. When I first looked up, that is when I first saw them. When I fell I fell on my knee and the butt of my gun.
- Q. How did that gun get cocked? This is a type of gun that cannot be fired unless the hammer is pulled back.
A. Sir, I don't even know how I shot.
- Q. When did you cock the hammer?
A. That is what I don't know, sir. I don't know when the gun went off.
- Q. In other words, when you fired the hammer had cocked itself? (R. 50).

* * * * *

A. I can't state how the gun went off because when I fell I don't know how it went off at that time. I couldn't state that.

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- Q. Did you shoot into the ground as you saw the Arabs?
 A. I wouldn't say, sir, because it all happened so quick.
 The last thing I remember there was two, one behind
 the other. This is because he had a knife or something
 in his hand.
- Q. In other words, you don't remember exactly what happened?
 A. I remember crying out when I fell.

- Q. You don't recall what happened while you were in the yard?
 A. I recall when I fell.

- Q. But you don't recall anything that happened after you fell?
 A. I knew only when the gun went off." (R. 51).

* * * * *

- "Q. What were you going to do with the pistol?
 A. We decided to scare them out of our money." (R. 52).

* * * * *

- Law Member: Had you ever seen the man that was shot before?
 A. I wouldn't say before because the night I shot him I
 didn't exactly give a look at him before because at the
 time it happened I got in a hurry to get out and I just
 got out of the gate as quick as I could.

- Law Member: Was the man that was shot--was he the man you
 gave your money to for the wine and the woman?
 A. I don't know, sir. That is what I am trying to say."
 (R. 53).

* * * * *

- "A. I was scared. I wanted to get out of there. I wanted to
 get out of the house.

- Q. After that you went upstairs?
 A. Between that time I said, "Let's get out," I said, "There's
 a place up here," so I went up and that is where I fell
 out.
- Q. You said you were scared before you went upstairs?
 A. Yes sir." (R. 55).

* * * * *

- Major Fertig: When you went to the house, how many people did
 you actually see? In the Arab house, I mean?

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- A. When we first went there I can't tell exactly how many were there but I only saw two or three because I was behind. They had been there before and they knew the place.
- Q. Now, the second time--how many people did you actually see?
- A. I saw one person when I was on the top of the stairs.
- Q. Did you have any words or any argument with that person?
- A. No sir.
- Q. Did he say anything?
- A. No sir.
- Q. Did you say anything?
- A. No sir. I don't say anything, but I was trying to get back towards the steps and I stepped off. The place is not in the center but it is a blind and you will step off if you take two or three steps.

Captain Foerster: Was the night the Arab was shot the first and only time you visited the village?

A. Yes.

Q. Who decided to go back to this village and get your money?

A. Sir, we all decided that. You know how it is. An argument came about and Red was fussing about his money and I said I would get his money and Chester's..." (R. 55,56).

* * * * *

Law Member: When was the first time you knew that a man had been shot?

A. It was the next day, sir, when I knew anyone had been shot." (R. 57).

* * * * *

Prosecution:

Q. Didn't you just state to the court, 'after I shot the Arab'?"

A. No sir. I said I didn't shoot him. I don't know when I shot him. It happened so quick and the gun repeated." (R. 57).

4. By exceptions and substitutions the court found accused guilty of the lesser included offense of voluntary manslaughter in violation of Article of War 93. It is obvious that the court based its findings upon the theory that accused fired the fatal shot while in a state of fear for his own safety, consistently with the principle that voluntary man-slaughter

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"is that which is committed in a moment of excitement or while under the influence of passion, and commonly either in the course of a sudden fighting or upon some immediate strong provocation" (Winthrop, reprint, p. 675).

The act of accused in entering the Arab premises was clearly unlawful and the facts and circumstances surrounding the subsequent happening are quite susceptible of more serious implications than those involved in the findings. But where there is absence of design to effect death or grievous bodily harm, the homicide is voluntary manslaughter, and not murder, although the act was unlawful and malicious (Wharton's Crim. Law, pp. 649, 650). While the characteristic element of voluntary manslaughter is a sudden heat of passion, aroused by due provocation and without malice, the moving cause of the act may be founded in fear, such as a reasonable person would entertain under the circumstances (Wharton's Crim. Law, p. 655; 29 C.J. 1127). By reducing the homicide to voluntary manslaughter the court resolved all these questions in favor of accused. It must follow that there is ample support for the conclusion that accused killed the Arab while in a sudden heat of passion induced by fear, real or imaginary, and that all required elements of the offense as found are present (MCM, 1928, 149a).

5. The declaration of deceased that "an American soldier killed him" was admissible. Under the circumstances it was acceptable as a part of the res gestae (Underhill's Crim. Ev., 4th Ed., p. 361) or, by the deceased's use of the word "killed", as a dying declaration (State v. Franklin, 192 N.C. 723, 135 S.E. 859; cited in Wharton's Crim. Ev., 12th Ed. 859; see also LCM, 1928, par. 148a; Winthrop, reprint, 326).

The admission of accused's statement made to the representative of the Provost Marshal's office is of no material consequence despite any impropriety involved in the overruling of defense counsel's objection to its admission pending a showing as to how accused was advised of his rights (R. 43,44). While the testimony of the witness that accused was warned of these rights is a statement of an ultimate fact, there is nothing in the record to indicate the statement was not voluntarily made and after due warning. The contents of the statement however are more in the nature of admissions than of a confessorial character and were fully covered by accused's own testimony. Moreover, whatever meaning be attached to the law member's subsequent ruling that the statement was admitted not "for the purpose of proof but to show the accused's statement", it is of no substantial effect in the case (Dig. Op. JAG, 1912-40, sec. 395 (10)).

6. Neither the Specification nor the evidence indicates the location of Cazes, Cazes Airport, or derb Bascho, the Arab village where the homicide occurred. The substantial rights of accused were in nowise affected by this omission. The place of the commission of the crime is not of the essence of the offense (Dig. Op. JAG, 1912-40, sec. 416 (10); MCM, 1928, pars. 7,87b; Winthrop, reprint, pp. 138,139). The papers accompanying

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the record show that the place of the homicide was near Casablanca, French Morocco.

7. The accused is twenty-seven years old and has served in the Army of the United States since 30 January 1942.

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. Penitentiary confinement is authorized for the offense of manslaughter here involved, 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.

Ronald Hollingshead, Judge Advocate.
O. T. J. G., Judge Advocate.
Gordon Simpson, Judge Advocate.

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

APO 534, U. S. Army.
21 August 1943.

Board of Review

NATO 452

UNITED STATES)	EASTERN BASE SECTION
v.)	Trial by G.C.M., convened at
Private First Class EMMITT)	Tebessa, Algeria, 14 July 1943.
(RMI) REED (34050471), 226th)	Dishonorable discharge and
Quartermaster Company (Sal-)	confinement for fifteen years.
vage Collecting).)	"Federal" Penitentiary, Lewis- burg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Koimgren, 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 93rd Article of War.

Specifications: In that Private First Class Emmitt Reed, 226th Quartermaster Company (Salvage Collecting) did, at or near El Oubira, Tunisia, on or about the 15th day of May 1943, with intent to do him bodily harm, commit an assault upon Travelse Kaddour, by wilfully and feloniously striking the said Trabelse Kaddour with a dangerous weapon, to wit a knife.

CHARGE II: Violation of the 94th Article of War.

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Specification: In that Private First Class Emmitt Reed,
226th Quartermaster Company (Salvage Collecting), did,
at El Oubira, Tunisia, on or about the 15th day of
May, 1943, wrongfully and knowingly sell issue cloth-
ing and equipment of a value in excess of \$50.00,
property of the United States furnished and intended
for the military service thereof.

CHARGE III: Violation of the 96th Article of War.

{Stricken by court.)

Specification 1: (Stricken by court.)

Specification 2: In that Private First Class Emmitt Reed,
226th Quartermaster Company (Salvage Collecting), did,
at Tebessa, Algeria, on or about the 15th day of April,
1943, wrongfully appropriate to his own use a U. S.
Government Vehicle, 4128010, value of over \$1000.00,
and drive the same to El Oubira, Tunisia.

The court sustained a motion of the defense to strike Specification 1,
Charge III. Accused pleaded not guilty to and was found guilty of
Charges and remaining 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 fifteen years, three-fourths of the members of the court
present concurring. The reviewing authority approved the sentence,
designated the "Federal" 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 15 May 1943, a French guard, stationed
along a road by the Tunisian customs house at El Oubira, Tunisia, observed
accused in a ten wheel American Army truck (R. 7,8). The guard's
wife took down the number of the truck (R. 8,14). She could not remember
"from my head" but from a letter she had signed, she testified the number
was 4128010 (R. 14).

Trabelsi Kaddour ben Mohammed, who lived about half a kilometer
from the Tunisian customs house and was "in a way connected with the
French Police", testified that about 15 May 1943, he stopped a truck and
started to take down its number when accused hit him with a knife, the
kind "that they wear on the side" (R. 18). Trabelsi had been instructed
by an American Army captain to stop any soldiers trying to sell American
clothing, and he testified he stopped the truck because he "knew of the
truck being there for that purpose" (R. 18). He said he showed accused
some money because

"I wanted to buy some clothes so I can take the
number of the truck see When I showed him the money
he stopped the car, and as he saw me taking the number

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of the truck, came over, hit me with the knife
then I ducked and he missed my shoulder" (R. 19).

In the truck were four or five barracks bags "full and tied" (R. 19,23). Trabelsi's brother came to his assistance when accused made the attack with the knife (R. 19,22), which the brother described as being about twelve inches long (R. 22).

Bougar ben Ahmed, a farmer living near Tebessa, had seen accused selling United States Army clothing and mattress covers (R. 30) on three occasions "about the month of May" in or near El Oubira; accused was in an American Army truck at the time (R. 31). Bougar testified accused

"sold clothes, mattress covers. *** I saw him with about three bags and plenty of people around and bought two or three pieces each" (R. 30).

According to Bougar, as well as other witnesses, accused sold new field jackets at prices ranging from four hundred to five hundred francs and older ones for three hundred to three hundred fifty francs; he sold mattress covers for four hundred to five hundred francs (R. 25,30). Asked how much he saw accused sell, Bougar testified:

"From the bags I saw they brought about ten to twelve mattress covers in each" (R. 30).

Asked how many francs he saw the Arabs pay accused, Bougar said,

"I did not count them or I'm not sure but in my opinion from what I see when they took money about from twelve to fifteen thousand francs *** as he sold the goods to the people took the money from the people and put in his pocket" (R. 30,31).

About 14 or 15 May 1943, Djemai ben Ali of El Oubira, bought United States Army shoes and underwear from accused; he was wearing the shoes and underwear at the trial (R. 24,27); he testified he paid three hundred francs for the shoes and forty-eight eggs for the underwear (R. 24); that the eggs sold "sometimes for four francs, sometimes five francs each" (R. 25). Djemai saw accused sell other items to the Arabs; "he sold shoes, mattress covers and jackets"; he testified that

"Some of them bought mattress covers some of them bought jackets, some of them bought shoes. There would be about 100 people there" (R. 26).

Djemai said he actually saw accused deliver the goods and the Arabs pay him for them; he testified he thought accused collected "about 5000, 6000, 7000 francs" for these items (R. 26).

Larrousi ben Hadj Ahmed also saw accused selling American Army clothes about 14 or 15 May 1943, at El Oubira. "He sold mattress covers,

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shoes, and jackets (fatigue jacket)". Larrousi testified he bought a field, an "American Field Jacket", from accused and paid one hundred fifty francs for it (R. 32,33).

Taibeb ben Brahmin testified he bought a jacket, fatigue shirt and shoes, all American Army clothes, from accused in October (sic) 1943; that he paid four hundred francs for the shoes, three hundred for the jacket and two hundred for the shirt (R. 34).

Marzouk ben Mohamed testified he bought "American Army clothes" from accused (R. 34); that he bought a mattress cover for four hundred francs (R. 35).

The following figures, taken from the listing of prices of clothing and equipage, AR 90-3000, were read into the record:

Field Jackets	\$5.76 each
Mattress Covers	1.45 each
Shoes, service	3.76 per pair
Drawers, wool	1.23 each (R. 29).

Accused was regularly assigned a two and one-half ton "GMC" United States Army truck, number 4128010, value about eighteen hundred dollars (R. 36). Captain Daniel O. Stoutmire, 226 Quartermaster Company (Salvage Collecting), testified he

"checked some dispatch tickets and on the dispatch tickets around May the 14th and 16th, there were a number of dispatch tickets for that W number assigned to Emmitt Reed, but we could not find any dispatch tickets for the 15, and that ticket of 14th and 16th have disappeared, but I will swear that those tickets were there at the time until July the 6th, the date the things were blown out of my tent" (R. 37).

He further testified that the missing tickets which had dispatched truck number 4128010 on 14 and 16 May 1943, directed it to haul salvage to General Depot Number 4, about two miles away; that the distance to El Oubira was "about 24 kilometer or about 20 miles"; that in checking the dispatch tickets, he found one that had a "33 or 34 mile discrepancy" but he could not state whether this was the ticket of the 14th or the 16th of May (R. 50).

For the defense, Sergeant Benjamin L. Norris, 226 Quartermaster Company (Salvage Collecting), testified that "Army truck 2-½ ton, 6x6 Serial No. 4128010" was sent "to the ordnance" for repairs May

"9th to the 11 and it was in there about two weeks before we could get it back *** It was sent in

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because it was backed into a ditch. They had to take out both differentials to repair the truck, and they didn't have the parts at that time" (R. 46).

On cross-examination, Norris, who was a truck dispatcher, testified he never dispatched any truck to carry barracks bags in the direction of El Oubira about 15 May and if accused did take the truck and haul Government property out to sell it to the Arabs, he did so without proper authority (R. 47). Norris had known accused since 15 August 1942, and neither he nor Staff Sergeant Daniel Lebert or the same company, who had slept in the same tent with accused since February, 1943, had ever seen the latter with a knife "that long" (R. 46,48).

Accused elected to make an unsworn statement. He said:

"The statements that were made up on me were wrong, and I know from myself truly in my heart that I am innocent and what the things that those Arabs say were pure lies because I never been to this city, this little town that the Arabs say I have been to on the 22d of March. I was assigned on a detail up in Casserine, and we came back through that way, but in this town I never knew this was the town because I never stopped there, and I never been out on that road, and if I sold the Arabs something, if I had nerve enough to sell the Arabs something, knowing that it was wrong, I'd have nerve enough to stand up before you officers and tell that I did because I know myself that it would be wrong. If I'd take a chance and have enough nerve to do such a thing, why I would have nerve enough to stand up and say I did" (R. 51).

4. It thus appears from substantial evidence that at the place and time alleged accused assaulted Trabelsi Kaddour with a dangerous weapon, to wit, a knife; that this assault was willful and the attendant circumstances compel the inference that accused had the specific intent of inflicting bodily harm on his victim when he made the attack (Dig. Op. JAG, 1912-40, sec. 451 (10)). Trabelsi was acting in the performance of a duty when he tried to take the number of accused's truck. The latter was obviously apprehensive of being detected in an unlawful trafficking in Government property and sought to prevent Trabelsi from making a memorandum of the number of the truck by assaulting him with a knife. He was properly found guilty of the assault as alleged in Charge I, and its Specification (MCM, 1928, par. 149m).

It further appears from the evidence that at the place and time alleged accused wrongfully engaged in selling clothing and equipage furnished and intended for the military service of the United States. There was direct evidence that he sold two pair of shoes, one suit of underwear, two field jackets, one fatigue shirt and one mattress cover,

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all United States Army issue articles, aggregating in value more than twenty dollars according to the published price list of Government clothing and equipage (AR 30-3000). There was also direct evidence that he had three to five barracks bags full of articles; that he sold ten to twelve mattress covers from each bag; that he sold goods to the Arabs, as many as one hundred of whom congregated at the sale, some of whom bought mattress covers, others, jackets and others, shoes. He was observed taking money from the people and putting it in his pocket as he sold the articles. One witness estimated that these sales ran as high as twelve to fifteen thousand francs, which at then prevailing rates of currency exchange, amounted to from \$240.00 to \$300.00. It was within the province of the court to weigh these proven facts and draw such logical and legitimate inferences as might be implicit in them. The determinative values in the case of the Government articles here shown to have been wrongfully sold by accused was the published list price rather than market or other values which might have obtained in Tunisia at the time (Dig. Op. JAG, 1912-40, sec. 452 (14); CM 194353. Hyden-Swift). Measured by the appropriate standard, the court might reasonably conclude, as it did, that all the circumstances in evidence showed that accused sold issue Government property of value in excess of fifty dollars. All elements necessary for conviction of the offense charged in Charge II and its Specification having been thus established by competent and substantial evidence, the court was fully supported in its findings of guilty (MCM, 1928, par. 1501).

The evidence also establishes that at the place and time alleged, accused wrongfully appropriated to his own use a United States Government truck, number 4128010, of a value in excess of one thousand dollars. Although he was supposed only to haul salvage to a depot two miles away, on either 14 or 16 May 1943, there was a discrepancy of thirty-three or thirty-four miles in the readings on his trip tickets. He had not been dispatched to El Oubira but he unauthorizedly proceeded to that point and when apprehended there, attacked the French official who undertook to make a note of the number of the truck. His presence at El Oubira with the vehicle, as alleged, was established by ample evidence. The elements of wrongful taking and using a motor vehicle belonging to the Government having thus been fully established, accused was properly found guilty as charged in Specification 2, Charge III and Charge III. This offense as found and proved was closely related to the offense of misapplication of military property denounced by Article of War 94, and is punishable as for the latter offense.

5. Specification, Charge II, alleging a wrongful sale of property furnished and intended for the military service of the United States, would have been more satisfactorily worded if there had been a specific averment of what property was sold and to whom. Or in event these matters could not have been pleaded with particularity, the general circumstances of the wrongful sales and such particulars as were known to the pleader, might well have been alleged. However, accused pleaded to the general issue upon arraignment without questioning the sufficiency of the allega-

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tions, nor did he make any motion for better and more particular pleading. The language of the Specification, while general, does allege the offense in statutory language which generally will be regarded as sufficient (31 C. J. 708). Moreover, accused could not possibly have been misled or prejudiced by the state of the pleading (Article of War 37).

6. At the opening session of the court, the trial judge advocate, Captain George O. Wilson, Headquarters, Eastern Base Section, was absent. The assistant trial judge advocate was present. After accused stated he desired to be defended by the defense counsel and the assistant defense counsel, the record of trial shows that the accuser, Captain William R. Battley, 175th Engineers (General Service), who was not detailed as a member of the prosecution in the orders appointing the court, was introduced as "assistant to the trial judge advocate" (R. 2). It is further recited that the personnel of the prosecution was sworn (R. 3). It is to be assumed that this recital as to the administration of the oath referred only to the assistant trial judge advocate since Captain Battley had no official status and was invested with no authority to participate in the trial as a member of the prosecution (Dig. Op. JAG, 1912-40, sec. 368 (1)). It does not appear that Captain Battley assumed to conduct or participate in conducting the prosecution's case. The regularly appointed assistant trial judge advocate was sworn and participated in the trial from its outset and on the beginning of the second day of the proceeding, Captain Wilson appeared, was sworn and participated in the trial as the trial judge advocate (R. 24,26,40,41,53). Under these circumstances, there being no showing that the prosecution was conducted by any person other than the regularly appointed trial judge advocate and assistant trial judge advocate, accused was not harmed (Article of War 37).

7. Accused was twenty-four years old at the time of the trial. He was inducted into the Army of the United States at Camp Blanding, Florida, 22 March 1941, and had no previous 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. Penitentiary confinement is authorized for the offense of assault with intent to do bodily harm with a dangerous weapon, as alleged in Specification, Charge I, 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.

Ronald M. Ferguson, Judge Advocate.
O. Z. Gandy, Judge Advocate.
Sandoh Simpson, Judge Advocate.

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WAR DEPARTMENT
Branch Office of The Judge Advocate General
with the
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Board of Review

APO 534, U. S. Army,
23 August 1943.

NATO 460

U N I T E D S T A T E S)	MEDITERRANEAN BASIC SECTION
v.)	Trial by G.C.M., convened at
Private CARLOS D. TREVINO)	Oran, Algeria, 23 July 1943.
(38249223), Company F, 338th)	Dishonorable discharge, confinement for seven years.
Engineer General Service)	Federal Reformatory, El Reno,
Regiment.)	Oklahoma.

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 93rd Article of War.

Specification: In that Private Carlos D. Trevino, Company "F", Three Hundred Thirty-eighth Engineer General Service Regiment, did at or near Fornaka, Algeria, on or about 2 July 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Bendaghar Charef Bendehiba, residence at Ayacha, Algeria, a sum of money, the property of Bendaghar Charef of Bendehiba, value about eighty-five dollars (\$85.00).

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.

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due or to become due and confinement at hard labor for seven years. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, 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 July 1943, accused was on guard duty at a ration dump, known as "D" dump (R. 9,28), located about a mile east of the bivouac area of Company F, 338th Engineer General Service Regiment, to which accused belonged. This bivouac area was approximately ten miles from Farnaka, Algeria (R. 11,12). At 1300 hours that afternoon, accused and Private Harold C. Ternes of the company mentioned, went off duty and rode in a truck to the bivouac area for "chow" (R. 5,6,10). Accused had his rifle with him when he left (R. 5,6,28). Upon reaching the company area, Ternes lay down and did not see accused again until 1700 hours the same afternoon (R. 10).

About 1400 hours the same day, one Bendaghar Charef of Bendehiba was "passing by this road" (R. 3,5), when "this guard" halted him (R. 3). Bendaghar testified:

"The first thing he told me, he told me to empty my bags. Finally he found out that the stuff I had in my bags was not government issue, and then he told me to pull out my money, and I didn't want to do it so he forced me by his rifle and I pulled my money out of my pocket and I told him 'what was the reason he wanted my money for' and he then was pretty nervous*** The guard, and he tried to shoot at me and I told him 'why is the reason you want this money for. I will let you keep six hundred of them and you give me the rest because I am a poor man'. So, finally, he told me to go on and I had to drop my money, and I was walking forward and looking backward to see what was going to happen, and he fired another shot and then I was going zig-zag and then he fired another shot that was over my head" (R. 4).

He testified further that "three shots were fired among my person"; that accused was the man who had pointed the rifle at him and had taken his money which amounted to four thousand two hundred fifty francs (the equivalent of \$85.00, United States money); that he had never seen accused, whom he called Charley, "before this case happened"; that he saw him next on the following Sunday "when he was in a group and I went direct to him and picked him up" (R. 4).

Accused resumed guard duty at 1700 hours, 2 July 1943 (R. 7), and later was seen in "chow line" about 1800 to 1815 hours. There he started talking with Technician Fifth Grade Charles A. Brackett, also of Company F, 338th Engineer General Service Regiment, whom he told "that he shot an Arab and held up one and got some money off him". Brackett testified he believed accused said he got "eighty-something" dollars from the Arab. Accused was sober at the time (R. 8). The next morning from 0500 to 0700.

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accused and Ternes were again on guard duty at "D" Dump. The latter saw accused where their posts met and noticed him pull out his wallet and count his money (R. 9). Ternes testified:

"He was counting his American money and it was about Sixty Dollars and I noticed that he had some Francs in his wallet *** I couldn't tell the amount but it looked like a large sum, sir" (R. 9).

Accused had been paid for the month of June 1943, "probably late in the afternoon" of 2 July according to Captain Bertram W. Hoare, Company F, 338th Engineer General Service Regiment, the company commander, who testified accused received "some thirty-six dollars". The organization was paid in "Gold-sealed" United States currency (R. 14). At noon on the following day, Captain Hoare observed accused asking Second Lieutenant Kermit V. Rouhier, also of Company F, 338th Engineer General Service Regiment, to count some money for him (R. 14). Later in the same day, Captain Hoare called accused to question him as to where he obtained the money that was reported "as being in his possession" and accused told the captain he won it playing poker with members of the 45th Division. Captain Hoare testified further that he asked accused what he had been doing "at the time the alleged robbery occurred", that is, the afternoon of 2 July, and

"He told me that he had been away from his post from shortly after noon until later and I asked him if he had seen any Arabs and he said, 'yes' and I asked him if he had taken any money from any Arabs and he said 'no'. I asked him if he had fired at any Arabs and he said 'yes' that he had fired three shots at an Arab" (R. 15).

Captain Hoare also testified that on 4 July 1943, Bendaghlar Charef identified accused under the following circumstances (R. 15,16): The first sergeant of the company lined up ten men who fit generally a description of the one who had stolen Bendaghlar's money and accused was placed in the center of the line in an "as inconspicuous place as possible". Bendaghlar, who had been kept on the opposite side of the stone building from where the men were being lined up, came "around the building and without any hesitation whatsoever the Arab went immediately to Private Trevino and identified him as the person who had stolen his money. He went up to him and grabbed him**** (R. 16,22).

Lieutenant Rouhier testified that accused asked witness on the afternoon of 3 July 1943, to count some franc notes and exchange them for American money -- "there were three 1000 Franc notes and several 100's and 20's, etc.", totalling approximately \$90.00 in American money (R. 11).

During an investigation which followed the robbery, Private Charles Abraham Koury, Company E, 338th Engineer General Service Regiment, an Arabic speaking interpreter, told accused what Bendaghlar had said about

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the robbery. Koury testified that accused "said the Arab was telling the truth except for the location of the spot where it took place" (R. 19,21).

Accused testified through an interpreter that on the afternoon of 2 July 1943, "when I come off of guard duty I took my rifle with me and walked away to visit a French family that I knew and then afterwards at about four o'clock I returned to the same place where I was"; that he saw "the Arab who testified before this court this morning" but did not take any money from him (R. 28); and that upon returning from the Frenchmen's house, he fired two shots at the Arab. He testified: "I found this Arab was coming closer to the dump and that is when I fired among him". Asked what statement he made to Koury, accused replied,

"When Colonel Kelly asked me if I had anything against this Arab, Private Koury was the interpreter, and I told him that the Arab was lying in the first place when the Arab told him that I made him kneel down and that I hit him with the butt of my rifle" (R. 29).

He testified that he had been saving the money he asked Lieutenant Rouhier to count "and part of it I got playing poker". Asked if he had not told other officers he won "this French money" shooting dice, he said he won part of it at poker and "the rest from playing dice" (R. 29,30).

In regard to the shooting, Captain Hoare testified that "there was a great deal of government property in there which we were trying to protect and about the only way we could possibly cover it was to frighten the Arabs away by firing"; that he did not consider it at all unusual or extraordinary when accused told him he had fired three shots at an Arab (R. 18).

4. It thus appears from substantial evidence that at the place and time alleged, accused wrongfully and at the point of a rifle compelled Bendaghar Charef of Bandehiba to give him four thousand two hundred fifty francs, or \$35.00, in the then prevailing rate of currency exchange; and that this money belonged to Bendaghar and was forcibly, violently and by putting him in fear, taken from his person by accused who thereupon converted the money to his own use. Later, the same afternoon the robbery occurred, accused virtually admitted his guilt when he told another soldier that he had "held up" an Arab and taken "eighty-something" dollars from him. The following day he had a large sum in francs, including three one thousand franc notes and several bills of smaller denominations which he tried to exchange for American currency.

By menacing him with a rifle, accused effectually put his victim in such fear that he was warranted in making no resistance other than to remonstrate and try to dissuade accused from committing the crime. Bendaghar's fear was a reasonably well founded apprehension of present danger and in order to avoid what appeared to him to be imminent death, or serious bodily harm, he was impelled to give up his money. The court

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was fully warranted in concluding that the evidence established all the elements required to prove the crime of robbery as alleged. Accordingly, accused was properly found guilty of the Charge and Specification (MCM, 1928, par. 149f).

5. It is questionable whether the proof that accused, before the trial, was identified by Bendaghah Charef should have been considered by the court. CM, 187116, Martinovitch is authority for its inadmissibility. A contrary view was indicated in Gray v. State, 137 SW (2) 777, 138 Tex. Cr. R. 587. But the testimony was clearly inconsequential in this case. The identity of accused was not a controverted issue.

6. Accused is twenty-three years old. He was inducted into the Army of the United States 12 September 1943, at Fort Sam Houston, Texas. 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. 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. Penitentiary confinement is authorized 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.

Ronald Geologous, Judge Advocate.

C. J. Clegg, Judge Advocate.

Gordon Simpson, Judge Advocate.

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APO 534, U. S. Army,
17 September 1943.

Board of Review

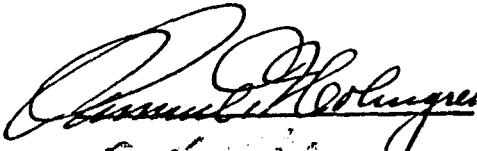
NATO 464

U N I T E D S T A T E S)	THIRD INFANTRY DIVISION
v.)	REINFORCED
Private First Class RAYMOND)	Trial by G.C.M., convened at
C. MCKENZIE (31144344),)	Ferryville, Tunisia, North
Headquarters Company, 3rd)	Africa, 20 June 1943.
Battalion, 7th Infantry.)	Dishonorable discharge and
)	confinement for twenty (20)
)	years.
)	Disciplinary Training Center
)	Number 1, North Africa.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

The record of trial in the case of the soldier named above, having been examined in the Branch Office of The Judge Advocate General, NATOUS, and there found legally insufficient to support the findings and sentence, in part, has been examined by the Board of Review. The Board of Review holds the record of trial legally sufficient to support the findings and the sentence.

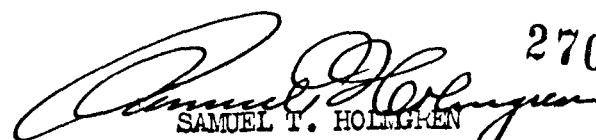
 Samuel T. Holmgren, Judge Advocate.

O. J. Ide, Judge Advocate.

Govron Simpson, Judge Advocate.

Branch Office, JAG, NATOUS, Board of Review, 17 September 1943.
TO: The Assistant Judge Advocate General, NATOUS.

For his information.


270184
SAMUEL T. HOLMGREN
Colonel, JAGD
Chairman, Board of Review

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~~CONFIDENTIAL~~ September 1943.

MEMORANDUM:

SUBJECT: Record of trial in the case of Private First Class
RAYMOND C. MCKENZIE (31144344), Headquarters Company,
3rd Battalion, 7th Infantry.

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

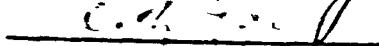
CHARGE: Violation of the 96th Article of War.

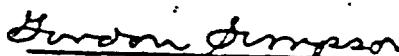
Specification: In that Private, first-class, Raymond C. McKenzie, Headquarters Company, 3rd Battalion, 7th Infantry, did, at El Alia, Tunisia, on or about 18 June 1943, willfully maim himself in the hand by shooting himself with an M-1 service rifle, with intent to avoid hazardous duty, thereby unfitting himself for the full performance of military service.

2. It is thus alleged, in substance, that with intent to avoid hazardous duty, accused willfully maimed himself by shooting himself in the hand and thereby unfitting himself for the full performance of military duty. With this alleged specific intent, the offense contains an element not necessarily included in that of mere self-maiming under the 96th Article of War. An offense of a graver aspect is here involved. While there is no proof that accused intended to avoid any specific hazardous mission or was guilty of acts approximating misbehavior before the enemy within the meaning of Article of War 75, it is inferable from the general tactical situation, the circumstances under which the shot was fired and the testimony of accused as to his previous experiences and dissatisfaction with his assignment, that, by maiming himself, he intended to avoid further service in the infantry unit to which he was assigned and thereby avoid further combat service. There is support therefore for the finding that accused intended to avoid hazardous duty. Committed in time of war and in an active theater of operations, his act is assimilable in nature to those other war time acts of misconduct that are specifically denounced by the Articles of War. No limit of punishment is prescribed.

3. The Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence.

 Paul O'Halloran, Judge Advocate.

 C. H. Thompson, Judge Advocate.

 Gordon Thompson, Judge Advocate.

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APO 534, U. S. Army,
1 September 1943.

Board of Review

NATO 466

U N I T E D S T A T E S)	MEDITERRANEAN BASE SECTION
v.)	Trial by G.C.M., convened at
Major DONALD E. BREWER)	Oran, Algeria, 13 July 1943.
(O-277690), Infantry,)	Dismissal.
Headquarters Company, Seventh)	
Replacement Depot.)	

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Major Donald E. Brewer, Infantry, Headquarters Company, Seventh Replacement Depot, did, at Djar Kjar, Algeria, on or about the 26th of May, 1943, commit an indecent and improper act upon the person of Private Michael R. Vitacco, Company "C", 18th Replacement Battalion, by feeling, pushing, pinching and stroking with his hands the buttocks and feeling with his hands the body of the said Private Michael R. Vitacco.

Specification 2: In that Major Donald E. Brewer, Infantry, Head-

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quarters Company, Seventh Replacement Depot, did, at Djar Kjar, Algeria, on or about the 18th of June, 1943, commit an indecent and improper act upon the person of Private Vernon M. Francis, Company "A", 31st Replacement Battalion, by feeling with his hands the body and stomach of the said Private Vernon M. Francis.

Specification 3: In that Major Donald E. Brewer, Infantry, Headquarters Company, Seventh Replacement Depot, did, at Djar Kjar, Algeria, on or about the 8th of June, 1943, commit an indecent and improper act upon the person of Technician fifth grade Lloyd A. Riley, Company "A", 31st Replacement Battalion, by feeling with his hands and stroking in a fondling manner the body, face and neck of the said Technician fifth grade Lloyd D. Riley.

Specification 4: In that Major Donald E. Brewer, Infantry, Headquarters Company, Seventh Replacement Depot, did, at Djar Kjar, Algeria, on or about the 8th of June, 1943, commit an indecent and improper act upon the person of Technician fifth grade Hubert M. Barry, Company "A", 31st Replacement Battalion, by feeling with his hands upon the shoulders, cheek, back and buttocks of the said Technician fifth grade Hubert M. Barry.

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 be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 4, 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 Theatre of Operations, confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

3. Private Michael R. Vitacco, Company C, 18th Replacement Battalion, testified that he had overslept on the morning of 26 May, 1943, and was therefore late in reporting to accused in accordance with directions previously given by the latter. Upon his arrival on that day at the headquarters of the military police detachment, accused told witness he had disobeyed his orders and that he was "going to put me in the guard house for six months" and "had me stand at attention for almost forty-five minutes", and

"came over and put his hands all over me and grabbed me on the cheek, stroked me on my cheek and came very close to me, put his nose practically against mine and said, 'I still can't make up my mind whether or not to put you in the guardhouse' " (R. 8).

Later accused told witness he would give him five hours guard duty

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"walking around a prisoner" and directed that he go with him to the stockade latrine where he was kept standing at attention for about another forty-five minutes. No one else was present. Witness testified that while thus standing at attention, accused

"worked his hands over my body and told me to pull in my buttocks and put my hands down and he felt around as if I were a girl and says, 'I still can't make up my mind whether to put you in the guardhouse,' and then he came up close to me and made me scared. He came up very close - you couldn't look him in the eye - and then he had me stand at attention, and every once in a while he would say 'parade rest' for a second and then he would say 'attention', and do the same movements over again all over my body. He put his hands inside my belt and told me to pull in on my stomach" (R. 9).

Accused ordered witness to "pull in on your buttocks" and then would say "tighten up on your buttocks". Then

"he would start pulling his hands all over my body, starting on my cheeks and coming down to the end of my body here (indicating)" (R. 9).

"He stroked down both of my cheeks, coming down sort of this way (indicating) and come down around the back" (R. 9).

During this time there was no conversation except "he told me about putting me in the stockade for six months" for disobedience of orders (R. 9). Accused also told witness he had been to see his company commander who said that he was a good soldier but he "couldn't depend on me for anything" (R. 10). Witness also testified that a lieutenant was present when accused was talking to him in the "MP tent", that he was at "attention" or "parade rest" all the time he was with accused in the latrine and that while accused was staring into his eyes accused would say that "he could put me in the stockade for six months but he didn't know whether to make up his mind, or not". Witness further testified that for about twenty minutes of the time they were in the latrine accused was touching him and that during the rest of the time he was

"Sort of standing there, looking at me then looking at the ground then looking towards the entrance of the latrine and then telling me to stand at attention and every once in awhile he would put his hands on my body again and hold me by the cheek" (R. 11).

Witness reported the incident to a sergeant (R. 12) who, having been

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in the orderly tent one hundred feet away, had asked him "what was going on in the latrine and I told him" (R. 13). Witness had known accused "only for a couple of weeks" before the incident (R. 8). (Specification 1).

Private Vernon N. Francis, 72nd Signal Training Company, testified that on 18 June 1943 (R. 4) he was brought to the accused's tent by two military policemen, whereupon the accused asked him why he had not been at guard mount that afternoon. To this, witness replied he did not understand that it was compulsory to stand guard mount. Accused then asked questions as to what witness did in civilian life and "we talked quite a while". Witness was then asked if he knew his general orders and when he replied in the negative, accused had him stand at attention for about fifteen minutes and at "parade rest" for about forty-five minutes. Witness was then told to sit down and with directions that the chair be brought over behind accused's desk. Witness testified that accused thereupon -

"asked me did I know how serious it was what I had done and I told him I did, and he asked me what my people would think if they knew that I was in the guardhouse. I told him that they wouldn't think very much of it, and after talking like that for awhile he wrote out somekind of a confinement to the guardhouse. During this speech we were interrupted by the MP's two or three times coming in and asking him questions, and after that he called an MP in and asked him if he had a Soldier's Field Manual and he told me to sit down at the table right across from his desk in the tent -- " (R. 5),

and that while witness was studying the general orders accused left the tent for about twenty minutes. Upon his return accused examined witness on his knowledge of the general orders, ordered witness to stand at attention and

"came around from behind his desk and stood in front of me, rather close, and took me by the chin, and told me to raise my head and put my chin in, and while doing that he went up one side of my face and forehead and down to my chin on the other side...He also told me to pull my shoulders back and he took hold of my shoulders and pulled them back and while he was doing that he straightened my arms and put my thumbs along the seams of my trousers. He ran his hands down the side of my arms and told me to pull my stomach in and he taken his hand and pushed my stomach in, and I don't know whether or not there was a button unbuttoned on my shirt or not - me being at attention and looking straight ahead - but he either buttoned a button or just fooled with my

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chest here one, and after he corrected my posture he looked at me for awhile and then he told me that the reason he wasn't going to carry this summons out, or confinement, or whatever it was, was because he thought I had the makings of a good Noncom, that I had done something I shouldn't just one time and that he was going to let me go, and just before I got ready to go, he said, 'allright, Francis, just forget everything that went on tonight,' and I saluted, thanked him and walked out" (R. 5, 6).

While accused was doing this he had his face six to eight inches from that of witness and "kept looking right in my eyes all the time". Witness remained in accused's tent for about three hours. At first the tent sides were rolled up but about an hour and a half later the accused called "the MP in and told him to roll the tent flaps down" (R. 6). Witness did not know "Private Vitacco" or "T/5 Lloyd D. Riley" (the enlisted men involved in the charges set forth in Specifications 1 and 3, respectively). He did not complain to accused about his actions because he was "scared" (R. 7). (Specification 2).

Technician Fifth Grade Lloyd A. Riley, 31st Replacement Battalion, testified that on 8 June 1943, as he and two other soldiers were walking on a road "with some GI clothes in our possession" accused stopped them and asked what they were doing (R. 14) with the clothes. When they finally admitted they were trying to sell them, accused took them to their battery commander, turned the clothing over to him and took them to the stockade. Sometime later accused returned to the stockade and told witness to come with him to the stockade latrine. Witness testified that,

"We went inside the latrine. I was standing at attention. It was dark by this time by-the-way and he had a lantern which he set down on the ground pointing away from us. I stood at attention I would say for forty-five minutes - I have no way to be certain - and during this time the Major was questioning me about my past, about what happened that evening and why we were doing it, etc. During this time he would take me by the chin like this (indicating) and look into my eyes and he said, 'I want to know if you are telling the truth' and I stood there for forty-five minutes; then he told me I could stand at 'parade rest' if I wanted to. I stood at 'parade rest' about fifteen minutes, then he told me to sit down on the edge of the latrine. I sat down and he walked around so he was on my side. During this time he would walk outside the latrine and look around and walk back in again - I don't know why...He come back in and stood right alongside of me, laid his hand on the back of my head and on my neck in a fondling manner. That is

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the best way I can describe it...He would take my chin in his hand, sir...As I described before, sir, like this (indicating) and bend my head back" (R. 15).

Witness further testified that no one else was in the latrine at the time (R. 15), that he was in the latrine with accused "from an hour and a half to two hours", of which time at least one-half hour was "taken up by this alleged fondling" by accused. Witness considered accused's actions improper, "just something one man doesn't do to another" (R. 17). Accused had his face about six inches to one side of that of witness (R. 16). He made no objection to accused because "I didn't believe I had a right to tell an officer what he could or couldn't do. I just sat there" (R. 17). Accused left the latrine about five times while witness was there (R. 16). There were five prisoners in the stockade which was about twenty feet from the latrine. Riley did not report the incident until asked to do so by "Captain Dodd, the intelligence officer". Witness was in the stockade one week and the charges against him were dropped (R. 17). He knew Private Vitacco and Private Francis "only by sight" (R. 17, 18). (Specification 3).

As to Specification 4 (finding of guilty disapproved by reviewing authority) Technician Fifth Grade Hubert M. Barry, Company B, 31st Replacement Battalion, testified that on 8 June 1943 (R. 18) he was taken to the stockade by accused for "a breach of conduct at the camp". Witness testified that accused took him into a tent, searched him and, after taking a few articles for safekeeping preparatory to his being taken to the stockade, "opened my blouse and laid his hands upon me and then walked around me in a rather embarrassing manner". He testified that,

"Among other things he cupped his hands and put them to my face and stood very close to me and looked into my eyes without any expression or statements and walked behind me and felt around over me, over different parts of my body.---he walked behind me, laid his hands on my shoulders and down my back and on my chest and he put both hands on my buttocks and then moved around in front of me again" (R. 19).

Upon being asked if accused was checking his pockets to see if they were empty, witness testified,

"Well, sir, that would be an interpretation on my part as to what he was doing. I really don't know, sir, what he was trying to do, but he had his hands on me at that time after he had emptied my pockets" (R. 21). (Specification 4).

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

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4. The evidence shows that under pretext of official license accused on separate and distinct occasions took unseemly and perverse liberties with the three enlisted men named in Specifications 1, 2 and 3 by manually touching and stroking parts of their bodies. One of the soldiers testified that accused's movements about the back of his head and neck were of the nature of "fondling" and another testified that the movements were suggestive of what might more appropriately be done to a person of the other sex. In each instance the enlisted man was summoned by or brought before the accused for some asserted breach of military duty or discipline and thereafter was detained by accused either in his tent or in a latrine for an inexplicably long period of time during which accused asked questions concerning the soldier's past life, made statements which were apparently dilatory in nature and with time consuming purpose and, in one instance, kept the soldier reading general orders. Much of the time he kept the soldiers at attention or parade rest and it was mainly in his presumptively official capacity and with the ostensible purpose of correcting the soldier's posture, that accused touched and moved his hands over the soldier's body, took hold of his cheek or chin, stroked his neck, pushed in his stomach or made such other movements as to bring the impropriety of his conduct to the consciousness of the individual concerned. That the accused was aware of his indecorum is manifested by his statement to one of the soldiers, whom he had detained for three hours, that he should forget everything that had transpired. There is substantial evidence to support the allegations of the specifications in regard to indecency and impropriety. Evidence adduced with respect to all of the offenses charged was properly for consideration in determination of the motive of accused in each particular instance of alleged misconduct (MCM, 1928, par. 112 b).

All circumstances in evidence evince either a depravity of instincts or, as betrayed also by his acts, an innate moral perverseness. He cannot escape the condemnation that his conduct was indecent, disgusting and scandalous and of such a nature as to cast dishonor and disgrace upon him as an officer and at the same time seriously compromise his character and standing as a gentleman (MCM, 1928, par. 151). The conduct of accused demonstrates his moral unfitness to continue as an officer in the army and therefore justifies the findings of guilty under the 95th Article of War.

5. Accused is thirty-four years old. He entered the service in October, 1940. Although the data submitted shows no former service, his letter (plea for clemency) indicates that accused was commissioned in the Officers Reserve Corps in 1930 and had several two-weeks tours of active duty and nineteen months in the Civilian Conservation Corps.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review holds the record of trial legally suffi-

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cient to support the sentence. Dismissal is mandatory upon conviction of violation of Article of War 95.

Donald D. Kehlmann, Judge Advocate.
O. G. T. S., Judge Advocate.
Gordon Simpson, Judge Advocate.

NATO 466 1st Ind.
Branch Office of The Judge Advocate General, NATOUS, APO 534, U. S. Army,
3 September 1943.

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

1. In the case of Major Donald E. Brewer (O-277690), Infantry, Headquarters Company, Seventh Replacement Depot, 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 $\frac{1}{2}$, you now have authority to order execution of the sentence.
2. After publication of the general court-martial order in the case, six 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 466).

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

(Sentence ordered executed. GCMO 28, NATO, 3 Sep 1943)

