

HOLDINGS OPINIONS AND REVIEWS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

**SOUTH WEST PACIFIC AREA (A)
PACIFIC (P)**



VOLUME 3 B.R. (A-P)

CM A 1843-CM A 2320

CM P 4-CM P 170

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

Judge Advocate General's Department

Holdings Opinions and Reviews

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Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1843

2 March 1945.

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

v.)

Private OWENS GILLAM (38531957),)
Company B, 96th Engineer)
General Service Regiment.)

Trial by G.C.M., convened at
APO 159, 2 February, 1945.
Dishonorable discharge, total
forfeitures, confinement for
life. The United States
Penitentiary, McNeil Island,
Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 Owens Gillam, Company "B", 96th Engineer General Service Regiment, did, at APO 159, on or about 2 January, 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Oscar L. Gainer, a human being, by shooting him with a rifle.

He pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution shows that on the evening of January 2, 1945, there was a "crap game" (R. 36) in progress in the "Rec

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Hall" of Company "A", 96th Engineer General Service Regiment, A.P.O. 159. An argument developed between accused and deceased, both members of Company "B", about a side bet (R. 28). Each claimed the other was "taking his money". Shortly (R. 27) thereafter the accused left the game saying, "I'll be back," (R. 12). Private First Class Leon Harris, "house man", called to accused as he was leaving stating that he Harris would pay him ten guilders saying, "No hard feelings." Accused "stopped when Harris said that, but then went on" (R. 28). Private Rhyly Fitzgerald, one of the players, noticed that accused "looked like he was mad and angry" and "figured he was going after something to hurt somebody with * * *. ** followed him to see where he was going after a minute." Private Fitzgerald went to Company "B" but did not see him there (R. 34). Corporal Calvin H. Gamble, Corporal of the Guard, hearing of the argument went to the "Rec Hall" and asked deceased with whom he was arguing. Deceased denied having had an argument with anyone. The Corporal left the hall but "stayed around" and heard deceased say "That mother-fucker tried to beat me out of my money." (R. 12-20). About 11:15 P.M. a shot was heard (R. 73) and deceased fell with a bullet wound through his left arm and his right and left chest, from which wound he died in about ten minutes (R. 18). Immediately after the shot was heard a short man, wearing a two-piece herringbone fatigue suit and carrying a rifle at port arms, was seen running toward the showers of Company "B" (R. 29). He was about the "same size as accused", and he was dressed the same" (R. 13, 21, 29). At that time the camp lights were out but there were "two flambeau lights" in the Recreational Hall. The night was "a little cloudy" but light enough to see a man running (R. 14). Captain James M. Humphries, Jr., heard the shot and upon investigation found deceased lying on the ground near one of the dice tables. A search of the area was made and about 16 feet from where deceased had been standing at the dice table a .30 calibre cartridge case was found (R. 43). First Lieutenant Raymond G. Black, of the 96th Engineers, Officer of the Day at the time in question, being advised of the shooting, ordered the rifles of each Company inspected and received a report that none were missing. The next morning it was reported to him that a rifle had been found in "E" Company. He investigated and found it leaning against a tree (R.46) about 250 to 270 yards from "A" Company "Rec Hall" (R. 48). The rifle was identified as belonging to "Company 'F'" (R. 49).

"Sometime after the show" on the night in question Private First Class J. H. Ball, of accused's unit, was on duty at the airdrome when he was approached by accused who "got me round the other side of the truck" and stated to him in a low voice that "he was in trouble, that he had shot a man, and he wanted me to take him to his quarters". Private Ball told accused that he "couldn't help him" after which accused "went away" (R. 55). Captain John M. Johnson, Commanding Officer of Company "B", heard a rifle shot on the night in question and shortly thereafter received orders to check the Company and ascertain if any rifles were missing. He instructed one of his Lieutenants to check the rifles at the supply room while he proceeded to the water points to check rifles there. At the first water

point all rifles were accounted for. While on the way to point No. 3 at about 12:30 A.M. (R. 74), he saw accused walking on the beach wearing a two-piece green fatigue suit. He "gave him a lift", at which time accused stated that "he had been up at B Company in the regimental area and was going to water point No. 3" (R. 52). From this place to the Regimental Area was about two miles (R. 54). He checked the rifles and left accused at No. 3 Water Point, telling him he might have to come down and question him the next morning "Because he was the only man from the water point who had been up in the regimental area, and because I picked him up on the road, and I couldn't figure why he was away from his place of duty that late." (R. 53). Water Point No. 3 was about four miles from the regimental area (R. 53-54).

Private First Class Dempsey Bell was on duty at Water Point No. 3 on the night in question. About 5:00 P.M., accused requested him to take his [accused's] place on guard that night, the tour of duty being from 8:00 to 12:00 o'clock. This witness complied with the request and was present when Captain Johnson brought accused to the Water Point at about 1:00 A.M. After Captain Johnson left, this witness stated, "I wonder why Captain Johnson was out here inspecting rifles at this time of night," and "Gillam [accused] spoke up and said * * * that he shot a man up there in A Company * * * He said he got into it up there, and went to B Company, but it was locked up, so he went to F Company and got a rifle, then came back and fired a shot * * * that he went and set the rifle behind a tree and then left." (R. 58-59). Private Roy J. Heller was at Water Point No. 3 when Captain Johnson drove up in his jeep to inspect the rifles. As to the discussion which followed Captain Johnson's departure this witness testified:

"We were wondering why Captain Johnson was out there inspecting rifles at that time of night, and Gillam said he knew what it was about, that he shot a man. Gillam said he didn't know whether he killed him or not, but he shot him. He said he got the gun out of F Company, and didn't have time to take it back, so he hid it behind a tree. He said we didn't have to be in it, that he would confess it his own self." (R.62).

The defense called several witnesses who testified, in substance, as did witnesses for the prosecution relative to the argument between accused and deceased prior to the shooting. Private First Class Leon Harris, the "houseman", stated that the argument between accused and deceased lasted about 15 or 20 minutes and the reason he "tried to straighten it out, it looked like it was going to be a fight, and Gainer [the deceased] was drinking, but not drunk; he was under the influence of whiskey." (R. 85). Corporal Robert Gray testified that on the night in question he was in charge of a detail on the air strip of which Private Bell [Prosecution witness] was a member. At no time did he see accused talking with Private Bell. He further stated that he saw someone come up to Bell's truck but that he did not know who the man was; he "didn't pay that much attention" (R. 91). Second Lieutenant Bert H. Wiley, of the 96th Engineer Regiment, testified that on the morning following the killing he went to Water Point No. 3 to get accused's "stuff" and asked Bell and Heller "if there had been any excitement down there the night before". He stated, "They told me that Gillam

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was drinking when he came back that night, but that he wasn't drunk. Said Gillam didn't talk, but that he relieved Bell from guard, and Bell said, 'I went to bed.'" (R. 93). The accused remained silent.

4. In the instant case the prosecution is called upon to prove that the accused unlawfully killed deceased with malice aforethought as alleged. There is no direct testimony that accused fired the shot causing the death of Private Gainer. His guilt rests principally upon circumstantial evidence.

"Circumstantial evidence is proof of facts and circumstances from which the jury may infer other connected facts which reasonably follow, according to the common experience of mankind" (20 Am. Jur. sec. 279).

Proof by circumstantial evidence is recognized in military law and "may be more convincing than a plausible witness" (par. 112b, M.C.M., 1928).

It has been held -

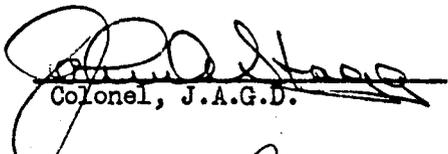
"Whatever may be established by direct, may be established by circumstantial evidence in criminal cases. Only few convictions could be had if direct testimony of eye-witnesses were required and the rule is one of necessity. * * * When evidence is of sufficient probative force, a crime may be established by circumstantial evidence provided there is positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts. * * *." (CM 216004, Roberts and Miller).

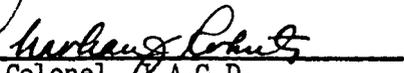
The record forges the following chain of circumstances around the accused. Both deceased and accused were at a gambling table where they made a "side bet" on the outcome of a turn of the dice. An argument developed lasting about 15 or 20 minutes as to which had won. Accused, looking "angry" and "mad" left the recreational hall with the statement "I'll be back". Shortly thereafter a shot was fired killing deceased, and a man of about the same physical characteristics and dressed as was accused, was seen running toward the showers of accused's company. One witness testified that accused requested him to drive him [accused] to where he was on duty at No. 3 water point, stating that he was in trouble and had shot a man, which request was refused. About 12:30 A.M., after the shooting accused was seen about two miles from the scene of the crime walking on the beach toward his place of duty. Two witnesses testified that when they were discussing the reason for Captain Johnson inspecting their rifles accused voluntarily stated that he was in trouble; he had shot a man "up there in A Company" with a rifle

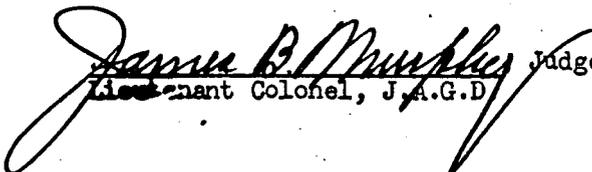
he had secured from "F" Company which he had hidden behind a tree at which place it was subsequently found. Such facts furnish a basis from which the court-martial could infer, to the exclusion of every other reasonable hypothesis, that the accused unlawfully shot deceased as alleged and warranted the court in finding him guilty of murder (par. 148a, M.C.M., 1928).

5. A sentence of either death or life imprisonment is mandatory upon a conviction of murder in 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 by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

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

 , Judge Advocate.
Colonel, J.A.G.D.

 , Judge Advocate.
Colonel, J.A.G.D.

 , Judge Advocate.
Lieutenant Colonel, J.A.G.D.



Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1864

7 March, 1945.

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

v.)

Technician Fifth Grade ROBERT
N. BARNES (38477752), 826th
Amphibian Truck Company, TC)

) Trial by G.C.M., convened at
) Base "K", USASOS, APO 72, 29
) January 1945. Dishonorable
) discharge, total forfeitures,
) confinement at hard labor for
) fifteen years. United States
) Disciplinary Barracks, Fort
) Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS and MURPHY,
Judge Advocates.

1. The record of trial 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 93rd Article of War.

Specification: In that Tec 5 Robert N. Barnes, 826th Amphibian Truck Company (TC) did, at APO 72, on or about 29 November 1944 with intent to commit murder, commit an assault upon, Tec 4 Willie Walton 826th Amphibian Truck Company, by willfully and feloniously striking the said non commissioned officer on the head with a hand grenade, from which Tec 5 Barnes had pulled the pin.

He pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. The reviewing authority approved the sentence but reduced the period of confinement to fifteen years and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50¹/₂, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. About 7:00 o'clock on the evening of November 29, 1944, the accused

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a member of the 826th Amphibian Truck Company, A.P.O. 72, Philippine Islands, went to the company kitchen and asked Ryland Foster, one of the cooks, for some food, stating that it was for his "Filipino boy". Foster refused the request telling accused that he "had just eaten" and that the food was being saved "for men who were out on the water" (R. 12). He suggested to accused that he see T/4 Walton, the mess sergeant (R. 12). Accused then requested food from T/4 Rikard, another cook, who also told him to "go to the mess sergeant" (R. 10). Accused approached the mess sergeant with the same request and was refused, the mess sergeant stating, "We were not allowed to feed the Filipinos". Accused then said that "when we landed in Manila some of the cooks would not get home * * *" (R. 7); "I will blow up this place" (R. 10). When asked what he meant accused replied "I will show you" (R. 12), and leaving his mess kit on the generator, "went down in the area" (R. 10). In about 5 minutes he returned and said to Sergeant Walton "You are not going to give me food?", the mess sergeant replying "I am not going to give you food to send out to people outside" (R. 10). Private Albert Thomas then asked accused to "come out of the kitchen" and grabbed him by the arms and "pulled" him at which time accused broke loose and took a hand grenade from his pocket (R. 7), pulled the firing pin (Pros. Ex. 1) and threw it at the mess sergeant hitting him on the head, after which the grenade fell to the ground, exploding, a fragment hitting the mess sergeant on the ear (R. 8). After the explosion of the grenade Sergeant Walton caught him by the collar at which time accused said, "I am drunk that's right, you caught me". Accused was then turned over to the company officers (R. 7). T/4 Walton denied having a knife in his possession at the time of the incident and all other eye witnesses testified that they did not see Walton with one. The prosecution introduced in evidence a statement by the accused given to Captain Francis T. Murphy of the Provost Marshall's office, Base K. It follows:

"I started to drink about 1400 hours, 29th of November 1944. I was drinking Filipino whisky which obtained from a Filipino boy who I met on the way to camp at that time. I was driving a dukw. When I reached camp I went around different tents in the area and drank a beer bottle full. I had only the one bottle. I ate chow with my company, but a little later than most of the men. I finished chow after dark. After I ate, washed my gear, I went back for seconds. I washed it before asking for seconds because they usually won't give seconds sometimes. Although I didn't expect it, I went back for seconds. I asked one of the cooks for some more chow. He sent me to Willie Walton. I went to Willie and asked if I could get some more chow. He said I couldn't get any more. He said I had already eaten. He asked me who it was for. I told him it was for myself. We then got to arguing. I did not say it was for 'my boy', nor that it was for a Filipino. I left my mess gear on the generator. When I walked away, I said, 'I'm going to get something to eat.' I was intending to get it at the Mess Hall. I walked to the Ammo Dump

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behind my tent. I got a hand grenade. I went back to the mess hall. Walton came outside. I asked, 'Can I get some chow?' He still said 'No'. I asked him again to feed me. He still refused. He had a trench knife on his belt. He didn't know I had a hand grenade. He pulled out his knife. I backed up. He stood still. He kept holding the knife. I don't know which hand it was in. I think it was his right hand. He jumped at me. Then I pulled the hand grenade out of my pocket. I pulled the pin out. I threw the hand grenade, and prepared to run in the opposite direction. I tripped after I threw it, I rolled over to avoid Walton who was running towards me. I got up and ran. Walton fell also. He dropped his knife at that time. I ran on and he caught me, hit me 3 or 4 licks in the face, then took me back to the orderly room.

Yes, Thomas was there. He tried to get the hand grenade from me. He came up to me before I had the hand grenade out. He tried to get food for me. He came out and told me I couldn't get it. He told me to go on back to my tent and go to bed. I told him I was hungry. I wanted to eat. That's when Walton was out in front. Walton had his knife out then and I told Thomas to get out of the way. I didn't want him to get hurt. He got out of the way and I threw it.

Captain Hogg talked to me last night. He said to me, 'You were taught never to use a weapon against a man unless you intended to kill him.' I answered, 'I'm sorry I didn't kill him.' I also said to Capt. Hogg, 'What would you do if you were hungry?' That was all.

'Signed) Robert N. Barnes.'

The accused elected to remain silent and called no witnesses in his own behalf.

4. Accused is charged with assault with intent to commit murder which has been defined as:

"* * * an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder." (par. 149, p. 178, M.C.M., 1928).

The evidence is undisputed, and the accused admits, that after an argument with T/4 Willie Walton, the mess sergeant, he went to the ammunition dump, secured a hand grenade, returned to the mess hall and upon again being refused food, he pulled the firing pin, threw it at the mess sergeant hitting him on the head and wounding him in the ear when it exploded. His statement

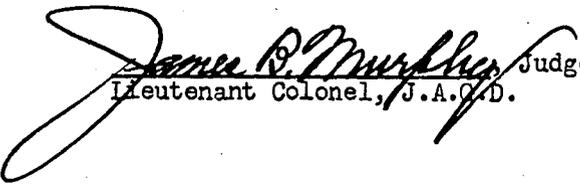
that the mess sergeant assaulted him with a knife immediately before he pulled the firing pin and threw the grenade, is specifically denied by the mess sergeant and several other eye witnesses. While he claimed to have been drinking he did not plead drunkenness in mitigation. His statement prior to the incident that he would "blow up the place" and his subsequent statement to Captain Hogg "I'm sorry I didn't kill him" show him to have been fully cognizant of his unlawful acts and furnish ample evidence upon which the court could find that the accused had the specific intent to kill T/4 Willie Walton with a hand grenade, per se a dangerous weapon, at the time and place and in the manner alleged. The evidence fully supports the court's findings.

The accused is 20 years of age. The sentence imposed is permissible for a violation of Article of War 93.

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


Colonel, J.A.G.D., Judge Advocate.


Colonel, J.A.G.D., Judge Advocate.


Lieutenant Colonel, J.A.G.D., Judge Advocate.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1882

19 March, 1945.

UNITED STATES

v.

Private First Class JOHN
PIZZITOLA (39151713),
Company K, 126th Infantry

) Trial by G.C.M., convened at
) APO 32, 23 February, 1945.
) Dishonorable discharge, total
) forfeitures, confinement for
) twenty-five years. The United
) States Disciplinary Barracks,
) Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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.

Specifications: In that, Private First Class John Pizzitola, Company K, 126th Infantry, did, at Tanauan Beach, Leyte, Philippine Islands, on or about 16 November 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself at Dulag, Leyte, Philippine Islands, on or about 13 January 1945.

He pleaded not guilty to the charge and its specification but, by exceptions and substitutions, guilty of absence without leave in violation of Article of War 61. He was found guilty as charged and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The reviewing authority approved the sentence but reduced the period of confinement to twenty-five years, and designated the United States Disciplinary

Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50¹/₂, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution shows that on the 14th day of November 1944, Company K of the 126th Infantry (32nd Infantry Division) landed at Tanauan Beach on Leyte, Philippine Islands. On 16 November the main body of the company moved forward (R. 11), leaving the third platoon, of which accused was a member, on the beach "doing details" and "Loading trucks of the 126th with equipment that was on the beach" (R. 7). About 1:00 o'clock P.M. on 16 November the accused left the area but returned about 4:00 o'clock at which time the platoon officer, Lieutenant Curran, told accused "that as he hadn't stayed in the platoon area before, that he had to report to the squad leader, Sergeant Homrick, every hour" (R. 8). A short time thereafter accused asked Corporal Grothers for permission to go to a river about 75 yards from the area and was told that he could go "for twenty minutes". Accused did not return and three men were sent out to "look for Pizzitola but with no results". The platoon left the following morning to join the company (R. 13). On the evening of 17 November, Lieutenant Curran and Staff Sergeant Gordon L. Sayre, of Company K, returned to the area where accused was last seen and made a search for him but he could not be found (R. 16).

On 23 November, Private First Class Paul A. Brinkman of Company K, having been wounded, was in an ambulance entering the First Field Hospital on Leyte when he observed accused sitting on a truck "heading toward the other direction toward Tacloban". Accused approached the ambulance and asked Brinkman "where the Company was" and was told that it was "up in the hills" (R. 18) and that "we were attacking this hill where I was wounded and we had some casualties" (R. 19). Accused said "he would like to get up there" and "had tried to find them" and was told that the only way "to get up there was by pack train, or with someone * * * who knew where it was" (R. 20). On or about the 10th or 12th of December, Sergeant Harold Ross, a member of accused's unit, was a patient at the 36th Evacuation Hospital. He had a conversation with accused "About the fellows at the front, and who got killed" (R. 21) at which time accused stated "Maybe it was a good thing I wasn't there" (R. 23). The accused told Sergeant Ross that he (accused) had been staying "with some Cavalry outfit" and had been "trying to get back to the outfit but couldn't get back on account of the road block (R. 21) * * * [and I told him it_] wasn't there any more" (R. 24). Sergeant Ross had another conversation with accused at which time he told accused that he was going back "the following day, and he [accused] was going to see me" (R. 23). He did not see accused again. Sergeant Ross was furnished transportation and returned to his unit.

Captain Harry L. Richardson of Headquarters Third Battalion, 126th Infantry, testified that he was in charge of the rear echelon of the 126th Infantry. The echelon was located between Tanauan Beach and where the road block was established by the Japs "Between the 19th and 21st" of November (R. 30). At all times there was communication of personnel between Tanauan Beach and this rear echelon either by road or barge (R. 31).

The accused elected to be sworn and testify. He stated that after he had taken the bath in the river he and another private decided to "go over and have a drink" and that when he returned at about 4:30 the Lieutenant was "pretty mad" and "bawled me out" and told him (accused) "to stick around the area and not go off like that". Later he decided to go over to the Seventh Division where he had friends to see if he "could borrow some money of them". Leaving instructions with a "Private" that if inquiry were made as to his whereabouts to "tell them I am over at the Seventh Division" he left the area. Upon arriving at the Seventh Division he drank "pretty heavy" of Filipino whiskey called "Tuba". About 10:30 next morning he started back to his outfit and upon arriving where he had left his platoon he found no one there. He made inquiry of an engineer outfit about the 32nd Division but "They said they didn't know". Thinking someone would be sent to find him, he waited all afternoon and when no one "showed up" he told the engineers that if "anybody comes" that he would be "at the duck outfit that was across the street". He stayed there about a week "drinking during that time", and then asked an MP "if he knew anything about the 32d Division". Upon being advised "the Infantry" was at a little town called "Palo" about 20 or 25 miles away he went there. Upon arriving he met an officer of the Field Artillery and inquired of him the location of the 32nd Infantry Division and was told "he didn't know what Division was on the line but he did say that one was Company K and one Company L that were pretty badly hurt". The artillery officer did not know if these two companies were "in the 126th". Late that afternoon while sitting in a truck he saw some members of the company in an ambulance and inquired of them "where the Company was at".

"They said they didn't know where it was at, but they said if the Company was there, but they doubted it it would be moving. It would be some where they didn't say what direction it was. How I was supposed to get there or find it. I said I have a ride with the Lieutenant here who is going up to the Artillery near Carigara, going up to the front lines. I said I would see them later. They said I wouldn't be able to get through because the road was blocked. I said I would see them later I -- I said I would see them later if I didn't get through. I got back to the truck. The MP said no trucks can go through. I

said 'do you know how long or when it will be before the trucks can go through?' I said 'my Company is around here somewheres.' I said 'I would like to get through' He asked me if I had a rifle. I told him I didn't. At the time I was in the Company I was a Browning Automatic Rifleman a BAR man, and that is the only weapon I have. I didn't have a weapon. He said if you had a weapon I might arrange it. In the meantime he said 'stay in town', which I did." (R. 38).

Upon being advised by an MP of the location of the Seventh Cavalry he went there and met a friend to whom he explained his predicament. This friend advised him to "turn in to the Headquarters" but he wanted to "turn into the Company if I could". His friend advised him to stay "until the road clears up or whatever is going to happen". He remained there about two weeks "having quite a bit of drinks" but kept contact with the 603rd Evacuation Hospital "to ask them if they knew where some of the boys of the 126th Infantry, Company K, may be located". Upon being advised that "there was some at Palo" he went there and met "only one" and explained to him "what happened to me", stating that he knew "the Company had been neglecting me in a lot of things" and that he did not see "how the Company didn't send anyone there to wait for me which they knew I would be back". Accused further testified:

"* * * I asked him if he knew where the Company was at. He said he didn't know exactly. He said up in the hills somewhere. He said there wasn't much left of the Company some went in with bad feet, some were wounded, some were injured, some were killed. I felt badly about it on account of my Lieutenant Curran and some of the boys were friends of mine. He didn't give me any directions on how to get back, and he in fact didn't care whether I got there or not. I didn't ask him any more. I asked him where the rear echelon was, and he said it was on a road across from a Chinese Cemetery. That's all the directions he gave me. * * * But I did go to the rear echelon. On the way while going up there I met one Sergeant and stated to him what happened. The explanation which he showed me and the way he put things it seemed as if he didn't give a damn whether I got there or not (R. 38). * * * I had chow at the rear echelon. I says 'the trucks when do they go up to the outfit?' I don't remember for sure whether he stated they were going up by barge or up by truck, I don't know, but he did mention something like that. I told him to let me know when you leave in the morning. That night, that is before it got dark that evening, I told the fellows I am going to see if I can get up and so I got a ride as far as Carigara. That is as far as any truck could get through" (R. 39).

He then returned to the Seventh Cavalry where he borrowed some money from a friend and eventually returned to his unit on 13 January 1945 (R. 45), stating "It seems when I got back to the Company it seemed that my Company blamed me for what happened to the Company. I said I didn't know the Company was in action" (R. 39). He specifically denied that when they landed on Leyte anyone in the organization knew the company was moving up to the combat zone, stating that when the company left the Dutch East Indies they were told that they would be a labor battalion (R. 40). On cross-examination accused admitted that the artillery officer who "picked" him up was from the 126th Field Artillery and that he knew this unit was a part of the 32nd Division. He admitted that this officer told him the Division was "on the line" but claimed that he (the officer) said that L and K Companies were scattered and that he did not "know where they were at" but that they had had some casualties (R. 42). When he talked with Sergeant Ross that day he believed that "they weren't fighting at that time" and that only security patrols were engaged with the enemy (R. 48).

First Lieutenant Edward A. Harris, a defense witness, 126th Infantry, testified that he was Personnel Officer for the 126th Infantry Regiment and that the accused had not been paid any money for the last year because his service record was not available and he was indebted to the government (R. 35). Lieutenant Harris admitted that accused was entitled to some pay even though his indebtedness to the government exceeded the amount he was drawing (R. 35).

4. The accused admits that he was absent without leave from his organization from the 16th day of November 1944 until the 13th of January 1945. He is charged with desertion in that such absence was with the intent to avoid hazardous duty, to wit: combat with the enemy. His unit had landed on a beach on 14 November in a combat area where it remained for two days after which the main body moved forward engaging in combat, leaving accused's platoon to finish loading equipment on trucks. This platoon moved forward on 17 November, at which time accused was absent, and so remained for almost two months. On several occasions he met wounded men from his company and talked with them, and while he expressed himself as desiring to return to the company, his subsequent actions belied such intention. When told of the heavy casualties the unit had sustained in combat, he said "Maybe it was a good thing I wasn't there". The record contains abundant evidence from which the court was justified in finding that when accused left his unit or at sometime thereafter his intention was to avoid hazardous duty. The fabric of his alleged attempts to rejoin his unit is woven in a pattern of actions, the warp and woof of which were considered by the court as unworthy of belief. The evidence surrounding his admitted absence without leave fully justified the finding of accused guilty as charged.

(16)

The sentence imposed is authorized for the offense of which accused was found guilty.

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

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Martha R. Hunt, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General.
Melbourne, Victoria,
Australia.

Board of Review
CM A-1883

23 March 1945

UNITED STATES)

v.)

Private WILLIAM T. CURRY
(35518555), 774th Engineer
Dump Truck Company)

Trial by G.C.M., convened at
Headquarters Base A, A.P.O.
928, 4 October 1944. To be
hanged by the neck until
dead.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 William T. Curry, 774th Engineer Dump Truck Company, did at APO 928, on or about 25 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private Robert J. Harris, 774th Engineer Dump Truck Company, a human being, by striking him on the head with an instrument or weapon the nature of which is unknown.

He pleaded not guilty, and was found guilty of, the charge and its specification and was sentenced to be hanged by the neck until dead, all the members of the court concurring in both the findings and the sentence.

The reviewing authority approved, and the confirming authority confirmed, the sentence. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution reveals that on 24 August 1944 Privates William T. Curry (accused) and Robert J. Harris (deceased) were members of the 774th Engineer Dump Truck Company, stationed at APO 928. About eleven o'clock that morning (R.41) Lieutenant Chester J. Flaum, of the Provost Marshal's Office, questioned accused with reference to certain homosexual acts that Privates Robert J. Harris and James A. Roach had admitted to the Lieutenant they had committed with accused. Accused denied any such acts and Lieutenant Flaum "pointed out to him the penalty for sodomy and advised him he was subject to charges of sodomy as well as perjury" (R.9). Later in the day Roach, who when testifying admitted that he had had homosexual relations with accused (R.18), was sitting in a jeep with Harris and heard accused say that "he was going to get rid of these punks in the car" (R.16).

That evening accused and his tentmates, Corporal Joseph Willis, T/5 James H. Moore and Private Cleathen Jordan, were sitting in their tent drinking "jungle juice" and talking. Accused called T/5 Charles W. Dow into the tent and told him that his, Dow's, name was "at the head of the list at the patrol office" as one of those who "was going around with Roach and Harris". Dow testified that accused said:

"* * * 'If that company clerk owns up that he put my name on that list I'll break his neck'. Then Curry said that Roach and Harris were trying to fuck him up and if he got convicted he would get 5 years and a dishonorable discharge. He then started talking in a mad tone of voice and said he had beaten a man to death in civilian life and got 4 years in jail, and said if he did beat those cocksuckers to death with his fists they couldn't call it murder. * * *" (R.23).

Willis testified that accused "said something about someone trying to get him in trouble* * *about he felt like taking his fist or a stick and beating these punks, beating the devil out of them or something like that"(R.20) but did not say who the "punks" were. Moore testified that "Curry stated that Harris might not leave the island alive, that he (Curry) beat a man in civilian life to death and had to serve four years for manslaughter. He said he could kill anyone with his fists and not get charged with murder" (R.25). Private First Class Thomas Lowder who had also come into the tent testified that "Curry kept walking across the floor shaking his fists and

talking loudly and said he was going to get those cocksuckers Harris and Roach if it was the last thing he did." Private Cleathen Jordan testified that he was accused's cousin and stated that in the tent that evening accused said " * * * that Harris and him had told different stories to somebody down at the Provost Marshal Office. * * * That there was supposed to be a general court-martial and that he wouldn't get less than 6 months, and maybe 5 years or life, or something like that * * * for monkeying with" Harris and Roach (R.11). Accused put on a pair of khaki pants and a white undershirt (R.23) and shortly thereafter Dow and Lowder left the tent (R.21,24). Accused later borrowed a pair of Jordan's old hobnailed shoes, put them on, and told Jordan " * * * to swear that he hadn't left the tent that night" (R.11).

Willis went to sleep "after 9 o'clock" and did not remember having seen accused leave (R.22). Moore left at 11:30 to go on guard and did not know whether accused was then in the tent "but his mosquito bar was down like he was in there but I didn't see him" (R.26).

At 11:30 that evening Lowder, who was asleep in his tent located about 100 feet from that occupied by accused (R.30), was awakened to go to work. Lowder complained of being sick and was given permission to remain in bed. He testified that about twenty minutes later he was "sitting on the floor" sick from the "jungle juice" he had drunk earlier in the evening when he saw accused leave his tent. Accused was then wearing khaki pants, a white undershirt, no top-shirt, and, from the noise of his footsteps on the gravel, hobnailed shoes (R.29,32). Accused called Harris' name and walked about 25 feet toward the latrine where he met Harris who was carrying a lighted flashlight (R.30). They stood and talked for about three minutes with the light shining on their faces (R.31, 32). Accused said "to take the light out of his face" and it was extinguished. Lowder further testified that he heard accused ask Harris "if he was trying to fuck him up and Harris said no, that he just did what they asked him to do. Then I heard Harris say, 'Go on, Curry, leave me along'" (R.29). Lowder heard no "cries or screams" (R.31). About thirty minutes later this witness saw Curry returning from the direction of the shower, looking back over his shoulder as he walked (R.31). Accused was no longer wearing the white undershirt (R.29) and Lowder could tell that he did not have the hobnailed shoes on "because he was walking on tiptoe and if he had had them on the iron on the shoes would have clinked on the gravel steel" (R.32). Lowder was recalled as a witness for the defense and asked if he positively identified accused and deceased as the men he saw and heard talking. Lowder answered in the affirmative. He recognized their faces when the flashlight was shining on them (R.57) and further identified accused by his voice and walk - "He walked on his toes and bounced" (R.56).

(20)

The next morning the body of deceased was discovered at the east end of the company area near the rear of the shower and about 25 feet from the latrine (R.5,27). The body was lying on grassy ground, the neck resting upon a tent pole eleven feet long and three inches in diameter (R.37; Pros. Ex. F). It had been raining the previous evening and deceased's clothes were wet (R.6). There were no distinctive marks in the vicinity other than a large pool of blood near his face. Practically all of the bones of his skull had been fractured; his face was "badly mutilated", the left side having been "mashed in" (R.44,45,52). Rigor mortis had already set in and a flashlight was "frozen" in the right hand (R.40). The fingers were pried open, the flashlight was tested and found to be working (R.44). An autopsy was performed about 1300 hours by Lieutenant Colonel James J. Park, M.C.. He testified that in his opinion Harris had been dead 8 or 12 hours or more and that death was caused "by extreme blows to the head * * * by a blunt instrument of some kind that was not sharp-edged but was large enough so that it wouldn't cut the skin" (R.52,53).

During the morning a cracked stick or club about two and one-half feet long with the handle trimmed off, identified as belonging to accused, was found on the ground behind the seats in the latrine (R.35). The stick had neither stains nor mud upon it (R.36). A wooden club was introduced in evidence as Prosecution's Exhibit B but was not identified as that belonging to accused. It was withdrawn and described in the papers accompanying the record as "Wooden club, about 2½ feet long, cracked halfway its entire length, with handle trimmed off" (Pros. Ex. B). In the opinion of Lieutenant Colonel Park it (Pros. Ex. B) could have been the instrument which caused accused's injuries (R.52).

Private Jordan talked to his cousin, the accused, in their tent about 6 or 7 o'clock in the morning of the 25th of August and "told him if he did what I thought he did he was a damn fool". Accused answered, " 'Maybe I didn't do what you think I did', 'Maybe I just know something about it' "(R.12). That morning Private First Class Lowder saw accused sweeping the dispatcher's office. Lowder testified:

"He asked me if I was going on sick call and I said yes. He said to try to go around by the Provost Marshal Office if I did and find out what Roach was telling and then come back and tell him and he would get Roach too." (R.29)

Lieutenant Flaum, of the Provost Marshal's office, talked with accused sometime during that day and told him that he was suspected of having murdered Harris. The Lieutenant testified in part:

"I asked him what he was wearing the previous night

and he said the same as he had on then, which were a pair of American service shoes, leather soles and heels, khaki trousers, khaki shirt and white undershirt. He said he was wearing exactly the same clothes."

* * *

"I asked Curry if he had borrowed a knife from anyone the evening before and he admitted to me that he had. I questioned him about that knife and at one point I asked him, 'Isn't it a fact, Curry, that you borrowed that knife because you wanted to use it to stab Harris,' and he immediately said, 'No knife was used on Harris.' I then explained to him that as he had not seen the body he could not know how Harris was killed unless he, himself, was the one who had committed the murder. He immediately became silent and refused to talk. That was the last he did say that day." (R.42).

Privates Moore and Jordan appeared as witnesses for the defense. Each was shown a club (not identified as Exhibit B) and testified that it belonged to accused and that it had been "split" or "broken" about two weeks prior to the 24th of August. Neither knew, however, whether the club had been split to the same extent as when examined by him during the trial (R.54,55).

Accused elected to make an unsworn statement. He said that he was in his tent on the night in question talking with his tentmates -

"* * * Dow was lying in my tent and I asked if he cared for a drink and he drank along with us. I mentioned to him that I had heard that his name was on the list at the Provost Marshal Office and he said, 'Yeah, I heard about it,' * * * I took off my shirt as jungle juice makes you sweat a lot. He /Dow/ told me that Thomas was putting that out. I said I didn't know anything about Thomas as Thomas and I never speak very much. Dow said if he ever found out that the fellow said that he would 'knock hell out of him and break his neck.' * * * After Dow left I walked to the door of my tent and started to the dayroom. I saw Sgt Dupree and asked him if he wanted a drink and he did. * * * I asked him to loan me his knife and he gave it to me. A

fellow had stopped by that noon about 3 o'clock from the AA outfit. He said that a soldier by the name of Miller was coming down and wanted to find out what I knew about this shooting. He said that he heard that they were calling Harris and I down to Headquarters on that case. When I asked Dupree for his knife my intention was to protect myself from whoever was doing the shooting for Jones had just gotten shot a few nights before and I was going to be prepared just in case. I went back to my tent and Dupree went to his. I sat down in my tent and took off my shoes and then put them back on to go give Dupree back his knife. Then I went back to my tent, took off my undershirt, washed my front part, and asked Jordan to wash my back, so he wiped it off and then I took off my pants and shoes and went to bed. Around 11 o'clock Sgt Black came in for his midnight shift. He called Moore twice and Moore didn't answer. Then Moore got up and put on his shoes. I then heard mess kits rattle. Whether Moore came back with his mess kit I do not know as the next thing I knew was when I got up the next morning."

4. From the evidence it is clear that about midnight 24 August 1944, Private Robert Harris was struck violent blows upon the head with some blunt instrument and killed. Accused was charged with and found guilty of Harris' murder. His conviction rests upon a chain of circumstantial evidence which inexorably points to him as the perpetrator of the crime - he had a motive, no matter how ill conceived; on the evening of the murder accused had expressed a desire to beat deceased; he believed that his punishment would be limited to that for manslaughter; he was seen talking with the victim about the time the fatal blows were struck and near the place the body was found; when returning to his tent he walked on tip-toe, was dressed differently than before and kept looking back over his shoulder; he endeavored to conceal his absence from his tent that night; the next day he evidenced knowledge that the death was not caused by stabbing although such knowledge could have been gained only by an examination of the body which he had not seen; he threatened "to get Roach (another soldier against whom he had a similar grievance both of whom he had called "these punks") too"; and a club, identified as belonging to accused which could have caused the injuries to deceased, was found near the scene of the crime.

It is well established that all elements of an offense may be proved by circumstantial evidence (CM 216004, Roberts, Miller, XI B.R. 69; CM 233766, Nicholl, XI id. 121; U.S. v. Greenbaum, 252 F. 259; U.S.

v. Sall, 116 E2d. 745; 23 C.J.S. sec. 907 and cases cited). The probative quality, value, and test of sufficiency of circumstantial evidence in criminal proceedings, quoted in CM 195705, Tyson, II B.R. 267, and other holdings of the Board of Review, is comprehensively set out in the following excerpt from the charge of the Federal Circuit Court to the jury in the case of U.S. v. Hart, 162 Fed. 192, 196-197:

"* * * The value of such evidence depends mainly on the conclusive nature of the circumstances relied on to establish the controverted fact. Where circumstances are relied on entirely to justify a conviction, the circumstances must not only be consistent with guilt, but inconsistent with innocence. Just what state of circumstances will amount to proof can never be a matter of general definition. That circumstantial evidence is not only legal evidence and proper to be considered by you but a well-connected train of circumstances is as much conclusive of a fact as the greatest array of direct evidence. The true test always of such evidence is the sufficiency and weight of the evidence to satisfy your minds and consciences to the exclusion of every reasonable doubt of defendant's guilt."

Accused's threats toward deceased prior to the homicide and his statement subsequent thereto that he "would get Roach too" were admissible to show his intent and the malice which accompanied his act (Shreve v. U.S. 103 F. 2d 796; People v. Frank, 148 N.E. 712; sec. 108, Wigmore, Evid. 3rd Ed.).

The evidence excludes every reasonable hypothesis but that of accused's guilt and the court was justified in finding therefrom that accused at the time and place and in the manner alleged caused the death of Private Harris.

A sentence either of death or of imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92.

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

(Absent) _____, Judge Advocate
Colonel, J.A.G.D.

Walter G. Roberts _____, Judge Advocate
Colonel, J.A.G.D.

James B. Murphy _____, Judge Advocate
Lieutenant Colonel, J.A.G.D.

(24)

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 924,
25 March, 1945.

To: Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. In the case of Private William T. Curry (35518555), 774th Engineer Dump Truck Company, 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 the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM A-1883).



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 6, USAFFE, 1 Apr 1945)

3. The evidence for the prosecution shows that about 8:00 o'clock on the night of 19 November 1944, the accused and deceased, tent mates, and both members of Headquarters Company, First Battalion, 35th Infantry, A.P.O. 25, became involved in an argument. Accused, a sergeant, told the deceased that he wanted the light put out. Deceased, who at that time was "straightening things on his bunk", replied that it was only 8:00 o'clock and too early for the light to go out. Accused then stated that he wanted the light out by 9:30 or 10:00 o'clock (R. 15, 21) and that "he was going to be hard on him and Musson just smiled". Accused told deceased that "he didn't want him to smile when he gave an order", deceased replying that "he would smile if he wanted to" (R. 21). Accused then threw a "jar or a beer bottle" at deceased who walked up to accused and "said something" at which time accused hit deceased in the face. A fight developed for a "few minutes" which was broken up by several men grabbing the contestants (R. 15, 22), accused stating that "he had enough" or "he guessed he was drunker than he thought he was and Musson wasn't" (R. 28). Accused went to the medical aid station where the attendant treated him for slight lacerations on the eye, the cheek, ear and hand (R. 36). While waiting there for the water to heat accused "sat on a box and had his head buried in his hands. He looked as though he was thinking about something". When the attendant had finished dressing accused's lacerations accused asked him "how bad his wounds were" and upon being told that "he had nothing to worry about" said "OK, thanks, I will see you tomorrow" (R. 37). Shortly after the fight deceased went to Sergeant Harris' tent where there were several other men and all began eating sandwiches. In about half an hour (R. 16, 24) the accused entered the tent and asked for deceased. Deceased replied "Here I am" and accused, with "the carbine in back of his arm", stated "I am going to kill you" (R. 23, 32). He fired one shot which entered the left breast of deceased, perforating "the big vessels at the base of the heart" causing the death of the deceased within a few minutes (R. 7). Immediately after the fatal shot was fired several soldiers "grabbed" accused and took the carbine from him. The magazine was removed and was found to contain "other rounds" (R. 24).

Captain Charles H. Turner, accused's Company Commander, was in his quarters at the time in question. Hearing the shot he came out of his tent, observed a crowd gathering, and upon investigation found deceased lying on the ground "shot in the chest" (R. 10-11). Upon being advised that accused had done the shooting he saw him (accused) standing in the company street and placed him under arrest and had him taken to the "Company CP" (R. 11) from which place he was later sent to the stockade (R. 12).

Various witnesses testified as to accused's sobriety at the time of the killing. Captain Turner upon being questioned "whether or not Sergeant Crabtree had been drinking" replied "I couldn't say for sure if he had been drinking" (R. 13). Immediately after he had pronounced deceased dead First

Lieutenant Sidney N. Rothstein, M.C., examined accused "with reference to alcoholic intoxication". He testified -

- "A. I asked him if he had been drinking and he told me he had a few bottles of beer. I smelled his breath and there was just a very faint odor of beer. There was no tremor and no shaking of the hands. He had no difficulty in walking. He could walk a straight line for five or ten yards. He didn't appear to be intoxicated.
- Q. Was there any redness of the face or disorientation of speech?
- A. No there wasn't. He had a few cuts and bruises on his face. He was slightly red, but I had never seen the man before and it would be hard to tell if that was abnormal with him.
- Q. Was there any evidence of lack of equilibrium at that time?
- A. Not at all.
- Q. Was his conversation intelligent as that of a sober man?
- A. Yes sir, it was." (R. 8).

Private John I. Carey of accused's company testified that he, deceased, and accused had been drinking beer early on the evening in question. On the night of the killing accused was "Not exactly drunk, he was just feeling good" and appeared to know what he was doing (R. 20). This witness further testified that when accused was drinking "He seems to be looking for trouble" and "[I] saw him in one fight" but knew that he was "in more than one" (R. 20). Other witnesses testified that his condition "wasn't bad" (R. 26); "he looked like he was drunk" (R. 29); "He acted normal. He didn't stagger around, he didn't stammer or anything like that" (R. 37) and that his face was not flushed or red. By stipulation the testimony of Major Woodrow W. Burgess, M.C., a qualified psychiatrist, was introduced in evidence at the close of the case for the prosecution. It follows:

"DIAGNOSIS: Constitutional Psychopathic State, Unqualified; manifested by marginal life adjustment and chronic alcoholism. RECOMMENDATION: The patient is not insane and is responsible for his acts. He is capable of distinguishing right from wrong, and of adhering to the right. It is possible that the patient was sufficiently drunk on the night in question as to not comprehend the significance of his acts, however, this cannot be determined clinically at the present time. The patient is suitable for trial." (R. 39).

The accused elected to be sworn and testify. He stated that on the day in question he was in town on a detail and "I didn't feel so good - I felt kind of sick", and that he lay down on a barracks bag until the detail returned to camp, when he took a shower. About 7:15 o'clock he "started out drinking beer" and "this here wine" out of a canteen cup. From that time "That is all I remember until they got me out of the sweat box at the stockade" (R. 43). He denied having any recollection of the fight with deceased or any of the subsequent events (R. 44, 50, 54). He stated that he started drinking when he was "seven years old" and that for the past year he averaged getting drunk "about once a week * * * I stay under whiskey practically all the time" (R. 45).

First Sergeant Harold S. Hays of accused's unit testified that he had known accused for over three years and had been in combat with him on Guadalcanal. On the night in question he drank beer with accused and later accused asked him if he wanted a drink of "Raisin-Jack" which he (Hays) declined. Accused was "just about as good a man as I had in the platoon" going into combat as a Private First Class and being "made a Corporal just before we came out of the front lines". He testified that when accused "is not drinking he is^a pretty fair soldier" but is a "heavy drinker. He gets drunk about once a week". When accused is drinking "he wants to fight the biggest part of the time, and he usually has a fight with someone". On the night in question this witness "couldn't say he was drunk and I wouldn't say he was actually sober" (R. 40-41).

4. The evidence is undisputed that the accused did, at the time and place alleged, kill Private Gene C. Musson. It is equally clear there was no legal justification, excuse or provocation for the killing. In the absence thereof, a homicide is murder (par. 148a, M.C.M., 1928). Accused's claim that he was so drunk that he was not conscious of his actions is not supported by the testimony. Although accused may have been under the influence of liquor, he appeared to have been entirely conscious of his actions prior to and immediately after the shooting. He was calm and collected when he went to the aid station where his minor lacerations were dressed. Thereafter he secured a carbine, loaded it, walked to the tent where deceased was eating sandwiches with his friends, called to him that he was going to kill him and calmly shot him through the heart. Approximately half an hour had elapsed between his altercation with deceased and the "cooling period" was more than sufficient to dispel any sudden heat of passion which he might have had. One who consumes liquor voluntarily and whets his appetite for evil and produces within himself an ugly and homicidal mood is not, and should not be, allowed to use his condition as a shield for his unlawful acts knowingly committed. The evidence warranted the court in finding accused guilty as charged.

5. The sentence imposed by the court is authorized upon conviction of a violation of Article of War 92.

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

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Leahy, Judge Advocate.
Colonel, J.A.G.D.

James D. Murphy Judge Advocate.
Lieutenant Colonel, J.A.G.D.

(30)

1st Indorsement.

Army Service Forces, Branch Office of The Judge Advocate General, A.P.O.
924, 22 April 1945.

TO: Commander in Chief, Southwest Pacific Area, A.P.O. 500.

1. In the case of Sergeant Harold Crabtree, 14030949, Headquarters Company, First Battalion, 35th 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 the execution of the sentence.

2. It is requested that before final action is taken in this case further consideration be given to the matter of the appropriate sentence to be ordered executed. In view of the evidence contained in Crabtree's record of trial and the actions of the President in commuting to life imprisonment sixteen death sentences in murder cases described in the inclosed statistics it is recommended that the death sentence in this case be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the term of Crabtree's natural life.

3. Article of War 92 requires that any person subject to military law who commits murder shall suffer death or imprisonment for life. This directive recognizes that while in certain instances the death penalty is the appropriate punishment it is not in other instances. The problem is thus presented as to when the one or the other sentence is appropriate. An exhaustive study of the sixty murder cases epitomized in the inclosure pertaining to records reviewed in the office of The Judge Advocate General from 7 December 1941 to 21 July 1944 (after which date this office has no records pertinent to this subject) reveals that in only five was the death sentence considered appropriate by the court-martial or by the confirming authority. The cases as a whole indicate that where the murder closely followed a quarrel or where the act was committed under the influence of liquor the appropriate sentence includes life imprisonment. In the instant case the accused under the influence of liquor engaged in a petty quarrel and fight with the deceased as a result of which he was immediately thereafter treated at a medical aid station for slight lacerations on the eye, cheek, ear and hand. About half an hour thereafter he sought out and killed the deceased. The circumstances of this case parallel the majority of the fifty-five murder cases described in the inclosure in reference, in fifty-four of which the sentence ordered executed involved life imprisonment and in one a term of years.

4. The commutation requested in this instance will provide a sentence in keeping with the sentences heretofore ordered executed in the Southwest Pacific Area, as revealed in the inclosed statistics pertaining to

this area, and cause the sentence to conform to what the War Department statistics indicate to be appropriate in cases of this character.

5. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM A-1897)



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

3 Incls:

1. Record of trial.
2. W.D. statistics.
3. SNPA statistics.

(Sentence ordered executed. GCMO 7, USAFFE, 22 May 1945)

ARMY SERVICE FORCES
Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1898

31 March 1945

UNITED STATES)

v.)

Private ROBERT C. NAYLOR
(35656382), Company "A",
1879th Engineer Aviation
Battalion.)

Trial by G.C.M., convened at
APO 70, 3 March 1945. Dis-
honorably discharge, total for-
feitures, and confinement for
life. The U.S. Penitentiary, Mc-
Neil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 92d Article of War.

Specification: In that, Private Robert C. Naylor, Company "A", 1879th Engineer Aviation Battalion, did, at APO 70, on or about 24 January 1945, forcibly and feloniously, against her will, have carnal knowledge of one Nieves Caguioa.

He pleaded not guilty to the charge and its specification, was found guilty as charged, and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated The United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

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3. The evidence reveals that Nieves Caguioa and her sister, Marcellina, lived with their parents and brothers in the Barrio of Paitan, San Carlos, P.I.. The 1879th Engineer Aviation Battalion was encamped nearby. Nieves was a girl 18 years of age, four feet eight inches in height and weighed approximately one hundred pounds (R.34). Marcellina was 16 years old. About the 22nd of January, 1945, the two girls went to the Battalion area with clothes they had laundered for some soldiers and while there invited Sergeant Thomas A. Bateman and Privates Robert C. Naylor (accused), whom they knew as Bob, and William A. Kyle, whom they knew as Bill, to visit their home the next evening (R.28,88,92). The following evening Bateman and Kyle went to the Caguioa home, bringing with them a quart of wine (R.93). Bateman drank some of the wine, "felt sick", and went to sleep (R.92). That night accused and Private William M. Poole visited people living next door. About 11:00 o'clock P.M., Kyle, from the Caguioa's porch, saw them leave the house and called to accused to come over. Poole remained in the yard and accused joined Kyle (R.66).

Kyle asked Nieves and Marcellina to go for a walk with them. The girls sought permission from their parents but the latter, because it was so late, and, suspecting that something might happen, refused. Kyle then "got his gun, cocked it and said, 'No, we will go down'" and threatened to shoot them (R.7,23,49). The girls' parents cried and said that they wanted to accompany them but the soldiers refused (R.23). They were "trembling in fear because he was pointing the gun to us" (R.24). The two girls and their brother, Alejandro (whose subsequent actions were unaccounted for in the record), Kyle and accused, left the house (R.8). Kyle and Nieves began to walk towards camp and Marcellina, accused, and Poole followed (R.66).

After walking about 30 yards they arrived at the house of the girls' cousin Marcelo Castro. Nieves testified that "I went upstairs /to "seek help"/ so hurriedly that he /Kyle/ was unable to overtake me" (R.10,25). Kyle called to them "to come down" (R.10). Then, "speaking in a high tone and keeping his gun with him" (R.25), went upstairs and threatened to shoot if they would not come out. Nieves asked her cousin Marcelo to accompany her and they joined Kyle and accused (R.10,26). The soldiers said that they were taking a walk (R.41) and continued in the direction of the camp. A short distance further, as they passed the house of Olimpia Caguioa, the girls' aunt, Nieves called to her and asked Kyle to stop and wait for the others but he, holding her hand, pulled her along (R.11,28,41). Marcelo was 29 years old (R.44).

When accused, Marcellina and Poole, who were walking about 20 yards behind Kyle, Nieves, and Marcelo, reached Olimpia's house she was

outside and joined them (R.12). Olimpia, seeing accused pulling Marcellina (R.46), seized the girl by the other arm. Accused said that he would shoot them and the aunt replied " 'Yes, go ahead. Shoot us here where it is moonlight, but do not take us to any dark spot' " and she and the girl sat on the ground (R.47). Accused stayed with them for about a half hour and then leaned down, took Marcellina, who was crying (R.38), by the hand and tried to lead her away, but not being able to make her move, he and Poole left them and went in the direction that Nieves, Marcelo, and Kyle had gone. Olimpia and Marcellina then ran back toward their homes. Marcellina went to a neighbor's house and hid (R.39).

Kyle led Nieves and Marcelo to a bamboo grove. Then, holding Nieves by the hand, he told Marcelo to lay on the ground (R.17,18), pointed his gun at him (R.17,41) and pushed him down (R.26). Nieves testified that she could not run away as "the soil is just plowed, very hard to run on such soil * * * there was nothing into which I could hide" and that it was useless to call for help as they were about 175 yards from the nearest house (R.22,27). Kyle then made her lay down putting his hands on her mouth so that she could not shout (R.27). Although she was struggling and trying to get up he had sexual intercourse with her (R.41). During that time Marcelo was still lying about five feet away (R.17).

After Kyle had completed his assault upon the girl he called accused (R.14,47). When accused arrived, Nieves was standing up and Marcelo was on the ground (R.28). Accused said, "Lie down" and she replied, "No, I don't want. Let us go home" (R.15,29). She clung to a guava tree and Kyle and accused pulled her and "put her down" (R.29, 30). Accused raised her dress although she tried to prevent it. She testified that she "was struggling and wiggling, trying to wiggle away. Bill said if I continued doing that, he would shoot me" (R.15). She attempted to lie on her side and so struggled that for ten minutes accused was unable to penetrate her person (R.31). Accused overpowered her (R.15) and accomplished his purpose (R.16,31). She felt a burning pain and kept trying to push him away (R.16). During that time Kyle, holding a gun, was standing guard over Marcelo (R.17). Marcelo testified that he did not attempt to run away because he knew that the gun was cocked and was afraid of losing his life (R.42). After accused had ravished Nieves they both arose. Kyle again made her lay down (R.16) and again assaulted her (R.45). Nieves testified that she did not consent to any of the acts of intercourse (R.32). After the last act they all returned to Nieves' home. On the way the girl told her cousin "not to tell anybody what happened because it is a great shame * * *" (R.32, 45). Kyle and accused remained at her house for less than a half hour with Poole again waiting in the yard (R.50) and then they returned to their area.

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As soon as the soldiers had left her home she told her parents what had happened (R.19,32) saying " 'They have done to me something awful'. * * * 'Bill forced me to have carnal knowledge with him * * * I suffered very much and then he called Bob who also had carnal knowledge with me' " (R.48,49) by force (R.52). At that time there were bloodstains upon her dress (R.18,49) and she was bleeding from the vagina (R.49). Being afraid that the soldiers might come back, Nieves went to another house where she spent the remainder of the night (R.21,51). Nieves' parents did not attempt to awaken Sergeant Bateman who was asleep in the house because they were afraid that he would also attempt to assault the girl (R.21,50). Her father did not then report the assault to the Barrio Lieutenant because "it was very late" and he was afraid that the soldiers might shoot him (R.53,54), but the next morning reported it to the military authorities.

At 1700 hours that day (24 January 1945) Nieves was examined at the 21st Evacuation Hospital. Major John F. Kuhn, Jr., M.C., one of the officers who examined her, found fresh lacerations on either side of the hymenal ring and a slightly bloody discharge. It was his opinion that there had been a forceful entry of the vagina and that she had been a virgin previous to the assault (R.34,35).

Private (formerly Sergeant) Thomas A. Bateman and Private Wilton M. Poole testified for the defense. Bateman said that he went to the Caguioa house with accused on the evening in question and that about 10 or 10:30 o'clock P.M., went to sleep there. He was not disturbed during the night. He arose the next morning about 5:30, saw Nieves' brother sitting on the porch and talked with him about the sunrise. As the Sergeant had left his wallet on his bed the boy secured it for him and witness gave him a peso, secured his rifle and helmet, and returned to camp (R.90).

Private Wilton M. Poole testified that at about 11 o'clock on the evening of 23 January, as he and accused left one of the native houses, Kyle called to accused from the house next door. Witness had his rifle slung over his shoulder during the times in question (R.72). Accused joined Kyle, and Poole remained in the yard. Later Kyle, accused, and the two girls came out. Accused said that they were going for a walk in the moonlight and asked him [Poole] to join them (R.83,84). He had not heard any of the conversation which had transpired in the house (R.66). They walked about 115 yards to another house and one of the girls "called for her aunt or something". They "stopped long enough for this lady to come out of the door" and then they all walked "about 30 feet of where this took place" (R.67). It was then about 12:30 o'clock P.M.. Marcellina said that "she was afraid that he [accused] would do something to her she didn't want him to do". Accused replied, "no, he wouldn't do anything she didn't want him to do" (R.69,85). She was crying (R.85) and "Private Naylor told this aunt of hers to take her back to the house" (R.68). Then accused "hollered out to Kyle and

wanted to know where he was". Kyle replied, " 'I'm over here' " (R.68,86). "Naylor asked him if he was doing any good and Kyle hollered back and said yes * * * to wait a few minutes; he'd be through" (R.69,86). After two or three minutes Poole and accused went to the place where Kyle was. Nieves was standing up and Marcelo was lying on the ground (R.70). "Private Naylor asked Private Kyle if it was good and Kyle said it was pretty good stuff * * * Naylor said he believed he'd try some. He turned and asked Nieves if he could have some * * * She didn't say anything. She just lay on the ground * * * he got on and had intercourse with her * * * [for about] 3 or 4 minutes" (R.70,71,76). He saw no "wrestling or scuffling" (R.71). She did not struggle (R.76) and he saw nothing to indicate that she was not willing to submit to accused's desires (R.77). Accused's rifle was lying on the ground about eight feet from Marcelo who was on the ground (R.71,72), not moving or saying anything (R.78). After accused finished, Nieves stood up, (R.78) Kyle said that "he believed he'd try some more" (R.72) and "asked her if it was alright". She laid down "by herself" and said nothing (R.79) and he again had intercourse with the girl. During that time accused and witness sat on the grass about 30 feet away (R.72). Poole did not "take advantage of the situation" as he "had no desire to" (R.78). Kyle said that he had to take Nieves back to her home and they all returned there, Poole walking about 15 feet behind the others (R.73). They remained at her house about 20 minutes and then went to camp (R.74). Poole testified further that at no time that evening did he see a gun pointed at Nieves or Marcelo (R.74).

Accused was sworn as a witness in his own behalf. He testified that about 11:00 o'clock P.M., on the night in question he joined Kyle at Nieves' house. They talked about customs and "Kyle said that the American custom was for a boy to take his girl for a walk in the moonlight * * * she [Nieves] asked her parents and they said something about it was late but she asked them again and they said that we could go for a walk, providing a boy went with us" (R.55,58). Nieves, Marcellina, Marcelo, Kyle, and himself left the house. He asked Poole, who was in the yard, if he wished to accompany them. Accused further testified that "one of the boys in that vicinity * * * was talking about those girls over to this neighboring house that I had visited first. He said they liked their pom-pom [sexual intercourse] and Private Kyle - he told me that this boy had also told him the same thing about these girls, so I figured the girls knew what they were taking a walk for when we left" (R.55). When they were out of sight of the house Marcellina started crying. He asked her what was the matter and she said "that she was afraid that I was going to do something to her that she did not want me to do and was afraid I would take her somewhere she did not want to go. I said no, I wasn't either" (R.55,62). While they were talking Kyle and Nieves walked on ahead. When they approached her aunt's house, she (Marcellina) called to her aunt who came out.

Marcellina wanted to find her sister Nieves and after they walked "a little ways and didn't see Nieves, she went to crying aloud and kind of sat down" (R.62). He did not pull her (R.56). He asked her if she wanted to return home with her aunt. She replied in the affirmative and Marcellina and her aunt left (R.56,62). He and Poole then started toward camp. He accused hollered for Bill who answered and "said he was getting himself something" and that "he'd be through in a minute" (R.64). Poole and he waited about five minutes and then walked over to the bamboo grove (R.56,63,64). Nieves who was "squatting" stood up (R.56,64) and he asked her "could I have some pom-pom" (R.59). She said nothing but "just lay right down" (R.56,59). Her dress was about three or four inches above her knees and he raised it "maybe 2 or 3 inches" (R.64). She made no "turn as if to avoid" him (R.65) and he had sexual intercourse with her (R.56). When he had completed the act Kyle said, "he would try another piece" so he accused and Poole walked away and waited until Kyle had finished (R.56,65). They were going to return to camp but Nieves said that " 'we must return home' for her parents might think that she had been out fooling around with some Filipino boys * * * and we walked on back with her" (R.56). While walking "she said that it was very painful" but she was not crying (R.59). They remained on the porch of her house with her parents about a half hour and then returned to camp (R.57). After he had returned he noticed blood on his body (R.60). The next day he was placed in arrest (R.56). Accused further testified that, although he saw Marcelo lying on the ground about ten feet away (R.64) saying nothing during the events related, he "didn't think anything about it" (R.58); that he was not armed at any time during the night and that at no time did he point a gun at Nieves (R.56).

4. Accused admitted, and the evidence establishes, that on the night of 23 January 1945, he had sexual intercourse with Nieves Caguicoa, an 18 year old Filipino girl. The only question for the consideration of the Board of Review is whether the record contains substantial competent evidence that such act was accomplished by force and against the girl's will (par. 148b, M.C.M., 1928).

Accused contended that the victim was of known bad reputation and he "figured" she would know why she was asked to go for a walk that night. After Private Kyle had had sexual intercourse with her, he, accused, "asked her if I could have some pom-pom"; she said nothing and "just lay right down", and he used no force to accomplish his purpose. Private Poole, a defense witness, corroborated this story and testified that in his opinion nothing indicated that she did not voluntarily permit the act. Contrasted with this evidence are the circumstances surrounding the assault and the testimony of the girl and her cousin

Marcelo. From their testimony it appears that Nieves and her sister, Marcellina, were forceably led from their home by accused and his companion, Private Kyle. Marcellina, who was later joined by her aunt, refused to walk further with accused although he threatened to shoot them. He left them and joined Kyle and Nieves. Accused told her of his desires. She resisted his advances to the extent of clinging to a tree but Kyle and he forcefully caused her to lay on the ground. Then, in spite of her continued resistance, accused had carnal knowledge of her. Meanwhile Kyle, holding a gun, stood guard over her cousin who was lying on the ground about five feet away, neither moving or speaking. Thereafter the soldiers walked with Nieves to her home. Immediately after they had left the girl told her parents of the assaults. The next day she was examined by medical officers of the army who expressed the opinion that she had been a virgin prior to the incidents.

The court in whose province it is to weigh the testimony had an opportunity to observe the demeanor of the witnesses and to appraise their testimony and, by its findings, accepted the girl's version of the incident as the truth. The extent and character of the resistance required by a woman to establish her lack of consent, accused having been charged with rape, depends upon the relative strength of the parties, their ages, and the surrounding circumstances, (52 C.J. 1019; 44 Am. Jr. 905-906; sec. 675, Underhill's Crim. Evid. 4th Ed.; CM 239356, Brown; CM 240674, Rimke). The record contains abundant evidence from which the court could determine that accused had carnal knowledge of Nieves Caguloa by force and without her consent. It follows that there is sufficient and substantial evidence in the record to sustain the findings.

Inasmuch as there is substantial competent evidence in the record upon which the findings may be predicated, no substantial rights of accused were prejudiced through the admission of testimony with reference to the actions of Kyle which took place out of the presence of accused.

A sentence of imprisonment for life is authorized upon conviction of violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 278 of the Criminal Code of the United States (18 U.S.C. 457) and section 32, Code of the District of Columbia.

(40)

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


_____, Judge Advocate.
Colonel, J.A.G.D.


_____, Judge Advocate.
Colonel, J.A.G.D.


_____, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
GM A-1925

1 May 1945.

UNITED STATES

v.

Private CHARLES C. KNAPP
(38066912), Troop "G",
7th Cavalry.

) Trial by G.C.M., convened at
) APO 201, 12 January 1945.
) Dishonorable discharge, total
) forfeitures, confinement for
) life. The United States
) Penitentiary, McNeil Island,
) Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 58th Article of War.

Specification: In that Pvt Charles C. Knapp, Troop "G", 7th Cavalry did, at APO 201 on or about 28 October 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: refusing to go to combat, and did remain absent in desertion until he surrendered himself at APO 201 on or about 12 December 1944.

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

Specification: In that Pvt Charles C. Knapp, Troop "G", 7th Cavalry, did, at APO 201 on or about December 13, 1944, fail to report to his Troop's advanced CP, which was then engaged in combat with the enemy and did not report there-to until after the engagement had been concluded which was on or about January 2, 1945.

(42)

He pleaded not guilty to both charges and their specifications, was found guilty as charged and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence shows that on 23 October 1944 accused, a member of Troop G, 7th Cavalry, APO 201, was admitted as a patient to the 58th Evacuation Hospital. His EMT tag, according to the testimony of Major Benjamin B. Rosen, MC, showed "an injury which was the result of a mortar shell explosion" (R. 7). Examination revealed no evidence of the injury. The Major's diagnosis of accused was "psycho-neurosis hysteria". On 27 October 1944 Major Rosen told accused that he was sending him back to duty. Accused "made a statement to the effect that he was not going back to duty" (R. 7-8). The next day accused was released "to a full duty status".

The prosecution introduced in evidence without defense objection an extract copy of the morning report of the hospital for 28 October 1944 bearing the entry with reference to accused "Duty from Hosp:" (Pros. Ex. B) and an extract copy of the morning report of accused's unit for 9 January 1945 bearing the entry -

"9 - Pvt Knapp fr sk in hosp ID to AWOL as of 28 Oct 44
Pvt Knapp fr AWOL to dy as of 12 Dec 44" (Pros. Ex. A).

On 12 December 1944 accused reported to his troop's rear command post at Carigara, Leyte, P.I.. He there saw Staff Sergeant Charles W. Perrien who "was the man in charge of supplies". Accused and Privates Christensen and Morgan were equipped and told "to get their packs and report to alligator headquarters * * * to report to the front lines on December 13th" (R. 9). Accused said "that he was not going to the front lines unless he was forced to go" and the sergeant "made no comment at that time". That day accused, accompanied by Private Morgan and two other soldiers rode in a weapons carrier "down to the beach" (the location of which does not appear in the record) where they spent the night. The next morning Private Morgan observed accused "sitting on a log" and "asked him if he was ready". Accused replied "he didn't have his breakfast". Morgan "asked questions and found out the route that the ration trucks took and obtained transportation" to the front. Accused did not accompany them (R. 12, 13).

On 15 December accused was in his tent at Carigara. A soldier of his unit, a friend of his, told him that "he should report to the Troop CP for his own good". Accused replied "I am not crazy; I am not going up there" (R. 14). Sergeant Perrien saw accused about the 15th but had no conversation with him (R. 9). On 18 December the sergeant "put him on a truck and sent him approximately the same way as the last time, and he returned the next day to the rear". Sergeant Perrien heard accused then say "they are crazy if they think I am going up there. He said he wasn't going up there" (R. 10), and understood accused to "mean front lines" (R. 10). On the 20th Sergeant Perrien again put accused on a ration truck "with the kitchen equipment which was going up to the front lines * * * he never returned until the kitchen returned from the forward CP".

On or about 22 December 1944 accused went to the 7th Cavalry Aid Station "at S-4" where casualties were being cared for. There Private Thomas Nolan of the Medical Detachment took accused's temperature and found it to be 102. He sent accused to X Corps Dispensary "where there was a medical doctor, but evidently the ambulance was gone so they sent him back to me". Accused was told to "stay around for three or four days" (R. 15). By stipulation it was agreed that Major R. O. Erwin, Adjutant, 7th Cavalry, if present, would testify:

"On or about 26 December 1944, I received an order from the 7th Cavalry Regimental Commander, not to send any more men forward from Pinamopon or Carigara. The men in these areas were so advised. Private Knapp of Troop "G", being among them" (R. 16).

Accused elected to remain silent.

4. The specification of Charge I alleges a violation of Article of War 58 in that accused absented himself without leave from his organization from 28 October 1944 until 12 December 1944 "with intent to avoid hazardous duty, to wit: refusing to go to combat". The specification apparently was designed to allege absence without leave with intent to avoid combat duty and such meaning may be given to its words.

Accused's absence without leave from his organization during that period was sufficiently established (see CM 187252, Hudson, I B.R. 19; CM 207730, Earp, VIII B.R. 373) even though the entry in his troop's morning report "sk in hosp ID to AWOL" is hearsay and not made admissible by the failure of defense to object thereto (CM 224325, Michael, XIV B.R. 117; CM 230278, Gunning, XVII B.R. 349; CM 245991, Cruff, XXIX B.R. 361). There is then for determination whether the record contains substantial evidence from which the court could conclude that such absence was with intent to avoid the hazardous duty alleged.

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For an accused legally to be found guilty of absence without leave with intent to avoid hazardous duty in violation of Article of War 58, there must be in the record evidence of such intent or circumstances from which the court could properly infer the same (cf. CM 220233, Pratt, XII B.R. 365; CM 231163, Sinclair, XII B.R. 153; II Bull. JAG 139; III Bull. JAG 335). There is a complete absence of either. The record is devoid of information concerning the activities of the accused's division or of the accused's duties respecting any period of time prior to his admission to hospital; neither is there any information as to duties he might have been expected to perform upon discharge from the hospital, augmenting those properly presumed to be the normal duties of a cavalry soldier. There is nothing, also, from which an inference can be drawn that either at the commencement, or during the period, of his absence without leave the accused entertained an intent to avoid hazardous duty. While the inference properly may be drawn that he intended to avoid the normal duties of a cavalry private there is no evidence permitting this inference to be inclusive of hazardous duties, as would be permitted if the accused or his division had been engaged in recent combat, or was about to be and the accused so knew when he went absent without leave. In arriving at this conclusion of absence of evidence upon which to predicate an inference of intent to avoid hazardous duties there has not been overlooked the EMT tag evidence of the alleged cause of hospitalization, i.e., an injury resulting from a mortar explosion. Respecting this matter, however, evidence of a medical officer member of the hospital is to the effect that an examination by him failed to find any evidence of such an injury and the accused's condition was diagnosed as psycho-neurosis hysteria. Although it was established that subsequent to the offense under consideration the accused failed to report to his troop's advanced command post then before the enemy (Charge II), as already indicated none of the evidence supporting that charge revealed how long the troop had been before the enemy and no presumption in that respect is legally permissible.

The Staff Judge Advocate in his review stated that the duty of the accused, whether at the forward or rear echelon was hazardous duty and "The fact that accused's unit was in actual combat was a matter of judicial knowledge since every member of the court, including the Trial Judge Advocate and Defense Counsel, had been in active combat from 20 October 1944 to 2 January 1945. It was also a matter of judicial knowledge that actual combat was still in progress at the time of the trial". He therefore concluded that the record was legally sufficient to support the findings.

The Board of Review finds it unnecessary to decide whether a finding of guilty of Charge I and its specification, predicated solely upon judicial notice by the court-martial that the division was in combat, considered in conjunction with the length of time of accused's absence, could be supported as the record does not reveal that the court took such judicial notice.

Pertinent is the statement in paragraph 194, Manual for Courts-Martial, 1921 -

"The oath taken by members of general and special courts requires them to try and determine 'according to evidence' the matter before them. * * * The evidence thus referred to, according to which the court must decide the case, means all the matters of fact which the court permits to be introduced, or of which it takes judicial notice, with a view to prove or disprove the charges. Every item of this evidence must be introduced in open court, and it would be seriously irregular and improper for any member of the court to convey to other members, or to consider himself, any personal information that he possessed as to the merits of the case * * *".

Judicial notice is the cognizance of certain facts of a conspicuous, general, or public character, which so authenticate themselves in law that the courts take notice of their existence as matters of course, and which are not required to be proved (p. 137, 318, Winthrop). Such matter should be suggested or presented to the court in some way and so appear in the record unless it is a fact of which the court must take judicial notice or is so self-evident that presentation is unnecessary (31 C.J.S. p. 522; 20 Am. Jur. sec. 27; Wigmore, Evid. sec. 2568; Woods v. Village of La Grange Park, 4 N.E. 2d 764 (Ill.); Grt. Am. Ins. Co. v. Greenwood Irr. Co. 265 F. 594). While a court-martial is privileged under proper circumstances to take judicial notice that the division from which it was detailed was engaged in combat, such fact is not one of which the court must take judicial notice (par. 125, M.C.M., 1928), nor is such fact so "notorious in common knowledge of all intelligent persons" (par. 289, M.C.M., 1921) that its suggestion would be superfluous. It follows that in the absence of the record revealing the same, there is no foundation for concluding that the court did in fact take judicial notice that the division of which accused was a member was preparing to go into or had been in combat prior to or during the accused's absence and that the accused was chargeable with knowledge thereof.

From the foregoing it is clear that the record contains no evidence that accused was absent from his organization with intent to avoid combat duty or circumstances from which the court could draw such an inference. While the duration of accused's absence without leave was sufficiently long (over 50 days) to permit an inference of an intention to remain away permanently from his organization or place of duty and upon which he could properly be found guilty had that type of desertion been charged, such proof is not sufficient to sustain a finding of guilty of the type of desertion here charged, the two offenses being separate and distinct and neither lesser included in the other (CM 230826, McGrath, XVIII B.R. 53; CM 231163, Sinclair, id., 153; CM 224765, Butler, XIV B.R. 179). The record is legally sufficient, therefore,

to support only so much of the findings of guilty of Charge I and its specification as involves the lesser included offense of absence without leave in violation of Article of War 61.

It may here be noted that although the Board of Review may be convinced of the guilt of the accused, we must look alone to the evidence as we find it in the record of trial and ascertain whether or not, under the rules of law, the conviction of the accused can be sustained. If the competent evidence is not legally sufficient the Board of Review may not supply by independent investigation essential evidence omitted from the record of trial. To do so would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens and destroy the fabric of military justice (CM 197408, McCrison, III B.R. 111; CM A-501, Lyons).

5. Charge II and its specification alleges that accused did on or about 13 December 1944 "fail to report to his Troop's advanced CP, which was then engaged in combat with the enemy". The balance of the specification merely alleges a continuance of his failure to report and may be treated as surplage. The evidence is undisputed that on 13 December 1944 the accused reported to the rear "CP" of his troop at Carigara and was there equipped and with three other soldiers told to report to the front lines. Accused at that time stated "that he was not going to the front lines unless he was forced to go". However, in company with other soldiers, he was placed in a weapons carrier and proceeded to a beach where all of them spent the night. The next morning the others went to the front lines but accused returned to the rear "CP" at Carigara.

It is noted that the specification alleges that accused failed to report to his troop's advanced command post, but does not allege that he was then required so to do. To "fail" imports an obligation. Thus it has been held "Where the word is used in connection with the performance of a duty for which a penalty or liability is imposed, it necessarily implies a notice in some reasonable form, as a prior act or condition by which the one failing shall have become aware of the duty; * * *" (35 C.J.S. p. 479). Reasonable implications may be drawn from the words of a specification (CM 208073, Moran, VIII B.R. 391; CM 234408, Warner, Oldham, IX B.R. 355, 361; CM 234414, Uihlein, IX B.R. 365, 376). While the specification here under consideration is not drawn with nicety, in the opinion of the Board of Review all elements of the offense alleged are impliedly included within it and accused was not misled thereby (par. 87h, M.C.M., 1928, p. 74).

The record is not as clear as might be desired as to the authority of Sergeant Ferrien to order accused to go to the advanced "CP". However, accused did not question the instructions but seemingly left in obedience to them and other soldiers received like instructions and obeyed them. In the absence of evidence to the contrary it may be concluded that the sergeant

was authorized to give such order. It is further noted that there is a seeming variance between the allegata and the probata in that the specification alleges that accused failed to report to his troop's advanced command post which was then engaged in combat with the enemy, and the proof is that he was ordered to report to the front lines and failed so to do. The substance of the order as testified to by Sergeant Perrien being the same as that alleged in the specification although not phrased in the identical language, the variance did not injuriously affect accused's substantial rights (CM 230827, Sheffler, Jr., XVIII B.R. 59; CM 233780, Bentley, XX B.R. 127, 135).

The failure of accused to obey the order to go from the rear command post to his organization's forward command post then located before the enemy was misconduct before the enemy within the contemplation of Article of War 75.

"* * * Whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation. For example, where accused was in the rear echelon of his battery about 12 or 14 kilometers from the front, the forward echelon of the battery being at the time engaged with the enemy, he was guilty of misbehavior before the enemy by leaving his organization without authority although his echelon was not under fire." (par. 141a, M.C.M., 1928, p. 156).

(and see III Bull. JAG 379 and IV Bull. JAG 11).

The sentence imposed is authorized upon conviction of either of the offenses of which accused is legally guilty, however, penitentiary confinement is not authorized.

6. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Charge I and its specification as involves the lesser included offense of absence without leave at the time and place alleged in violation of Article of War 61, and legally sufficient to support the findings of Charge II and its specification and the sentence. However, as indicated above, confinement should be other than in a penitentiary.

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Harold Roberts, Judge Advocate.
Colonel, J.A.G.D.

James D. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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guilty to the charge and its specification, was found guilty as charged and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence reveals that on 16 November 1944, Privates William T. Burton (accused) and Roy G. Prezas (deceased) were members of Troop A, 8th Engineer Squadron, stationed at APO 201.

About 11 o'clock that morning the troop was preparing to move to a new area. Accused "who was under the influence of alcohol * * * [but] wasn't drunk" (R.14) saw Prezas in the orderly room and began cursing him and the latter answered in kind (R.13). About noon, immediately after the troop had moved into its new area, accused, T/4 Rodger C. Empereur, and Private Paul Zvolenski were seated near a truck. Accused had a bottle containing "Tuba" and he and Empereur drank some of the liquor (R.18). Prezas and another soldier approached them and sat down. Accused immediately began cursing deceased (R.17,18,19,20, 21) saying, as T/5 Rodela testified, "you are nothing but a God damn 'Pelow'. Prezas said, 'Don't call me that, I won't take that from you. Don't call me that again'. Private Burton said, 'That's what I said you are, nothing but a low, dirty 'Pelow'. ["Pelow" was an opprobrious word used in the troop particularly with reference to a Mexican (R.15)]. * * * Right after that they started to fight" (R.15). Prezas hit accused "three or four" (R.21) or "about 8 blows" (R.16) on the face and knocked him to the ground from the kneeling position in which he was when the altercation started and caused him to bleed from the mouth and the eye (R.20,21). The entire incident "was a matter of seconds" (R.17). Zvolenski told Prezas "to leave Burton alone and go off". Prezas said, "OK" and walked away (R.21,23). Zvolenski then left. About an hour later he passed the place where the fight had occurred and noticed that accused was still there and that his eye was bleeding. He suggested that accused get medical treatment and they went to the dispensary. A suture was taken, something was put over accused's eye (R.21,23), and they returned to the troop area.

About 5 o'clock that afternoon Prezas and Private Ismael Revelez were cleaning a chicken in the troop area (R.30,34) when accused came to within "a few yards" of them and again started to curse Prezas saying that * * * he was no good and he called him a 'bastard' and a few others * * *. Accused told Prezas that "he won't forget what he did" (R.34). Deceased "ignored him. He told him to get away; he didn't

want nothing to do with him (R.30,34) * * * or he would give him two black eyes". Burton "kind of hesitated and then he went off. * * * /Prezas/ * * * just stood around. He told us he didn't want any trouble with him" (R.35). Revelez then told Prezas to get some salt and pepper (R.31,35) and testified "the next thing that I heard was a shot". He turned around and saw Prezas "in between Burton's legs, and heard another shot" (R.35).

After leaving the place where Prezas and Revelez were cleaning the chicken, accused went to a nearby tent occupied by other soldiers. He said that he wanted to speak to Private Zvolenski (R.25). The latter was called and accused asked where his (accused's) equipment was. Zvolenski testified, "I told him that I had it but I would get it a little later on" (R.21,25,26). Burton walked to the back of the tent and picked up a carbine belonging to another soldier which contained a clip of ammunition (R.29). A metallic noise, the click of a bolt, was heard (R.22,25). Burton slung the rifle over his shoulder (R.21,25) and walked out of the tent saying he was "going down and find himself a place to sleep" (R.21,24).

The testimony reveals that the area was subject to attack, that the soldiers had orders to carry arms whenever they went on a job and that "there was nothing out of the ordinary or nothing unusual about Burton having a carbine when he went to sleep" (R.24).

Accused walked with the rifle slung over his shoulder to within "a few feet" or a "few yards" of the place where Prezas had been cleaning the chicken (R.32,35), and talked to Sergeant Wells and Private Martin J. Ruthven who were stringing a hammock (R.36,37). Accused was "kidding Sergeant Wells about hanging the hammock of a Corporal" (R.38,39). A few minutes later Sergeant Yanko approached and he and accused went about ten or fifteen feet "to the rear" (R.38,39). The Sergeant, noticing that accused had a patch over his left eye and that his face was "battered" (R.43), asked what had happened. Accused replied in "a friendly manner", "This is what your good friend Prezas did to me when I was down and out" (R.43). The Sergeant further testified that about that time accused's "attention was attracted and he looked off back of me on the right" (R.43). Sergeant Yanko, who was standing about 10 or 12 feet from him turned around to see what had attracted accused's attention and saw Prezas (R.43,45,48) walking down the company street towards them carrying something in his hands (R.44) held more or less waist high (R.39). There was nothing unusual in the manner in which Prezas was walking (R.40,44). "Just about the time" that Prezas reached the hammock "he glanced up" and "looked more or less over" Sergeant Well's shoulder "to the rear", dropped what he had in his hands (R.41,44) and dived between Sergeant Wells and Private Ruthven towards accused (R.37,40). The dive was described by witnesses

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as a "flying tackle" and a "lunge" (R.38,53).

Sergeant Yanko testified that as soon as Prezas started to lunge -

A. * * * I turned my head towards Burton * * * to see what he was diving at * * * and saw him [accused] bring his carbine up (R.44,47).

Q. Will you explain to the court the exact position the carbine was in his hands?

A. (Witness demonstrated). Coming up in this manner. (Rifle butt nearly to his shoulder) * * * Just as that carbine was coming up, about time, Prezas collided with Burton. During their fall or just about the time they nit the ground, the first shot went off. I dove in and grabbed the forestock of the gun to get it away from them and the second shot went off at that time (R.44). * * * I would say it [the shot] went off about the time they hit the ground (R.45). * * * I know there was no shot until the fall (R.46).

* * * *

Q. Did you see him [accused] take that rifle from the sling position?

A. No Sir, he already had it in a moving position. About the time they came up there, they had hit. The first shot went off after they had collided.

Q. He was moving the rifle to the shoulder as they came up?

A. Yes Sir.

Q. Did you see any movement on the part of the Defendant prior to the time you saw Prezas lunge, in other words you say him standing there.

A. The next time I looked over to Prezas and faced back to Burton and I saw the rifle coming up" (R.48).

The first shot was distinct and the second sounded "muffled" (R.12).

Sergeant Wells in answer to the question, "Would you state to the Court the position Private Burton was holding the rifle [after the first shot was fired?]" answered, "Private Burton was holding it in this position with his hand on the forestock and one on the forearm. * * * The muzzle of the rifle was between Prezas' chest and Burton's left leg" (R.40). Prezas struck accused around the knees (R.48), the momentum throwing him backwards to a sitting position. Prezas executed "a half roll" (R.49) and came to rest on his stomach (R.32) across accused's leg. (R.42).

Private First Class John A. Lentz, who was standing nearby at the time of the shooting, testified that Sergeant Yanko yelled "don't shoot or words to that effect" and when asked to state "the position of accused hands on the gun when you saw this incident" testified "He had the gun more or less tight against his hips. He was going down to his knees in a lock like a bayonet thrust" (R.31). This witness further testified that "a span of five minutes, no more [elapsed between the time accused left the place where Prezas was cleaning the chicken and returned with the rifle and shot him]. Just the time he [Prezas] walked up to the kitchen and came back" (R.33).

A few minutes after the shooting medical officers arrived. Prezas was examined and found to be dead. His death was caused by two bullet wounds, one in the chest near the heart, the surrounding area being discolored by powder burns (R.8,9), and another in his back. From the condition of the wounds it appeared that the missiles had coursed downwards.

Accused remained silent and the defense introduced no witnesses.

4. Accused is charged with and found guilty of the murder of Private Prezas. Murder is the unlawful killing of a human being with malice aforethought (par. 148a, M.C.M., 1928). Malice is implied in every intentional and deliberate homicide unlawfully committed if there are no circumstances serving to mitigate, excuse or justify the act (Miller, Crim. Law, p. 271; CM 237022, Hughes, XXIII B.R. 217, 228).

It is clear that accused fired a rifle at a fellow soldier and killed him. As accused elected not to testify, the court could only infer the reason for accused's act and was confronted with three questions: a. Did accused act in self-defense, in which case he was not guilty, b. Did accused act with malice aforethought in which event he was guilty of murder, or c. Did he act in the heat of sudden passion incited by adequate provocation and therefore could be guilty only of voluntary manslaughter.

To excuse a killing on the ground of self-defense one must reasonably believe that his life is in danger or that he is in danger

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of suffering great bodily harm, and that it is necessary to kill to avert the danger (Allison v. United States, 160 U.S. 203, 217; Acers v. United States, 164 U.S. 308, 392). A homicide is not justifiable or excusable on the ground of self-defense by reason of a danger, or apprehension of danger, of general bodily injury, or of a slight or moderate injury, such as that to be apprehended from a simple or ordinary assault or battery with the hand or fist without a weapon, unless the assault is accompanied by acts indicating imminent danger of great bodily harm and produces in the mind of accused a reasonable belief of such danger (40 C.J.S., sec. 123a, p. 999). Furthermore, he must retreat if by so doing he may lessen the danger (16 Harv. Law Rev. 567; 12 Iowa Law Rev. 171; 18 A.L.R. 1279). Thus in CM 235044, Winters, XXI B.R. 265, 271, there appears the following:

"When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die" (Comm. v. Drum, 58 Pa. St. 9, 22).

"No balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. Such thoughts are trash, as compared with the inestimable right to live" (Springfield v. State, 96 Ala. 81, 11 So. 250).

In the instant case it appears that deceased, some five hours prior to the killing, had beaten accused about the face because accused had cursed him. However, about five minutes before the killing accused, then unarmed, again cursed deceased and the latter merely told him to go away under pain of receiving another black eye. Immediately preceding the shooting deceased, holding nothing in his hands which he could use as a weapon, dived at accused who was then armed. Accused made no effort to evade being hit by deceased's body, nor did he call to the several soldiers standing close by for help but fired at, and killed him. Whether accused acted in self-defense was a question of fact for the court's determination. From the evidence it could properly conclude that accused had no reasonable cause to believe himself in danger of great bodily harm at the hands of deceased and that the homicide was not excusable on the ground of self-defense.

Less easy of solution are the remaining questions, whether accused acted with malice aforethought requisite to the crime of murder or whether the evidence is susceptible only of the conclusion that accused acted in the heat of sudden passion caused by adequate provocation.

Malice aforethought has been defined as follows:

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. 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.

"Malice aforethought may exist when the act is unpremeditated. It may mean any one 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 a 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 or by a wish that it may not be caused; intent to commit any felony. * * *" (par. 148a M.C.M., 1928; CM 224951, Thompson, XIV B.R. 219,226; and see Bostic v. United States, 94 F 2d 636; Bullock v. United States, 122 F 2d 213).

If an intentional unlawful homicide which might otherwise be murder was committed in a sudden heat of passion caused by adequate provocation, technical malice being lacking, the crime is reduced to manslaughter (see sec. 423, Wharton Crim. Law and cases there cited). As stated in the Manual for Courts-Martial, 1928:

"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. * * * Instances of adequate provocation are: Assault and battery inflicting actual bodily harm, * * *" (par. 149a).

In order to reduce murder to the status of voluntary manslaughter the anger or passion of the accused at the time of the homicide must be so violent and impulsive as to dethrone reason and exclude the power of deliberation. Passion must take the place of reason; violent anger must be substituted for deliberation. There must be evidence of some actual assault upon accused, or an attempt by the deceased to commit a serious personal injury, or evidence of equivalent circumstances which momentarily struck from the accused's mental processes the power to reason or deliberate (CM 221640, Loper, XIII B.R. 195, 208). The test of sufficiency of such provocation is that which would cause a reasonable man, or an average man, to become so aroused (Bishop v. United States, 107 F 2d 297).

The evidence may now be examined in the light of the above concepts. The accused bore ill will toward deceased. He cursed deceased on the day of the shooting and in retaliation was beaten about the face. About five minutes before the homicide, accused, then unarmed, again cursed deceased. Deceased told accused to let him alone or accused would have two black eyes. Accused hesitated a moment, said he would not forget the incident, and walked to a tent nearby where he asked a friend where his [accused's] equipment was. Accused was told that his equipment would be secured a little later. Accused, however, did not wait but picked up a carbine belonging to another soldier which contained a full clip of ammunition, inserted a shell in the chamber and went back to within "a few feet" or "a few yards" of where he had left deceased on the company street cleaning a chicken. Deceased had meanwhile gone to secure some salt and pepper to use in cooking the chicken. Returning to the place where the chicken was being prepared, deceased reached a place about 10 or 15 feet from accused, glanced up, looked in accused's direction, suddenly dropped the things he was carrying and lunged at him. The reason why deceased lunged at accused does not appear in the record by any direct evidence; however, the evidence raises certain inferences in this regard. In the interval between the time accused looked in deceased's direction immediately preceding deceased's lunge at accused and the time their bodies met accused had moved the gun from a sling position on his shoulder and had brought it to a position with the butt nearly to his shoulder. Immediately after deceased collided with accused the gun was discharged, accused then holding it "more or less tight against his hips, going down to his knees in a lock like a bayonet thrust" in such a manner that Sergeant Yanko was given the impression that he intended to fire it again and yelled "Don't shoot", and grabbed the fore-stock of the rifle. The inference is justifiable that as deceased was

walking along the company street he saw accused make a motion as if preparatory to aiming the gun at him, and the further inference might be made that deceased dived toward accused for the purpose of wresting the carbine from him. A further foundation for the inference that an act on accused's part must have incited deceased to make the lunge is the testimony that about five minutes prior thereto although accused then unarmed had provoked him, deceased made no motion indicative of an assault upon accused but merely told him to go away and let him alone.

The court was privileged to reject as a self-serving declaration accused's statement that he picked up the rifle because he was going to find a place to sleep. The testimony and the reasonable inferences therefrom furnish substantial evidence from which the court could conclude that accused did not shoot deceased in the heat of sudden passion caused by adequate provocation but that his act was with malice aforethought.

CM 236044, Winters, XXI B.R. 265, wherein the Board of Review held the facts sufficient to support a finding only of voluntary manslaughter, has been considered. In that case deceased, holding a bottle in each hand, advanced toward accused in a threatening manner, calling him vile names. Accused told his assailant to stop but he continued to come. When deceased was about four or five feet from him accused fired into the ground; deceased advancing dropped the bottles and one to three seconds later accused fired and killed him. It is believed that the menacing gestures of deceased with bottles which might have been so used as to constitute dangerous weapons and the almost simultaneous shooting, sufficiently distinguish the facts of that case from those now before us.

It is further noted that the cited case was one requiring the confirmation of the President and the Board of Review was there privileged to weigh the evidence and judge the credibility of the witnesses. In the instant case the Board of Review is not privileged so to do but may determine only whether there is any substantial evidence in the record upon which the findings of the court can be predicated and may not substitute its opinion of the guilt or innocence of the accused for that of the court whatever may be their personal view (CM 210985, Bonner, et al, IX B.R. 383, 393; CM 211586, Gerber, X B.R. 107, 115; CM 212505, Tipton, X B.R. 237, 244; CM 233879, Ellison, et al, XX B.R. 169, 187; ETO 2432, Diviz).

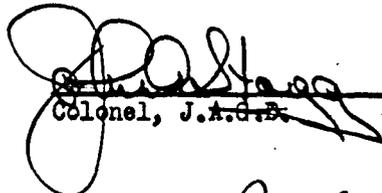
Whether adequate provocation existed and whether the provocation did in fact excite accused's passion sufficiently to reduce the degree of the homicide were questions of fact for the court to

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determine (41 C.J.S. p. 347; Kinard v. United States, 96 F 2d 522). The court-martial by its findings answered these questions in the negative. As there is substantial evidence in the record upon which the findings of the court could be predicated they are conclusive upon the Board of Review and may not be disturbed.

A sentence of death or of life imprisonment is mandatory upon conviction of murder in 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 by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452,454). It is noted that the reviewing authority suspended the execution of the dishonorable discharge. Prior to the transfer of a general prisoner to a Federal institution designated as the place of his confinement the dishonorable discharge should be executed (subpar. 16g (1), AR 600-375, May 17, 1943).

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


_____, Judge Advocate
Colonel, J.A.G.D.


_____, Judge Advocate
Colonel, J.A.G.D.

Dissenting _____, Judge Advocate
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
 In the Branch Office of The Judge Advocate General
 Melbourne, Victoria,
 Australia.

Board of Review
 CM 1926

12 April 1945.

UNITED STATES

v.

Private WILLIAM T. BURTON
 (18081308), Troop "A",
 8th Engineer Squadron.

) Trial by G.C.M., convened at
 APO 201, 12 January 1945.
) Dishonorable discharge, total
) forfeitures, confinement for
) life. The United States
) Penitentiary, McNeil Island,
) Washington.

DISSENTING OPINION by MURPHY,
 Judge Advocate.

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 William T. Burton, Troop "A", 8th Engineer Squadron, did at APO #201, on or about 16 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with pre-meditation kill one Roy G. Prezas, Troop "A", 8th Engineer Squadron, a human being by shooting him with a rifle.

He pleaded not guilty to the charge and its specification and was found guilty as charged. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50¹/₂, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

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3. The competent evidence shows that on 16 November 1944 Troop "A", 8th Engineer Squadron, APO 201, was moving from its "old area" to a "new area". About 11:00 o'clock that morning the accused and Private Zvolenski were sitting under a tree near the orderly room (R. 12, 18, 21). Accused had a bottle of "tuba" and Technician Fourth Grade Roger C. Empereur, of accused's unit, who had joined them, had a drink with them. Private Roy G. Prezas, the deceased, came walking down at which time they "Started cussing each other" (R. 20). Accused said to him "You are not wanted here. I told you to stay away from here so you had better move on (R. 18) * * * you are nothing but a God damn 'Pelow'". Deceased said "Don't call me that, I won't take that from you. Don't call me that again". Accused replied "That's what I said you are, nothing but a low, dirty 'Pelow'". (Technician Fifth Grade Guadalupe B. Rodela, testified that "Pelow" was a word used only in the Squadron "mostly as a discriminating word to degrade a person, particularly applying to Mexicans" (R. 15)). Deceased said that accused was a "Bullshitter" and that "he was worse than that when he was drunk" (R. 13). He then struck accused on the face "about eight blows". Private Zvolenski told deceased "to leave Burton alone and go off" (R. 23), and deceased replied "OK" and left (R. 21). Zvolenski then went to "chow" and upon returning found Burton "still lying in the same place" (R. 23) where he had remained for an "hour or two" (R. 30). Accused went to the dispensary and had his eye treated necessitating the use of a "needle and thread" (R. 23). At the time of the fight accused "wasn't drunk" but he was "under the influence of alcohol" (R. 14). About 5:00 o'clock that afternoon deceased was cleaning a chicken in front of his tent. Accused came by and was "telling him off. He told Prezas what he thought of him and what the Troop thought of him. Prezas told him to go away or he would give him two black eyes" (R. 30). Accused called deceased a "bastard" and "told him that he won't forget what he did" (R. 34). Accused then went to a tent occupied by Private Carrol J. Morvant. He inquired as to where his equipment was (R. 24). Private Morvant testified "He had called for Private Zvolenski and came to the tent and set down to chow. As I was seated there, Private Burton went to the rear of my tent and picked up a rifle. A few seconds later, I heard the click of a bolt" (R. 25). Private Merlin D. Green testified that the rifle accused got in the tent had been issued to him. He checked it when he came in from work and when he "hung the gun up in the tent, it was empty" but it had a clip in it (R. 29). Shortly thereafter accused left the tent with the rifle slung over his shoulder stating "he was going down and find himself a place to sleep" (R. 21). At that time the Squadron was "in an area subject to attack" and it was "customary to carry their arms then". Private Zvolenski testified: "Q. So there was nothing out of the ordinary or nothing unusual about Burton having a carbine when he went to sleep? A. No Sir." (R. 24).

He went to where Sergeant Theodore W. Wells and Corporal Martin J. Ruthven were putting up Corporal Ruthven's hammock (R. 36-39). Accused began "kidding" Sergeant Wells "about putting up a hammock for a corporal". At that time accused had the rifle "over his shoulder" and appeared in a good humor. Sergeant Wells noticed accused had "a patch over his left eye" (R. 41). Accused then "went to the rear" when deceased, who had gone to the kitchen for some pepper and salt (R. 31) was observed "coming down the street * * * About 10 feet away (R. 40) * * * carrying something in his hands, both hands, more or less waist high" (R. 39). Sergeant Wells testified:

"A. Just as he got abreast of us, he dove under the hammock between Ruthven and I and towards the rear of me and as I turned to see what was going on, I heard a shot. After I completely turned around I saw Private Burton sitting on the ground with Prezas at an angle this way (witness demonstrating) - Private Burton's left leg on Private Prezas' chest. I yelled to Sergeant Yanko to get the gun away from the men. As he dove in, I started in and the second shot went off. I dove in and pinned Private Burton to the ground by both shoulders and Captain Wilson arrived on the scene and picked up the rifle.

Q. Did you see the rifle at the time you turned around after this first shot?

A. Yes Sir.

Q. Would you state to the Court the position Private Burton was holding the rifle?

A. Private Burton was holding it in this position with his hand on the forestock and one on the forearm.

Q. Was it pointed at anything?

A. It looked like the muzzle -

DEFENSE: I object.

PRESIDENT: Objection sustained.

A. The muzzle of the rifle was between Prezas' chest and Burton's left leg." (R. 40).

"Q. When you first observed Burton before the shooting took place, would you describe the manner in which he carried his arm?

A. He had his rifle slung over his right shoulder. Right shoulder with his thumb on the sling.

Q. Would you sling the rifle in the manner you described?

A. The witness demonstrated the rifle was slung.

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Q. Would you state to the Court the position of Burton's hands on the rifle when you saw him?

A. Yes Sir. (Witness demonstrated) Right hand on the rear left hand on the forestock." (R. 41)

"Q. And then after the shot, you saw the gun in the position which you described.

A. Yes Sir.

Q. At that time was Burton standing up?

A. He was on the ground. Burton was on the ground.

Q. Was he on his stomach or was he on his back?

A. No sir, he was in a sitting position.

Q. How close was Prezas?

A. Prezas was across his leg with his arm around his leg lying on top of Burton." (R. 42).

Sergeant John Yanko, of accused's unit, testified that he met accused where the corporal and the sergeant were stringing the hammock. -

"A. I was walking down the company street and I met Burton coming down the opposite side of the street and he had a patch over his left eye and his face was battered. I asked him what the hell had happened to him and Burton replied, 'This is what your good friend Prezas did to me when I was down and out.'

Q. Did he say it in a friendly manner?

A. Yes Sir." (R. 43).

Accused was carrying his rifle at "a sling arms position". About that time "his [accused's] attention was attracted and he looked off back of me on the right. I turned around and saw Prezas". When asked if he noticed the expression on accused's face at that time he replied "He had a serious expression, which was common for him to carry" (R. 44). Sergeant Yanko testified further "I immediately turned around and saw that Prezas had something in each hand and he had taken two or three steps and went into a lunge. * * * I turned my head towards Burton and saw him bring his carbine up".

"Q. Will you explain to the Court the exact position the carbine was in his hands?

A. (Witness demonstrated). Coming up in this manner. (Rifle butt nearly to his shoulder)

Q. What happened then?

A. Just as that carbine was coming up, about time, Prezas collided with Burton. During their fall or just about the time they hit the ground, the first shot went off. I dove in and grabbed the forestock of the gun to get it away from them and the second shot went off at that time." (R. 44).

"Q. You were standing a few feet apart?

A. Yes Sir.

Q. And Burton had a patch over his left eye?

A. Yes Sir.

Q. And then you saw Burton look in the direction to the left?

A. It was his left.

Q. That was over his bad eye?

A. Yes Sir.

Q. And then you saw Prezas and saw him going into his lunge or dive in the direction of Burton?

A. Yes.

Q. And you saw Prezas grab Burton around the legs?

A. Yes Sir.

Q. And the_fell, knocking Burton backward?

A. Yes Sir

Q. In other words it carried Prezas forward and Burton backward?

A. Yes Sir.

Q. When did the shot go off?

A. I would say it went off about the time they hit the ground." (R. 45).

"Q. There was no shot you heard, no shot fired, until after Prezas made physical contact with Burton. It was not until after they collided?

A. I know there was no shot until the fall." (R. 46).

"Q. The Court is anxious to bring out the facts. There is one fact that is a little vague. When Prezas ducked under that ham-mock did he duck and stop momentarily or was it one lunge?

A. He took two or three normal steps. When he went into the lunge, I turned back to see what he was diving at." (R. 47).

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"Q. Did you see him take that rifle from the sling position?

A. No Sir, he already had it in a moving position. About the time they came up there, they had hit. The first shot went off after they had collided." (R.48).

As to the firing of the second shot Sergeant Yanko testified:

"A. Burton's right hand was in the small of the stock. Up here in the forestock he had his hand like this here and I noticed it right there. I attempted to raise it. About that time, the shot went off and

Q. Let's see you take the position like Prezas was in.

A. He was in a half roll. (Witness demonstrated). He had him down around the knees there right against his body.

Q. And you didn't say a word during the whole proceeding?

A. No Sir. I seen that rifle coming up. They had already hit and I dove right down beside them and grabbed that rifle." (R. 48-49).

Private First Class John A. Lentz was with deceased when deceased left the place where the chicken was being cleaned and went to the kitchen for some salt and pepper (R. 31). Shortly thereafter he heard a shot and Sergeant "Yanko yelling don't shoot or words to that effect". At that time he saw accused who "had the gun more or less tight against his hips. He was going down to his knees in a lock like a bayonet thrust" (R. 31).

"Q. Will you explain to the Court the exact position of these two men when you first saw them?

A. Well, after I got up and ran around and heard this second shot, Prezas was lying with a slight angle to the Company Street with his arms outstretched, like this, lying on his stomach and a part of his face. Private Burton was in a more or less kneeling position going down with the gun about a foot or two away.

Q. When you first saw this gun in Burton's hands what direction was it pointed?

A. Well the gun was in more of a swaying position because Sergeant Yanko was on the other end of the gun parallel to Prezas body and it was waving more or less toward where I was sitting." (R. 32).

** * *

Q. Now you have described the position to the Court that Private Burton was holding this gun, was that the first time that you had seen the gun?

A. Yes Sir.

Q. At that time, had there been one or two shots fired?

A. Two shots." (R. 32).

This witness further testified that from the time of the last argument between accused and deceased it was "A span of five minutes, no more" (R. 33). Private Ismael Revelez was present when deceased left to get the salt and pepper from the kitchen. Shortly thereafter he heard a shot. He stated -

"A. As I turned around I seen Prezas in between Burton's legs, and heard another shot.

Q. Were you in a position to see the accused and Prezas so that you could describe it to the Court?

A. I was a few yards away as I heard the first shot. I turned around and Prezas was in between Burton's legs and I heard another shot and I think the Sergeant was taking the rifle away." (R. 35).

"Q. You know he was in close, right up against him, is that correct?

A. Yes Sir.

Q. And Burton, you say, was falling at that time, falling backwards?

A. Yes Sir.

Q. After the shot, he was in the sitting position?

A. Yes Sir.

Q. After the rifle was taken he was sitting?

A. Yes Sir.

Q. Where was Prezas at this time?

A. He was lying on the ground.

Q. Close to Burton?

A. Yes sir.

Q. How far away would you say?

A. Just a few yards.

Q. He was falling the same way. Prezas was falling the same way as Burton?

A. Yes Sir. (R. 36).

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Corporal Martin J. Ruthven testified in substance as did the other witnesses as to the swinging of the hammock (R. 36). As to the shooting he stated:

"I looked up and saw Private Prezas coming down the street. Well, I paid no attention until Prezas was within a few feet of me. He dove between me and Sergeant Wells. I heard a shot. The second shot went off and I immediately yelled for a medico.

* * *

Q. When you first saw Prezas, would you describe to the court, the manner in which Prezas was walking?

A. Yes Sir, he was walking down the street cocksure as if he owned the world.

Q. Is this his normal walk?

A. Well, Sir, it was most of the time because that's the way he felt most of the time.

Q. Up to the time, you saw him lunge, he kept up this normal walk?

A. Yes sir." (R. 37)

"Q. There was nothing about the conversation or his actions that led you to believe anything unusual was in the air.

A. That's right.

Q. The next thing you noticed was that you saw Prezas walk down the street in the manner you have described?

A. Yes Sir.

Q. Was he coming from the direction that you and Sergeant Yanko were?

A. He was coming towards us Sir, coming from the opposite direction.

Q. And then you saw him suddenly lunge in the direction of Burton.

A. Yes Sir. A flying tackle, I would say." (R. 38).

Captain William L. Porter, of the Medical Detachment, heard the two shots and immediately went to the scene. He directed that deceased be taken to the hospital and upon arrival he examined him and found him to be dead as the result of two bullet wounds, one entering the body from the front and the other from the back (R. 7, 8).

The accused elected to remain silent.

4. To sustain a conviction for the crime of murder it is required of the prosecution to prove beyond a reasonable doubt that at the time and place alleged the accused killed deceased and that such killing was intentional and was with malice aforethought.

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. 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. (Clark.)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one 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 a 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 or by a wish that it may not be caused; intent to commit any felony." (Par. 148a, M.C.M., 1928).

"* * * Malice aforethought does not require the existence of an intent to kill for any particular length of time before the killing, and an intentional killing without justification, excuse, or provocation is murder no matter how short the existence of the intent to kill (M.C.M., 1928, par. 148a, p. 163). A homicide committed in the heat of sudden passion caused by provocation is manslaughter. But of course if the provocation is legally inadequate to reduce the offense to manslaughter, the killing is murder even though committed in the heat of passion; and insulting or abusive words or gestures are inadequate provocation (M.C.M. 1928, par. 149a; CM 238138, Brewster, XXIV B.R. 175).

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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. Instances of adequate provocation are: "Assault and battery inflicting actual bodily harm * * *" (par. 149a, M.C.M., 1928, p. 166).

It is my considered opinion that the record of trial does not contain a sufficiency of evidence to warrant the court's finding that at the time and place accused killed deceased in the manner alleged. Such evidence has none of the essential elements necessary to sustain a finding of guilty of murder, but, at the most, of manslaughter only.

There is, however, evidence in the record that at the time and place alleged deceased met his death from a bullet discharged from a rifle in the hands of the accused.

Accused and deceased had twice quarrelled on the day in question. At the first time, accused admittedly under the influence of alcohol, was given a severe beating by deceased and was found by a comrade "still lying in the same place * * * an hour or two" afterwards. About three hours later accused passed deceased in front of his [deceased's] tent and again the quarrel was renewed ending with a threat by deceased that if accused did not leave he [deceased] "would give him two black eyes". Accused left and the only evidence of any ill-will, hatred, or resentment contained in the record is his statement to deceased that he would not "forget what he did". Such a statement does not in itself, standing alone, furnish a basis from which malice or an intent to commit a crime can be inferred. -

* * * It does not necessarily follow, because a man avows to commit a crime, that such intention really exists in his mind. The words may have been uttered in a transient fit of anger, or through bravado, or with a view of intimidating, annoying, or extorting money, or with other collateral objects * * * (sec. 280, Wharton's Crim. Law, p. 361).

Accused then went to the tent of a comrade in a new area occupied by his unit that day seeking his equipment. At that time the company was in a combat area, subject to attack, where it was customary for all men to go armed with clips in their rifles. With the statement that he was going to "find himself a place to sleep", he picked up a rifle, put a round in the chamber and left the tent. He made no threats or statements of any hostility toward deceased at that time. The taking of the rifle was not objected to by the occupants of the tent. He then went to an un-designated area where a sergeant and a corporal were putting up a hammock and in a "good humor" began "kidding" the sergeant about swinging

a hammock for a corporal. At that time he was approached by Sergeant Yanko who asked him how he received his battered and beaten face, accused replying "in a friendly manner" that it was "what your good friend Prezas did to me when I was down and out". Accused had not sought out deceased after he had armed himself although he had left him about five minutes previously, and was at that time engaged in a friendly conversation with his comrades, having his rifle in a "sling" position over his shoulder with no expressed or implied threats, words, or gesture having been directed toward deceased, nor is there any evidence in the record that he even knew the whereabouts of deceased. With no warning whatsoever, deceased approached him and with no evidence of any provocation on the part of accused he suddenly threw "something" from his hands and from a distance of about ten feet assaulted accused making a "lunge" or a "flying tackle" at him and "after they collided" the rifle was discharged while deceased was falling forward and accused backwards. What provoked deceased to make the unwarranted attack on a man to whom he had given a severe beating only three hours before remains locked in his silent bosom. There is no evidence in the record showing why the deceased made the assault.

Upon this evidence the court found accused guilty of murder. Such evidence falls far short of the proof required that the killing was intentional and with malice aforethought and beyond a reasonable doubt, as the rule of "a reasonable doubt" extends to every element of the offense. A reasonable doubt has been defined:

"It is an honest, substantial misgiving, generated by insufficiency of proof. * * *

In order to convict of an offense the court must be satisfied, beyond a reasonable doubt, that the accused is guilty thereof. * * *

A court-martial which acquits because, upon the evidence, -the accused may possibly be innocent falls as far short of appreciating the proper amount of proof required in a criminal trial as does a court which convicts on a mere probability that the accused is guilty. (See Winthrop)
* * *

The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty. * * *

The rule as to reasonable doubt extends to every element of the offense. Thus, if, in a trial for assault with intent to kill, a reasonable doubt exists as to such intent,

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the accused can not properly be convicted as charged, although he might be convicted of the lesser included offense of assault. Prima facie proof of an element of an offense does not preclude the existence of a reasonable doubt with respect to such element. * * *

A reasonable doubt may arise from the insufficiency of circumstantial evidence, and such insufficiency may be with respect either to the evidence of the circumstances themselves or to the strength of the inference from them." (Par. 78, M.C.M., 1928, pp. 62, 63).

From the foregoing statement of facts it will be noted:

- a. There was no threat by accused at any time to do bodily harm to the deceased.
- b. His arming himself was customary by all soldiers of his unit, as they were in a combat zone and subject to attack by the enemy.
- c. The taking of another soldier's rifle when he could not find his own equipment was without objection by the occupants of the tent.
- d. His stated purpose of going to hunt a place to sleep and then going to an area where a sergeant and a corporal were preparing sleeping quarters is undisputed and not a self serving declaration.
- e. His not seeking deceased where he had last seen him negatives any intent that he took the rifle to do deceased bodily harm.
- f. His "good humor" when telling Sergeant Yanko that it was accused who had given him such a severe beating.
- g. Accused had no knowledge that deceased had gone to the kitchen for salt and pepper, nor did he know what deceased had in his hands when he threw something away and immediately assaulted him.
- h. His having the rifle at a "sling" position when an unprovoked attack was made on him by deceased and made with such suddenness that the rifle was not fired until after their bodies had "collided".
- i. His inability to "retreat" or even call for assistance, which because of the suddenness of the attack, was impossible, is shown by the actions of Sergeant Yanko and Sergeant Wells.

Such evidence does not contain a basis on which malice can be inferred. Per se, it is not susceptible of a conclusion on the part of the court, beyond a reasonable doubt, that accused killed intentionally and with malice aforethought. The Board of Review has repeatedly held that a killing under like circumstances is manslaughter only -

"In State v. Thompson (9 Iowa 188), deceased advanced upon accused with a heavy board. He dropped the board and continued after accused unarmed. Deceased was strong and in the prime of life, whereas accused had recently fallen off a horse and broken several ribs. He had been out of bed only a day or two. When deceased reached a point near accused the latter shot him. It was held that accused was not justified in killing his assailant to avoid a violent beating, he having no reason to fear death or great bodily harm. Similarly, in the present case, accused, armed with a rifle which he could have used as a club, had no reason to fear death or grievous bodily harm, and it was not reasonably necessary for him to shoot deceased to protect his life or limb. Furthermore, accused could have avoided the danger by retreating when deceased threatened to attack him from the steps. To have retreated would have lessened the danger materially, and his chances of suffering death or grievous bodily harm from a thrown bottle were infinitesimal. Instead, believing that deceased had been drinking, and knowing him to be in an ugly, threatening mood, accused elected to remain on the scene and invite the disaster. He failed to take proper steps to avoid the catastrophe.

However, in the opinion of the Board of Review, the accused was not guilty of murder, but only of voluntary manslaughter. Had accused formed a design to kill Green, he could have carried it into effect upon seeing him on the porch or at some point in the chain of events prior to the actual killing. He warned deceased to stay back, and fired the first shot into the ground. Only when he believed himself cornered and in great danger did he fire the fatal shot. He thus lacked the malice aforesaid essential to murder. His state of mind is best described by his statement to Sergeant Nailon immediately subsequent to the crime; i.e., that he had lost his head. The case is distinguishable from a recent one in which, after a quarrel, accused procured a rifle and, without warning, fired the fatal shot (Bull. JAG, May 1943, sec. 450(1))." (CM 235044, Winters, XXI B.R. 265).

The Manual for Courts-Martial states that the use of a deadly weapon presumes malice but it does not follow that such presumption

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cannot be overcome in a situation negating such presumption. The prosecution is still charged with proving the offense as alleged -

"The words 'deliberately' and 'with premeditation' have been held to mean '* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act'" (Wharton's Crim. Law, Vol. 1, sec. 420).

In numerous cases wherein the facts were far more aggravating than those in the instant case the Board of Review held that the offense was not murder but manslaughter -

"The evidence thus shows that deceased forcibly pushed accused aside in order to place a bet in a crap game and that he directed some foul language at accused in an angry manner and possibly threatened him with harm. Thereupon accused went to his barracks and obtained his rifle and some ammunition. On the way back to the crap game accused saw deceased on a porch adjoining the barracks in which the game was in progress. As accused passed the steps, deceased threatened him with the bottles and started down the steps after him, whereupon accused told him several times to keep away, and backed away as deceased advanced. When deceased reached a point only a few feet from accused, the latter fired a shot into the ground. According to eyewitnesses, deceased then dropped the bottles and lunged or jumped at accused, who pointed the rifle at him and fired two shots in rapid succession, thereby killing him" (CM 235044, Winters, XXI B.R. 265).

The Board of Review has repeatedly held an accused guilty of manslaughter when there was not adequate provocation -

"4. It is undisputed that at the place and time alleged, without legal justification or excuse, accused willfully and unlawfully shot Crompton with a revolver and that Crompton died as a result. The shot was fired in apparent heat of passion under provocation. The provocation was not of such degree as might be deemed adequate to excite uncontrollable passion in the mind of a reasonable man (par. 149g, M.C.M.) and findings of guilty of murder, as charged, would have been legally justified. The evidence is legally sufficient to support the findings of guilty of the lesser included offense of voluntary manslaughter, in violation of Article of War 93". (CM 222737, Gilbert, XIII B.R. 315).

Likewise has the Board of Review held a killing only manslaughter where deceased used only gestures and insulting language and accused killed him with a beer mug -

"The unlawful homicide of which accused stands convicted was obviously committed by him on sudden impulse aroused by provocative action [nudging him in the ribs] and insulting language of the deceased. The weapon used was not one which would ordinarily be considered a deadly one * * *" (CM 213348, McClain, X B.R. 270).

This Board of Review recently held (CM A-260, Hill) that a killing under like circumstances was manslaughter only. In that case deceased, after cursing and abusing accused, attempted to take a blanket from him and accused picked up a loaded rifle. A "scuffle" ensued during which the rifle was discharged killing deceased. Although several soldiers were present accused did not call for help. Excerpts from the holding in that case follow:

"Accused admitted that the rifle which caused the death was one that he picked up to use as a club. Immediately after the shooting the accused was found holding the rifle at the position 'port arms' and before surrendering it he first ejected a cartridge therefrom. Immediately after the event he gave a reason for his shooting the deceased and a short time later stated that he did not mean to do it. The latter statement denies the intent of the accused but not the homicide. Although accused testified that the rifle was discharged during the struggle, and that he did not know who cocked it or how the trigger was pulled, there is ample evidence in the record from which the court could infer that the accused caused the death of the deceased. * * *

If the accused reasonably believed that he was in immediate danger of death or grievous bodily harm from the deceased he was justified in using such means as were then available to him including that of killing his assailant in self-defense (Brown v. United States, 256 U.S. 335, 343), but the facts and circumstances which would excuse the killing must be such as to induce the reasonable belief or fear of the existence of such peril of death or great bodily harm (Allison v. United States, 160 U.S. 203, 217; Acers v. United States, 164 U.S. 388, 392).

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* * *

Certain evidence is present in the record from which the court could conclude that the accused, when he picked up the rifle to use in the nature of a club, acted in self-defense * * * From other evidence in the record the court could conclude that the accused at such time could not entertain the reasonable belief that he was in danger of death or grievous bodily harm -- the altercation was not so heated that other soldiers in the tent became interested in the affair, one thought that they were just tusselling as they usually did; his tent mates did not think that either the accused or the deceased were talking loudly, although another soldier some distance away heard arguing and got up with the intent of stopping it; accused did not call out for help from his tent mates but a few paces away; immediately after the shooting accused bore no marks of injury upon his face or person although his clothes were disarranged and his shirt was hanging out; accused neither in his statement immediately after the affair or as a witness at the trial claimed that he was in fear of his life or of grievous bodily harm; at the trial, after reasoned thought, the accused, in answer to the question 'Why did you pick up the gun?', testified 'Well, Sir. He asked for my blankets and he hauled off and hit me, and then I grabbed my rifle to hit him with it * * *'; * * *As it was accused who picked up the rifle initially, the threats of the deceased upon the life of accused cannot be associated with the rifle or any other dangerous weapon.

The deceased had committed an ordinary assault upon accused in striking him. Generally, an ordinary assault is not sufficient justification for the use of a deadly weapon in defense (Allen v. United States, 164 U.S. 492; sec. 613 Wharton's Criminal Law). Whether or not sufficient circumstances exist to establish that the accused acted in self-defense is for the court to decide as a question of fact (Allison v. United States, supra; Brown v. United States, supra). There is sufficient evidence in the record from which the court could conclude that the use of the rifle as a club by the accused was not justified in self-defense. Hence, if the death of the deceased was caused thereby, although unintended by the accused, he is legally guilty of voluntary manslaughter.

(3) That accused at the start of the quarrel did not intend the death of deceased but during the altercation, in the heat of sudden passion intended the act causing death is sufficient to constitute the crime of manslaughter. Although accused testified that when he first seized the rifle he intended to use it as a club and in fact the rifle was not fired while the participants were in the tent, the court could none the less find from the evidence before it that subsequently accused intended to discharge the rifle. It is sufficient that such intent exists at the time the act is committed. * * *

In the instant case the evidence is circumstantial in its entirety as to the manner in which the rifle was fired - whether by accused or by the impact of their bodies when they "collided" no eyewitness could state.

"Where conviction results from circumstantial evidence, the circumstances must not only be consistent with guilt but also must be inconsistent with innocence. The evidence must be such as to exclude every fair and rational hypothesis save that of guilt * * *" (CM 242553, Fernandez, XXVII B.R. 103).

Paralleling the facts in the instant case with the one last cited we find accused armed with a rifle but with no expressed intent to use it against deceased. He was in an area where he had no reason to expect deceased to be, having no knowledge that deceased had been sent to the kitchen. He was attacked without provocation by deceased who at that time was carrying "something" in his hands which he threw away and "lunged" at him and who, three hours previously, had inflicted on him great bodily harm. While being bowled over backwards by deceased the rifle was discharged - how, or by whom, there is no evidence in the record disclosing.

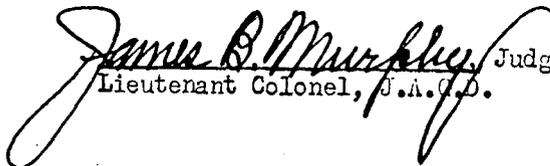
In this theater of operations a Board of Review is not privileged to weigh the evidence and draw its own conclusions therefrom. However, its duty is to determine the legal sufficiency of a record of trial and to apply the principles of law which every soldier is given by the Constitution which overshadows all rules of evidence or prescribed procedure, either civil or criminal, to the end that substance shall be above form and justice above the mere appearance of justice. The record containing no evidence that accused had that element of malice at the time of the killing, which is essential for a conviction of murder, it follows that a court may not infer such by surmises or speculations of its own and impute motives to the accused not supported by the evidence and he cannot so be found guilty. There is evidence from which a verdict of voluntary

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manslaughter can be found. The court found that accused had no reason to believe that it was necessary to use the rifle in such a manner that death would probably result therefrom and his actions warrant the court, in whose province lies the determination of such facts, in finding that the killing was unlawful, but not accompanied by malice aforethought. The element of malice aforethought being lacking the crime resolves itself into one of voluntary manslaughter.

Since the accused is guilty of voluntary manslaughter only, that portion of the sentence adjudging confinement in excess of ten years is illegal. It is my opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of voluntary manslaughter, at the place and time and upon the person alleged, in violation of Article of War 93, and legally sufficient to support a sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years - the maximum authorized for voluntary manslaughter.

Confinement in a penitentiary is authorized by Article of War 42 for the offense of voluntary manslaughter, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 454, Title 18, United States Code.

 Judge Advocate.
Lieutenant Colonel, U.S.A.C.

Private Philip V. Davis, members of the 49th General Hospital, Tacloban, Leyte, P.I., were playing cards and drinking strong Filipino wine (R. 33) or whiskey (R. 45) in one of the wards. They consumed two quarts of liquor, accused and Hanuksela doing most of the drinking (R. 34), "Baker * * * drinking the heaviest" (R. 41, 46). Accused asked Private First Class Anders Wallacker who had joined them to lend him his .45 calibre pistol so that he could take it to town. Wallacker gave him the pistol containing a clip of ammunition (R. 44). As accused was "clumsy" with it, he was asked to give it to Davis but he refused (R. 37, 43) and fastened the holster to his belt (R. 38).

Hanuksela, Davis, and accused left the hospital about 8:30 P.M. going to town and taking with them another quart bottle containing "GI alcohol and grape fruit juice" (R. 47). Accused was then wearing a white T-shirt and khaki pants (R. 49). He was drunk (R. 34, 47); "He wasn't acting sober. He was rather boisterous. He couldn't keep his balance very well" (R. 41). On the way to town they apparently consumed the third bottle of liquor (R. 35). Arriving there they went to the WAC area where a dance was in progress and sought admission. They were not permitted to enter the dance hall, the MP at the door telling them they were too drunk and had no invitations (R. 35, 38, 39, 48). The three soldiers temporarily became separated in the crowd and when Hanuksela later saw accused he was "getting off the ground" (R. 35, 39). Either Hanuksela or accused purchased a quart of liquor from a sailor and they drank "some of it" (R. 35, 39). Davis warned them that "the MP was going to run them in if they didn't leave" and about 10:00 or 10:30 P.M. accused and Hanuksela left the WAC area (R. 50). At that time accused was "staggering" and "not hardly walking straight" (R. 48) and he and Hanuksela "were holding on to each other" (R. 35). Hanuksela testified "the last I remember is that we left the WAC area and I fell in the ditch, and I'll say Baker was as drunk as I was, or more" (R. 36).

Later that night two American soldiers called at the municipal police station at the corner of P. Burgos and Del Pilar Streets, Tacloban. One of the soldiers, identified at the trial as accused, had "sort of brown or red color" hair, was wearing a white T-shirt, and had a .45 calibre pistol at his waist (R. 8, 11, 12, 13, 14). They were both very drunk (R. 11); were staggering, "could stand, but not good" (R. 13). They asked the policemen on duty where the "pom pom" (prostitution) house was. The police said that they did not know and that the soldiers should go home because they were drunk. Accused and the other soldier became "unreasonable" and accused attempted to take the pistol out of the holster but "was prevented by his companion". After arguing for a few minutes they left the police station. Accused fell into a ditch in the road; his companion attempted to pick him up but also fell down (R. 13). They finally got up and walked along Del Pilar Street toward Veteranos Street (R. 8, 12), being followed by the police sergeant and another policeman (R. 9). Accused and his companion again fell down and, while lying on the ground, accused fired a shot in the air. The two

soldiers helped each other up. "They were having a hard time getting up from the ground. * * * they could hardly get up", and went a little further to the house occupied by Telesforo Iglesias and his family (R. 9, 14). Accused there spoke to one Segundo Comendador, "asking for pom pom", who replied, "Sir, I cannot give you, because these girls in the house are not bad women". Accused then said that if Segundo "does not want to give him * * * he would shoot him, pointing the gun to Segundo" (R. 17). The Filipino quickly closed the door and went to the kitchen at the rear of the house where other members of the family were hiding (R. 19). Telesforo Iglesias, however, remained asleep on the floor in the middle room of the house, lying on his right side next to the sawali wall or door which separated that room from the front room of the house (R. 19). As the two soldiers left the house accused stumbled and fell into the ditch in the middle of the street, the police sergeant testifying that "I think he was paralyzed" (R. 9, 14). Then accused, who was about two meters (R. 10) or 8 feet from the house (R. 15), fired five shots toward it (R. 9, 14, 15), followed by another shot "in the entrance of the house" (R. 10).

Accused crossed the street and went toward the buildings on the other side. T/5 Carmichael who was there, seeing accused waving a pistol in the air, thought that accused might fire at him and ran between two buildings to Veteranos Street (R. 24). Accused followed. He walked like a drunken man, fell against the building, and staggered out from between the houses waving the pistol to a parked truck (R. 24a, 28). A sergeant of the guard who had been called by a guard stationed on the corner waited behind the truck until accused looked the other way and then hit him with his (the sergeant's) pistol. Accused threw his gun away saying, "I'll throw the gun away' or words to that effect" and was then taken into custody (R. 25). The sergeant testified that in his opinion accused "was either drunk or insane * * * he was very drunk" (R. 26). About three minutes had elapsed between the time the six shots were heard and accused was seen coming from between the houses on Veteranos Street (R. 28).

Shortly after the shooting outside the Iglesias house one of the policemen who had followed accused went there and inquired whether anything had happened, and was told "No, nothing happen" (R. 15). No other shots were heard at the Iglesias house that night (R. 20).

About 8 o'clock the next morning Marcellina Iglesias attempted to awaken her father, Telesforo Iglesias, who was lying on the floor in the same position that he had been at the time of the shooting the previous night, and found that he was dead (R. 19, 20, 23). The deceased was examined by a doctor who testified that he had died within the previous 24 hours as a result of a gunshot wound to the head, about three inches behind and slightly over the right ear (R. 6). The doctor probed the wound and extracted a portion of a .45 calibre bullet (R. 7). Investigation revealed five or six bullet holes in the front door of the house (R. 11, 20, 23) and two or three

in the second door or wall (R. 11), one of the latter being near the place where deceased's head had been resting as he lay sleeping on the floor (R. 21). The two doors were about 4 yards apart (R. 10), the front door being made of thin wooden planks and the inner door of sawali (R. 24).

On 28 January 1945, accused was shown a .45 calibre pistol at the Provost Marshal's office and admitted that he had had it in his possession on the night of the shooting (R. 30). He said that he had secured the pistol because he believed it was necessary to have one before going to town (R. 31). He further admitted that he had been drinking in the 49th General Hospital (R. 31) and outside the WAC barracks (R. 32) on the night in question.

Accused elected to remain silent.

4. On the night of 25 January 1945, accused, after having been refused sexual intercourse at the house occupied by Telesforo Iglesias and his family, fired six times with a .45 calibre pistol into the house from a distance of about eight feet. The next morning Telesforo Iglesias was found dead, having been shot in the head with a .45 calibre bullet that had apparently gone through the door or wall of the building. Accused was charged with and found guilty of his murder, the court thereby having determined that accused unlawfully killed deceased with malice aforethought (par. 148a, M.C.M., 1928). From the evidence the court could properly conclude that one of the shots fired by accused caused deceased's death. Malice aforethought, necessary to the crime of murder, -

"* * * does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. 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. (Clark.)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one 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 a 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 or by a wish that it may not be caused; * * * (par. 148a, M.C.M., 1928, p. 163).

Every person is presumed to intend the natural and probable consequences of his act, and the use of a dangerous weapon, resulting in a homicide, by one having no right to use the weapon at that time and place, and in the absence of mitigating facts, is always regarded as evidence of the existence of malice aforethought. The intentional discharge of the pistol into the house by accused "clearly tends to establish that, whether or not he had any special malevolence toward any particular individual, he was possessed of a 'generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief,' which has been held to be embraced by the term 'malice aforethought'" (Liggins v. U.S., 297 F. 881; Allen v. U.S., 164 U.S. 492, 17 S.Ct. 154).

From the evidence the conclusion is inescapable that accused was drunk at the time of the fatal shooting. Accused did not testify but in a statement contained in the papers accompanying the record of trial, said "I swear that I don't remember anything that happened after we left the vicinity of the WACs barracks". The question is therefore presented whether accused was so drunk as to preclude a finding that he acted with malice aforethought. The record contains some evidence that accused was possessed of ability to reason a few minutes before the shooting; he and his companion were sufficiently in control of their mental faculties to go to a police station to seek the address of a house of prostitution; accused, in order to force compliance with his request for "pom pom" at the Iglesias house threatened to shoot the Filipino who refused him admission and immediately thereafter fired into the house; he was apparently conscious of some wrong-doing immediately after the shooting for when apprehended he threw his gun away. Accused clearly showed by his attempts to gratify his sexual desires through the sequence of events related that he had sufficient mental capacity to carry into effect such intent. The determination of the question of accused's mental ability was for the court-martial as triers of fact (II Bull. JAG 427; People v. De Moss, 50 P. 2d 1031 (Cal.); Bishop v. U.S., 107 F. 2d 297, 301; McAfee v. U.S., 111 F. 2d 199, 205). By its findings the court-martial resolved the question against accused and the Board of Review may not substitute its conclusion therefor whatever may be their personal view (CM A-1926, Burton, and cases there cited). The closely analogous case (CM 223336) reported in detail at page 159, et seq., in Volume I of the Bulletin of The Judge Advocate General, has been considered by the Board of Review and is distinguished from the instant case because from the evidence now under consideration mental capacity may be inferred. It follows that since the record contains substantial evidence upon which the findings of guilty may be predicated it is legally sufficient to support the findings and the sentence.

A sentence of death or of life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a

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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 by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

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

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Leshaughbert, Judge Advocate.
Colonel, J.A.G.D.

James P. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence reveals that Private Lester C. Gline (accused) and T/4 Dallas F. Vancil (deceased) were members of the 153rd Engineer Construction Battalion stationed at APO 72, and on 25 December 1944 occupied the same tent which was located on the other side of a bridge from their company. On that evening they became involved in an argument over the ownership of some liquor and decided to split up the partnership in their joint operation of a whiskey still (R. 67), the accused paying deceased 100 pesos for his share. A fight then developed after which deceased went to his tent, loaded his rifle and threatened to shoot accused (R. 66). The fight was witnessed by T/5 Arthur W. Cushing who told accused to "break it up". The matter was then reported to the First Sergeant (R. 32, 60, 66) who went to deceased and asked him for his gun. The latter refused to give it up saying that accused was "gunning" for him. After some discussion deceased said that he would not bother accused "so long as he don't bother me" (R. 60). Accused was told of this conversation, and, with Cushing returned to the tent to get his personal belongings. Deceased said to him "This is a loaded rifle I got, and I got a good mind to empty it at you" or words to that effect. Accused said "Go ahead" and he and Cushing ran back to the company area (R. 61, 66, 67). Thereafter accused moved to another tent.

About 8:00 o'clock on the morning of 13 January 1945, T/4 Elmer L. Armstrong awoke and heard accused and deceased, who appeared to have been drinking (R. 44), arguing about money that deceased owed to accused. At that time deceased told accused "something to the effect that 'If I catch you out' * * *I'll kill you'" (R. 41). About noon accused, who had been drinking (R. 63), met First Sergeant John L. Gentile and told him "Vancil is pretty drunk and he is in no condition to go to work, and he just made a T/4 and I don't want to see him ruined because we are such good friends" (R. 62). Accused endeavored to get another soldier to work in deceased's place as "he wasn't in shape to go to work and wanted somebody to take his place and get him out of trouble" (R. 35b). Accused did not then seem angry with deceased (R. 36). About 2:00 o'clock that afternoon accused's commanding officer, First Lieutenant Herbert L. Humphries, dispatched a noncommissioned officer to find him as he had failed to "show up" for duty. Upon being advised that both accused and deceased had been drinking, the Lieutenant went to a tent and found them and two other soldiers "rather intoxicated". He directed that they be sent to the "medics" to "get them fixed up" (R. 18, 21).

About 5:30 that afternoon deceased asked Sergeant Gentile if he (deceased) would be "busted" for not reporting for work that afternoon (R. 29, 62) and the Sergeant told him to see Lieutenant Humphries. Shortly thereafter deceased asked Lieutenant Humphries the same question and was told by him that the matter had been referred to his (deceased's) commanding officer. At that time the deceased was not as drunk as when seen by the Lieutenant that afternoon but he was too drunk to work and was not permitted to report for duty (R. 21). About 5:45 deceased was seen to cross the bridge going toward his tent. He was then under the influence of liquor but appeared to be "very jolly" (R. 30, 34a, 37).

Asuncion Avello testified that late in the afternoon that day when it "was not time yet to have a light", the accused:

"* * * went to my house to get his clothes, which I am laundry. I did not see him with gun. I have seen him that he has the gun when he was on the way. Vancil was approach to my house, and they meet in one way. Vancil fall down, the other soldier pick him up. Vancil call, saying 'Hello, Les' and right after, during his saying 'Hello, Les', he [accused] holding the rifle at his waist (R. 28) shoots the gun.* * * [eight times(R. 28)]."

* * *

Q When the shots were fired, was he still down or was he getting up?

A He was standing up.

Q When Vancil said 'Hello, Les', was he angry or friendly?

* * *

A He don't appear as he is angry.

Q He did not appear to be angry?

A He did not; he was laughing.

Q As Vancil approached Cline, did you observe whether or not Vancil was carrying anything in either hand.

A Vancil was carrying on his shoulder a sack. * * * [Holding with right hand (R. 25)]." (R. 23-24).

Asuncion was the only eye-witness to the shooting. She had been walking about "26 paces" behind accused who, at that time, was about eight feet from deceased (R. 27). She did not see deceased "put hand in his pocket" (R. 27, 28). After the incident she immediately left the scene and went to the home of her sister (R. 25).

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About 6:00 o'clock accused, who appeared to one witness "a little" excited (R. 39) and to another "very nervous" (R. 49), asked for, and was given, a ride in a truck to the Headquarters and Service Company area. About twenty minutes later (R. 40, 45), he entered the tent occupied by T/4 Armstrong and T/5 James A. Dolan and stated "that he had pumped eight shots in Vancil's body and 'I think he's dead'" (R. 40). Dolan testified:

"* * * [accused said] 'I told you I'd have to do it sooner or later, and I did'. Then he said, 'I fired a whole clip into Vancil'. Then he said that he was afraid of him and that Vancil had threatened to kill him earlier in the day and he was afraid to stay in his tent because he couldn't see anyone coming to it * * *" (R. 46).

At that time accused "had been drinking", "was nervous", and made no attempt to "hide what he had done" nor did he indicate that he was "going to try to get away" (R. 46).

About 6:00 o'clock or shortly thereafter (R. 8, 19, 30, 33), deceased's body was found in a muddy path (R. 22) about 25 or 30 yards (R. 13) or, according to another witness, 100 yards (R. 31) from his shack. His instant death was caused by ".30 cal. bullet or bullets that probably entered in the right shoulder in back and passed through * * * [his] heart" (R. 17, 20, 31, 51). Deceased "had a cigarette butt, burned down to his fingers, with possibly an inch of ash on it" in his left hand (R. 12, 20, 34, 51). A sand bag (R. 11, Ex. 2) and four expended .30 caliber cartridges were found nearby (R. 13, 20, 34).

The day following the killing accused, after having been advised of his legal rights (R. 7), gave a statement to the investigating officer. In it accused recounted the argument of Christmas evening and stated:

"* * *

During the morning of 13 January 1945, Vancil and I were in my tent and we were arguing. Armstrong was lying on his bunk. Vancil told me that he would kill me. I think Armstrong heard him say it. Vancil told me several times during the day that he was going to kill me. Vancil had moved his shack across the road into the brush. That afternoon we were over at Vancil's shack. He was sitting on the cot and I was sitting on the floor of the shack with my back towards him. He had my gun on his lap. I heard the gun go off. The bullet passed within six inches of me and went through the corner of the tent. I turned around and asked Vancil what the hell he was up to. Vancil kind of laughed and said that the gun had gone

off accidentally. Then we sat in the doorway of the shack and took turns shooting at a stump. I was half-way afraid at the time that he would shoot me. I didn't turn my back on Vancil anymore and watched him pretty closely. Then we started back to my tent. Vancil and I had been drinking off and on all day.

On the way to my tent we met Sgt Stauber. Sgt Stauber talked to us at the tent for a while and then left. After a while Vancil and I started arguing. Vancil told me that he was going to get his rifle and if he saw me within thirty feet of him he would kill me. Then Vancil left. It worried me because I believed that Vancil meant it.

I had some laundry over at Vancil's shack. Shortly after supper, I went to get it. I was afraid of Vancil so I took my rifle with me. I had the girl at Vancil's shack carry my laundry and we started back to my tent. The girl was walking a short distance behind me. I hadn't gone far when I saw Vancil coming down the road about ten yards from me. At about that time, Vancil saw me. Vancil put his hand in his pocket. I thought he had a pistol in his pocket so I stood still, Vancil began to walk faster. I pointed my gun at Vancil and squeezed the trigger and kept squeezing it until the gun was empty. Vancil went down. I was shaking very hard. I stood there for a few minutes until I stopped shaking. Then I went back to my tent and sat on my bunk for a while. After a while I went out to the road and caught a ride on a truck going down to H&S Company. I was talking to some of the boys when they came and got me and took me to B Company." (Pros. Ex. 1).

Deceased's shack was examined and there were "found a bullet hole in the corner of the shack where Cline had said it would be" (R. 16) and expended cartridges (R. 14, 16).

T/5 Calvin D. Naquin, of accused's unit, testified that deceased had previously borrowed his .38 Smith and Wesson pistol; that on the day in question the deceased was drinking and asked to borrow the pistol but he, Naquin, refused to lend it to him (R. 70).

Several witnesses testified that deceased, when drunk, was "quarrelsome" and "overbearing * * * hard to get along with" (R. 35b); "angry and threatening" (R. 42); "ugly" (R. 43); a "trouble maker" (R. 48) and "belligerent" (R. 63).

Accused elected to be sworn and testify. He recounted the argument of Christmas night stating that he had requested that deceased be placed "under arrest". He further stated that he and deceased had had no more trouble from Christmas night until the day of the killing (R. 72). As to the events on that day his testimony was to the same effect as that in the sworn statement he made to the investigating officer above set out. He further testified that when he saw deceased on the path the latter said "Les, * * * You know what I told you", and made a gesture with his right hand to his right pocket" (R. 73), and that he had shot deceased because he thought he had a pistol in his pocket; that once before he had seen him with a pistol and thought that he would use it, "I thought he would kill me. He had told me, emphatically, that he would, in such a way that I had no doubt in mind" (R. 74).

Captain Adam L. Gorczyca and First Lieutenant John B. Pope, defense witnesses, testified that accused was a member of their command and that he was an excellent soldier, easy to get along with and a willing worker (R. 57, 59).

4. The evidence reveals that accused and deceased had been friends. Deceased had a general reputation of being a trouble maker and belligerent when drunk. On Christmas night, 1944, during a quarrel between them, deceased threatened to shoot accused. They apparently settled their differences and were again friendly. On the morning of 13 January 1945 both accused and deceased were drinking and again quarrelled. Deceased again threatened to shoot accused. However, they settled their differences and continued drinking. In the afternoon while they were sitting in deceased's tent, the latter fired his gun and the bullet passed about 6 inches from accused's head. Deceased said that the gun had been discharged accidentally. After they left the tent another argument ensued in which deceased said that if accused came within thirty feet of him he would kill him. Shortly thereafter accused saw deceased walking toward him about eight feet from him. Accused testified that deceased made a motion toward his pocket saying "Les, * * * You know what I told you"; that he (accused) believed that he was about to draw a pistol and, being in fear of his life, he shot and killed deceased. The evidence reveals, however, that deceased was holding with his right hand a sand bag resting on his shoulder and had a lighted cigarette in his left hand. It further reveals that deceased was drunk, fell down, got up, said "Hello, Les" (accused's name) in a friendly fashion, and was immediately shot.

To excuse a killing on the ground of self-defense one must reasonably believe that his life is in danger or that he is in danger of suffering great bodily harm and that it is necessary to kill to avert the danger (Allison v. United States, 160 U.S. 203, 217; Acers v. United States, 164 U.S. 388, 392). Furthermore, he must retreat if by so doing he may lessen the danger (16 Harv. Law Rev. 567; 12 Iowa Law Rev. 171; 18 A.L.R. 1279). Thus in CM 235044, Winters, XXI B.R. 265, 271, there appears the following:

"When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die" (Comm. v. Drum, 58 Pa. St. 9, 22).

"No balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. Such thoughts are trash, as compared with the inestimable right to live" (Springfield v. State, 96 Ala. 81, 11 So. 250).

An honest although unjustifiable belief in the necessity of killing in self-defense may, however, reduce an intentional and unlawful homicide to manslaughter (CM 235044, Winters, *supra*; Kinard v. U.S., 96 F. 2d 522; Wallace v. U.S., 162 U.S. 466).

Whether accused shot deceased with malice aforethought as alleged in the specification; whether his actions were excusable on the ground of self-defense, or whether he acted under the heat of sudden passion induced by fear of deceased were questions of fact for the determination of the court-martial (Kinard v. U.S., *supra*; Stevenson v. U.S., 162 U.S. 313; Michigan v. Toner, 187 Nev. 386; Wyoming v. Sorrentino, 224 P. 420). By its findings the court determined that the homicide was not excusable and further determined that it was unlawfully, feloniously, and intentionally committed, but without malice aforethought, and thus found accused guilty of voluntary manslaughter. The record contains evidence upon which such findings could be predicated.

5. The sentence imposed is authorized (par. 104g, M.C.M., 1928). Confinement in a penitentiary is authorized by Article of War 42 for the offense of voluntary manslaughter, which is recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 275 Criminal Code of the United States (18 U.S.C. 454).

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

(Absent) Judge Advocate
Colonel, J.A.G.D.

Walter Robert Judge Advocate
Colonel, J.A.G.D.

James Blumley Judge Advocate
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1994

19 April 1945.

UNITED STATES)

v.)

Private First Class SIXTO CARPIO)
(38363378), Company "A", 79th)
Engineer Construction Battalion.)

Trial by G.C.M., convened at A.P.O.
70, 21 March 1945. Dishonorable
discharge, total forfeitures and
confinement for ten years.
The U.S. Penitentiary, McNeil
Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS and MURPHY
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 First Class Sixto Carpio, Company "A", 79th Engineer Construction Battalion, did, at APO 70, on or about 3 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Corwin W. Alloway, Company "A", 79th Engineer Construction Battalion, a human being, by shooting him with a rifle.

He pleaded "NOT GUILTY to the specification and Charge but pleads GUILTY to a violation, under the 93rd Article of War, of a lesser-included offense in that Private Carpio is GUILTY of an assault to commit a felony, namely, an assault with intent to commit bodily harm with a dangerous weapon".) He was found guilty of the specification except the words "with malice aforethought", "deliberately", "and with premeditation" and not guilty of the charge but guilty of a violation of the 93rd Article of War. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. (The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement.) Pursuant to Article of War 50^g, the record of trial was forwarded

to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence reveals that on 3 March 1945 Company "A", 79th Engineer Construction Battalion, of which accused was a member, was stationed at Neuva Ecija, Luzon, Philippine Islands. That afternoon at about 3:30 o'clock Sergeants William E. Draffen and Adolfo Ruel returned to their area from a visit to a nearby town and went to the motor pool. About half an hour later Sergeant Ruel was told by Sergeant Draffen to assist a Filipino in repairing a flat tire on his bicycle "Just outside the gate" (R. 40). While so engaged Sergeant Ruel was approached by accused, in company with two other soldiers (R. 40, 43, 44). Accused, who appeared to have been drinking but "seemed not to be mad" (R. 28) "started a little argument" and began talking to him in Spanish which he did not understand. Someone called Sergeant Draffen who was working in the motor pool nearby. Upon approaching accused Sergeant Draffen noted that he was not staggering, talked coherently and he did not smell liquor on his breath. He was asked by accused "Are you going to take up for Ruel?" Sergeant Draffen, "not knowing what was going on", replied "Yes" (R. 15). Accused then said, "I'm not in any mood to argue with anybody today (R. 40) * * * Hell, I will shoot you" (R. 15) or "Well, hell, I will just shoot you" (R. 16) and advanced (R. 20), raising his rifle from a "Parade Rest" (R. 23) with his helmet liner over the muzzle (R. 45) to a "Thrust" (R. 15, 23) position and pointed the rifle "with his finger on the trigger" (R. 43) directly at Sergeant Draffen. Sergeant Draffen "slapped it to my right" (R. 16). The gun, an M-1 rifle, went off while still in the hands of accused (R. 48), the bullet striking Private First Class Corwin W. Alloway, who was about 8 feet away (R. 17), in the left side of the chest inflicting a wound from which he died almost immediately (R. 9). Immediately after the shot was fired accused said, "See, I take no shit" (R. 34). Shortly thereafter accused was seen by his company commander slowly walking toward the kitchen. In about 15 minutes thereafter he saw him again and testified "he would not make any statement at all" (R. 9). He did not testify as to accused's sobriety.

At no time prior to the shooting did Sergeant Ruel hear any conversation between accused and deceased. He thought accused drunk at that time as he was not speaking "very clearly * * * he not hardly recognized me while I was there" (R. 32), and smelled liquor on his breath (R. 33). Other witnesses testified that accused "seemed normal" (R. 37) and that "he appeared to have been drinking - not drunk" (R. 38); while he had been drinking he was not drunk, and "had control of himself fully and to the point where you would consider him normal, although he had been drinking" (R. 39).

Private Carl O. Swanson of accused's unit, the only witness called by the defense, testified that on the morning of 3 March 1945 he and accused secured passes and visited a Filipino family at Cabanatuan. On the way they purchased one-tenth of a gallon of orange wine and drank it (R. 51). When they arrived they were served food and "a substantial amount of liquor" and while there consumed about one-tenth of a gallon of Filipino whiskey and a like amount of orange wine (R. 52-53) each consuming about an equal amount

of the liquor. He remembered leaving the house with accused about 3:00 o'clock but from that time until shortly after the killing he had a "lapse of memory" and remembered nothing (R. 54).

The accused elected to remain silent.

4. The accused was found guilty of voluntary manslaughter which is defined as:

* * * * unlawful homicide without malice aforethought
* * * where the act causing the death is committed in
the heat of sudden passion caused by provocation" (par.
148a, M.C.M., 1928).

The evidence is undisputed that at the time and place alleged accused committed "an assault with intent to commit bodily harm with a dangerous weapon", which resulted in the death of Private First Class Corwin W. Alloway. His real or imagined differences with Sergeant Ruel were transferred to Sergeant Draffen when the latter was called to the scene. He immediately used threatening words accompanied by actions designed to carry out the threat, and pointed at him a loaded rifle with his finger on the trigger. The fact that Sergeant Draffen "slapped" the rifle aside and by its discharge an innocent bystander was killed in no manner excused the accused for his unlawful acts (par. 148a, M.C.M., 1928, p. 163). His statements immediately preceding and subsequent to the shooting show that the rifle was not discharged accidentally. The evidence is clear that accused had been drinking prior to the killing but his state of intoxication was not shown to be such that he was not capable of entertaining a specific intent. Furthermore, by his plea of guilty of assault with intent to do bodily harm accused admitted his ability to entertain such intent. The court, in whose province it is to weigh the evidence, judge the credibility of witnesses, and resolve questions of fact (sec. 395 (56), Dig. Ops., JAG, 1912-40; Allison v. United States, 160 U.S. 203), excepted the words "with malice aforethought", "deliberately", "and with premeditation" from the specification and found accused guilty of willfully, feloniously, and unlawfully killing deceased, and guilty of violating Article of War 93 and thus convicted accused of voluntary manslaughter. There is substantial evidence in the record which would have supported a conviction of murder. The court, however, for reasons of its own, elected to find accused guilty of the lesser included offense of voluntary manslaughter. Even though the evidence does not support the definition of that offense as set out above accused was benefited by the court's election and he may not complain because he was not found guilty of the more serious offense (cf. CM 202359, Turner, VI B.R. 87, 114; Owens v. United States, 85 F.2d 270; 26 Am. Jur. sec 572, p. 559; 102 A.L.R. 1019, 1026).

5. Confinement in a penitentiary is authorized by Article of War 42 for the offense of manslaughter, recognized as an offense of a civil

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nature and so punishable by penitentiary confinement by section 275 of the Criminal Code of the United States (18 U.S.C. 454).

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

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Mark J. Cochrane, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2041

2 May 1945.

UNITED STATES

v.

Sergeant SAMUEL HILL
(33040748), Company "L",
368th Infantry Regiment.

) Trial by G.C.M., convened at
) 93rd Infantry Division, APO
) 565, 7 March 1945. Dishonor-
) able discharge, total forfeitures,
) confinement for life. The United
) States Penitentiary, McNeil
) Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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.

Specifications: In that Sergeant Samuel (NMI) Hill, Company "L", 368th Infantry, did, at APO 565, on or about 7 January 1945, forcibly and feloniously, against her will, have carnal knowledge of Baroe Banondi.

He pleaded not guilty to, and was found guilty of, the charge and its specification, and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution reveals that on 7 January 1945 Company "L", 368th Infantry was located at APO 565, Dutch New Guinea. Some

time in the early afternoon on that day (R. 18), a native, Samuel Jarisetou, who estimated the time by the sun, saw accused and three other colored soldiers enter the village of Tablancesoe which was about a mile from their camp (Ex.A). The accused was carrying a rifle and one of the others had a sabre (R. 16). The soldiers remained in that village about an hour and then left. Shortly thereafter Jarisetou went to the village of Mariboe, which was approximately a 45 minute walk from his home to visit his step-father and reached there about 3:00 o'clock (R. 18). He observed four colored soldiers, one of whom was the accused, approaching the village "coming over a jungle trail" which led out to a motor road built by American soldiers (R. 16). The accused approached Siakoet Banondi, one of the men of the village and said to him "Cherie, Pom Pom, Mary", meaning "I have come to the village to look for a woman". The native replied "No got". The accused then put "his rifle near the head" of the native and fired it "up into the air" and went "quick" to the front door of a hut where he saw four women (R. 17). All of the women ran from the hut, the victim, Baroe Banondi, carrying a child in her arms (R. 23). She was overtaken by the accused who threw her to the ground, opened her sarong, and committed an act of sexual intercourse upon her. At that time the victim "tried to get rid of" him, "screamed" and "cried" for her father, hit the accused with her fist and kicked him with her leg and "cried for help to get away". After the act was completed she tried "to run away" and was immediately ravished by accused's companion (R. 24). During the second assault Siakoet Banondi was held by accused. After the act was completed accused's companion took a knife from the native and "they went to the vilgge". Siakoet asked for his knife. It was returned to him and the soldiers left the village at which time accused again fired a shot from his rifle (R. 26, 27).

On 9 January, during the investigation of the alleged rape, Baroe Banondi identified accused as her assailant (R. 31, 34, 37, 38, 39) and other witnesses identified him as having been present in the village where the act took place (R. 34). While testifying, however, the victim failed to identify accused stating that she had never seen him before (R. 22, 23) but two other natives while testifying identified him (R. 16, 28).

The defense called as its first witness Private First Class Alford Edwards who testified he was a member of accused's unit. About 10:00 o'clock in the morning on the day in question, desiring to get some shells, he took his rifle and started toward a native village with another soldier taking a path through the jungle, where he was joined by the accused. Having purchased some shells they were returning from the village when -

*** Hill goes up behind, between the back in the jungle when I heard these two shots go off.

Q Who had the rifle?

A Hill had the rifle. ***M-1***

Q How far back in the jungle was Hill when he fired these shots, if you know?

A I don't know, it wasn't very far.

Q After the shots were fired, what happened then?

A I went around Walls [another soldier] to see what was going on. I asked Hill, he didn't say anything. I don't know if he shot up or down. Walls said 'let's get out of here'. All four started together. Hill stopped and Walls and I kept going. Hill and I started after these two shots were fired and we came around just to see what it was.

* * *

Q Did you say anything to him why he fired?

A I asked him what he was shooting at, he didn't say anything, just smiled (R. 45).

* * *

Q Did you see Oglesby at that time?

A No sir, I didn't see him. It was when we started back out of the village and looked at the Bay and a fellow with a hat and I said that looks like a soldier, let's wait and see who he is. We waited and sure enough it was Oglesby and we asked what time it was. He said around 12:15 and I and Hill we went back up the trail to the company." (R. 42).

He further testified that after the investigator had talked to Hill that "He [Hill] said to tell the investigators I had seen some [white] sailors on the trail"; that there were three of them and that they were dressed in dungarees and had no hats (R. 45). Accused stated to him that was what he had told the investigators and "He told me to say the same thing". He admitted that he had made that statement to the investigator and that it was untrue (R. 46).

Sergeant Jackson Meadows testified that he saw accused on the day in question in the company area at 10:00 o'clock in the morning and again at 2:30 or 3:00 o'clock in the afternoon and "the rest of the afternoon" (R. 48).

Private First Class Sammie Oglesby testified that in the morning of the day in question he went to Tablanoesoe "by the water front" to see about "some sea shells". About 1:00 P.M. he heard two shots fired and in about twenty minutes he saw "Hill and Edwards standing back of the water front" (R. 51) at which time accused was carrying a rifle (R. 52). While talking to them he observed some women running and asked Edwards "Why are the women running like that", Edwards replying that he reckoned it was because he (Edwards) "came up here" (R. 53). Edwards, accused's companion, was present at guard mount at 3:30 that afternoon (R. 58).

Captain William P. Hurd, Jr., accused's commanding officer, testified that he had known accused since September 1943 and that his service record showed nothing "that would bear against his character * * * I had to give him a rating of excellent, which he deserved" (R. 61).

The accused elected to remain silent.

4. The accused is charged with the crime of rape which has been defined as "the unlawful carnal knowledge of a woman by force and without her consent" (par. 148b, M.C.M., 1928). In the instant case the evidence is undisputed that at the time and place alleged Baroe Banondi was ravished. While the identity of the accused as the perpetrator of the crime was both established and denied by the victim, other witnesses definitely identified him as the guilty party. The facts and surrounding circumstances give added weight to his guilt. He told one of his companions to tell the same story to the investigating officers which he (accused) had told, his companion admitting that such story was untrue. The defense attempted to establish an alibi in that at the time the crime was committed accused was in his company area. While the time element was uncertain, being based on the natives' observation of the sun, it became relatively unimportant in the light of other testimony which fully warranted the court in rejecting this defense. The court, in whose province lies the determination of contraverted issues of fact, the weighing of the evidence, and the judging of the credibility of witnesses, found accused guilty as charged (cf. sec. 881, Vol. II, Wharton's Crim. Evid., p. 1520). There was abundant evidence to warrant its findings.

No errors injuriously affecting the substantial rights of the accused were committed during the trial. A sentence of death or of life imprisonment is mandatory under Article of War 92 upon conviction of rape, and confinement in a penitentiary is authorized by Article of War 42 for the offense, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 276 Criminal Code of the United States (18 U.S.C. 455).

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

(Absent) _____, Judge Advocate.
Colonel, J.A.G.D.

Richard Roberts _____, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy _____, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
 In the Branch Office of The Judge Advocate General
 Melbourne, Victoria,
 Australia.

Board of Review
 CM A-2042

4 May 1945.

UNITED STATES

v.

Captain CHRISTOPHER J. MENDELIS
 (0400544), Medical Corps, Head-
 quarters, Far East Air Service
 Command.

Trial by G.C.M., convened at
 APO 565, 20 February 1945.
 Dismissal, total forfeitures,
 confinement for one year and
 a fine of \$4,000.00. The
 United States Disciplinary
 Barracks, Fort Leavenworth,
 Kansas.

HOLDING by the BOARD OF REVIEW
 STAGG, ROBERTS, and MURPHY,
 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 96th Article of War.

Specification 1: In that Captain Christopher J. Mendelis, Medical Corps, did, at APO 565, between 1 September 1944 and about 31 December 1944, with intent to deceive, wrongfully falsify the alcohol register of the Dispensary, 92nd Replacement Battalion (AAF)(P), formerly the Dispensary, 268th Replacement Company, by fictitious entries with respect to the consumption of alcohol and the daily average attendance at sick call, which entries were known by the said Captain Mendelis to be false and fraudulent.

Specification 2: In that Captain Christopher J. Mendelis, Medical Corps, did, at APO 565, between 1 September 1944 and about 31 December 1944, wrongfully sell to persons unknown, about 77 gallons of ethyl alcohol and 2 quarts of medicinal whiskey, of a total value of about \$51.00, property of the United States, for a consideration of approximately \$10,000.00.

CHARGE II: Violation of the 94th Article of War.

Specification: In that Captain Christopher J. Mendelis, Medical Corps, did, at APO 565, between about 1 September 1944 and about 31 December 1944, knowingly and willfully misappropriate about 77 gallons of ethyl alcohol and 2 quarts of medicinal whiskey, of a total value of about \$51.00, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to both charges and their specifications and was found guilty of the first specification of Charge I and of its second specification except the words "and 2 quarts of medicinal whiskey", and the figures "\$51.00" and "\$10,000.00", substituting therefor the figures "\$49.28" and "\$3,500.00" respectively, of the excepted words and figures not guilty, of the substituted figures guilty, and guilty of Charge I. As to the specification of Charge II he was found guilty except for the words "and two quarts of medicinal whiskey" and the figure "\$51.00", substituting for the latter "\$49.28", of the excepted words and figure not guilty, of the substituted figure guilty and guilty of Charge II. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to be confined at hard labor for one year and to pay to the United States a fine of \$4000.00. The reviewing authority approved and the confirming authority confirmed the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence reveals that the accused, Captain Christopher J. Mendelis, MC, was in charge of the 268th Replacement Company Dispensary, subsequently changed to the 92nd Replacement Battalion Dispensary, APO 565, New Guinea, from 29 August 1944 to 1 January 1945. This unit drew its medical supplies from Base G Medical Supply Depot on regular requisition forms (R. 9), records of which with the tally-outs were kept by Staff Sergeant Arthur H. Pennock, Sr., of the 27th Medical Depot Company (R. 6). From 29 August 1944 requisitions were received by the Supply Depot (R. 9-55) signed by accused for 105 gallons of ethyl alcohol (Pros. Exs. 1-14 incl.) at a stipulated government value of 64¢ per gallon (R. 63) with written request that such alcohol be delivered to designated members of accused's unit (R. 21-26). Corporal David Allan Schoor, of accused's unit, testified that during the month of September 1944 there came into the dispensary three cans of alcohol, four cans in October, one can in November and two cans in December (R.86).

On 6 December 1944 and several times subsequently there appeared a typed statement on the requisitions "Basis, five thousand men, period, month" which statement was not required by any regulation (R. 49-51). All of the alcohol requisitioned was issued to the designated members of accused's unit or to the accused personally (R. 55). A dispensary register was kept showing the number of patients treated averaging approximately 150 per day. After the month of October no daily register was kept but an estimate was made by the accused based on the number of patients previously on the daily register (R. 81). The latter part of September 1944, Corporal Schoor observed that a "Private Gaines" came to the dispensary where Gaines and accused had a "hushed and whispered conversation in the back of the dispensary" (R. 90). After that he (Pvt. Gaines) continued to come back "About two or three times a week" until "the end of October" (R. 90, 173) and after the second visit he brought an empty container of about "a half gallon quantity" and before he left it would be filled with alcohol by the accused from a gallon jug (R. 91, 92, 93, 145, 172). During the latter part of September 1944 (R. 99) Corporal Schoor heard the accused and Private Gaines discussing the amount of money owed accused by Gaines which was "well over 100 guilders"; accused was "worried concerning the money * * * since he found out that Gaines was due for rotation (R. 97, 98, 145) near the end of December 1944. This witness heard accused tell Private Snyder "I was glad he came. I'll be getting my orders one of these days, and I've earned \$9,600. since I have been overseas" (R. 102). Some time in October upon accused's instructions he delivered to an unidentified cook a quart of alcohol for which he received "For Captain Mendelis" fifteen guilders which he gave the accused who "split the f15 among us - the three of us present - Private Wolf, Snyder, and myself" (R. 106, 124). Alcohol was also given by the accused or by "any of the boys directed to give it, to cooks in exchange for food, which he [accused] used to put in the ice box" (R. 107). He further testified that the normal use of alcohol in a dispensary of that size would be about a gallon a week (R. 124). No records of "incoming alcohol" were kept and in October the files on requisitions and tally-out slips were destroyed by the accused (R. 129).

Private Martin Wolf, of accused's unit, testified that he was a medical technician and that during the months of September and October 1944 there came into the dispensary five gallons of alcohol per week (R. 138) and fifteen gallons during the month of November. His estimate of the amount of alcohol used by the dispensary would be a "Gallon, more or less, per week" (R. 140, 169). Some time during the month of December 1944 Private Wolf was awakened about midnight by "a man" who insisted on seeing accused, stating that he had "something in his eyes". Accused was called and shortly thereafter Private Wolf took out two five-gallon cans of alcohol and brought them to a truck. Accused drove away with this man, and "stayed

away about 3/4 to an hour and Captain Mendelis came back". Accused did not have the cans of alcohol when he returned (R. 146, 147). The day accused left for the States this witness heard Major Grigsby question accused on the "subject of alcohol" (R. 148) at which time accused stated "that if any alcohol was disappearing, he didn't know anything about and perhaps the enlisted men did". The enlisted men were then questioned on this subject and all replied "No" (R. 149).

Private Carl A. Snyder, of accused's unit, largely corroborated the testimony of the preceding witnesses relating to the transactions between accused and Private Gaines (R. 184). He further testified that on several occasions at accused's direction he took out a total of five or six gallons of alcohol from the dispensary at about 8:00 o'clock at night (R. 191) and placed them by a truck (R. 192) and that accused stated to him that he received \$250.00 per can for the alcohol (R. 190). On several occasions he heard accused talk about "plans he was going to make for a clinic. * * * he was going to put up a big clinic and he would be all set to go after the war was over. * * * He said that he had been struggling all of his life, that he had a hard time going through medical college" (R. 190).

Staff Sergeant William E. Hardin, Base Area Command, Camp Washington, testified that on numerous occasions he accompanied Private Gaines to the dispensary and saw the accused fill containers which Gaines brought with him with something "he took from a big can out of a locker" (R. 195). On one occasion he saw Gaines give accused some money and heard accused say "something about how did the last deal go over" (R. 196). Upon returning from the dispensary with Gaines on one of these visits they observed some MP's parked near the A.P.O. Gaines got out, instructing Hardin to proceed with the jeep in which there was a gallon of alcohol. This witness did as directed but became frightened and threw the alcohol in the ocean and later paid Gaines 162 guilders (approx. \$81.00) for it (R. 198-199). Subsequently he approached accused and tried to buy some alcohol from him but accused stated that he had "quit selling alcohol" (R. 199).

Major Robert E. Grigsby, MC, Depot Surgeon, APO 714, testified that he had overall supervision of medical installations of the 22nd Replacement Depot (R. 221) and was responsible for the supervision of the 268th Replacement Company Dispensary (R. 223). On the night of 29 December 1944 he learned of orders transferring the accused back to the States and that he was to be placed in charge of the dispensary. On the morning of 1 January 1945 he began checking "the equipment that was to be turned over, and the narcotic register and the alcohol register" (R. 228). The check revealed no discrepancies as to equipment and narcotics but the alcohol register (Pros. Ex. 15) proved not to have been kept in accordance with regulations which provided for "The tally-outs from the Medical Supply Depot, the duplicate copy of the receipts, also a copy of the initial requisition, also prescriptions numbered and pasted in a book or at least filed, and to whom

the alcohol was given and for what prescription it was withdrawn, and initialed" (R. 231, 270). Upon asking accused why they were not in order accused said that "he never kept them" (R. 270). The accused turned over to him a small book in accused's own handwriting on which the word "Alcohol" was written (R. 299; Pros. Ex. 15) which summarized at the end of each month the amount of alcohol on hand, the number of immunizations and the total number of patients treated (R. 230). Such record disclosed the receipt and disposal of 70 gallons and one quart of alcohol; also, that the daily average sick calls were 300, whereas the dispensary register kept by one of the clerks giving the name and serial number of each patient (Pros. Ex. 16), for the month of October 1944 indicated an average sick call of fifty-seven (R. 73). Reports of sick and wounded (Form 51) based on figures given by accused for September, October and November showed an average sick call of one hundred and fifty-six (R. 79, 80, 83, 208; Pros. Ex. 18, 19, 20) but his assistants and attendants testified that the average daily sick call attendance was from sixty to one hundred and fifty (R. 161, 329) with possibly twenty-five to fifty "stragglers" in addition (R. 176). Major Grigsby told accused he was not satisfied and "was going to investigate it further" (R. 266).

The accused elected to make an unsworn statement in which he recited his hardships and financial difficulties during his early life, continuing throughout his college career and internship, during which time he borrowed money from both his wife and her family (R. 343, 344). He neither smoked, drank nor gambled (R. 346). Upon entering the Army his father-in-law requested that he repay him the money which he owed him. After having various assignments in the States he was sent overseas, arriving in New Guinea in 1942 (R. 350). On or about 1 September 1944 "without premeditation and suddenly" he saw "an opportunity to obtain large sums of money by the sale of Government issue alcohol", the proceeds from which he intended to build a clinic and purchase a Cadillac automobile. He thereafter obtained from the sale of government issue alcohol "Just over \$3,500" which he sent to his wife and mother (R. 349), sending in all from 1 September 1944 to the end of the year \$4,200.00, about "\$600 or \$700" being money saved from his Army pay (R. 350). When he returned home in January 1945 he was to attend a Flight Surgeon's Training School having been recommended by the Air Surgeon, Colonel Simpson. He was then returned to this theater for his trial (R. 352).

Captain Cornelius Joseph Waldo, Chaplain, of Headquarters, Far East Air Service Command, and Major Herman Fred Antonini, MC, of Headquarters, V Air Service Area Command, testified that accused's character was "excellent" (R. 354, 355). Major Harry M. Kandel, MC, 51st General Hospital, testified that he had been a psychiatrist since the inception of the 51st General Hospital and on 18 February 1945 examined the accused. Basing his opinion on accused's career and his actions at the time in question he would consider him "mentally ill". His opinion was that accused was able to distinguish

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right from wrong but could not adhere to the right (R. 360, 375), such opinion being based solely on accused's statements to him (R. 361). The prosecution requested an adjournment for the purpose of having accused examined on the question of his sanity; the court overruled this request (R. 379).

4. The record is clear that at the time and place alleged the accused kept in his own handwriting an alcohol record not in accordance with regulations. He admitted the falsity of such record. He also admitted the receipt of "Just over \$3,500" from the wrongful sale of alcohol, the property of the United States furnished and intended for the military service. The evidence fully supports the court's finding accused guilty of these offenses. While the proof of the exact amount of alcohol misappropriated by the accused was not shown the evidence revealed the receipt of 105 gallons by the accused and there was testimony that the normal need for alcohol in a dispensary such as that in charge of the accused was only one or two gallons per week. Assuming that 2 gallons of alcohol per week were required for the proper operation of the dispensary, 40 gallons would have normally been used during the period in question, leaving approximately 65 gallons unaccounted for. Accused was not prejudiced by the variance in the proof as to the amount of alcohol misappropriated by him, especially in the light of his admissions. The evidence warrants the court's finding accused guilty of this offense.

Accused's attempt to excuse his wrongdoing because of a lack of mental accountability was properly rejected by the court in whose province lies such determination (CM 244490, Peace, XXVIII B.R. 309, 323).

The record contains no errors affecting the accused's substantial rights and the sentence is permissible.

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

(Absent), Judge Advocate
Colonel, J.A.G.D.

Walter J. Roberts, Judge Advocate
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate
Lieutenant Colonel, J.A.G.D.

1st Ind.

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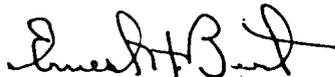
Army Service Forces, Branch Office of The Judge Advocate General, A.P.O. 924, 16 May 1945.

TO: Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. In the case of Captain Christopher J. Mendelis, O400544, Medical Corps, Headquarters, Far East Air Service Command, 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 the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM A-2042)



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 2, USAFP, 17 Jul 1945)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2043

21 May 1945

UNITED STATES)

v.)

Private First Class THOMAS
H. DUKES (34007595) 1520th
Engineer Water Supply
Company.)

Trial by G.C.M., convened at
Headquarters XIV Corps, APO
453, 6 April 1945. Dishonor-
able discharge, total forfei-
tures, confinement for life.
The United States Penitentiary
McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 First Class Thomas H. Dukes, 34007595, 1520th Engineer Water Supply Company did, at Army Post Office 453, on or about 7 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Andrew Richardson, a human being, by shooting him with a carbine.

He pleaded not guilty to, and was found guilty of, the charge and its specification and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The reviewing authority

approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. About 10:30 on the morning of 7 March 1945, Private Thomas H. Duker (accused) a member of the 1520th Engineer Water Supply Company was at the company's purification plant at its water point in the vicinity of Manila, P.I.. Accused told Sergeant Scott McMorris who had just arrived that he had traded a Jap rifle for a carbine and the Sergeant said that he should have retained the rifle as a souvenir (R.15). A short time later accused approached the Sergeant who was then seated upon the fender of a truck near the purification unit and said, "You go to work at twelve o'clock; this is your first eight hours on". While talking, accused took a carbine from his shoulder, pulled back the bolt and "sends it home" and slung the gun over his shoulder (R.37,42). It appears that the sergeant then arose and went inside the truck where the purification unit was housed. Private Andrew Richardson, the deceased, described as a shorter but heavier and stronger man than accused (R.22), who was standing about 15 feet away (R.40,42), noting accused's actions said to him, " 'I wouldn't do that; you are supposed to be a man with an education and you ought to have better sense' ". Accused replied, " 'You stand like a man that has no sense' "; whereupon deceased told accused that "he would kick his ass". Accused retorted "If you kick my ass your mother won't see you no more, and I hope you don't play the dozen an opprobrious and insulting expression" (R.37,38,39). Deceased advanced towards accused and the latter took the carbine from his shoulder, and held it "in a port arms position at a 45 degree angle", with his left hand around the stock (R.40,42). Deceased grabbed the gun and it was discharged several times. Sergeant McMorris, hearing the firing, looked out of the window of the truck and saw accused and deceased "tusseling", each holding the carbine and trying to pull it from the other's grasp. Accused had his right index finger through the trigger guard, resting on the trigger, and deceased's right hand was on the stock (R.18,23). The sergeant ran out of the truck and found accused and deceased lying on the ground, facing each other (R.18,19), deceased having "sagged" or fallen to the ground (R.31,32,45). The carbine was between the two men, both of whom were holding the gun, accused's finger being on the trigger (R.19,20). The sergeant grabbed the carbine and pulled it, pulling accused up and two shots more were fired from the gun (R.19,20,23). Sergeant McMorris could not state in which direction the muzzle of the gun was pointing at the time (R.20). The deceased said, "Take me somewhere, I am shot" (R.21,25). He was taken to the hospital but died that day

of bullet wounds (Pros. Ex. A). An autopsy showed three penetrating wounds at about the level of the lower ribs, one wound of exit being just to the right of the umbilicus, another just in front of the right hip bone, and the third through the right buttock. There was a fourth bullet wound in the palm of the deceased's right hand, the exit of which was under the wrist. All of the wounds were surrounded by powder burns. The wounds, particularly that through the buttocks, which severed a large vein, would have caused death (R.12,13).

Accused elected to remain silent and the defense introduced no witnesses.

4. Accused was charged with and found guilty of the murder of Private Andrew Richardson. Murder is the unlawful killing of a human being with malice aforethought (par. 148a, M.C.M., 1928).

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. 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. (Clark.)

"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 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 a 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 or by a wish that it may not be caused; * * *" (par. 148a, M.C.M., 1928).

The court had before it evidence that accused, for no apparent reason, inserted a round in the chamber of a carbine which he was carrying and reslung it over his shoulder. Upon being told by the deceased that he should have "better sense" than that, he replied,

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"You stand like a man that has no sense". Deceased then told accused that "he would kick his ass", accused replying that if he did deceased's mother would never see him again. Deceased advanced toward the accused and grabbed the gun. During the subsequent struggle for its possession it was discharged several times. Deceased and accused fell to the ground, a sergeant endeavored to take possession of the carbine, and it was discharged twice more. The evidence does not reveal which shots inflicted deceased's various wounds but as the rifle was discharged only twice when the sergeant attempted to pull it away from the men on the ground and as deceased had three wounds in the body and one in the hand it follows that at least one of the shots pierced deceased's body during the initial struggle. From the nature of the several wounds in deceased's body received at a distance sufficiently close to cause powder burns, the court could conclude that any one of them was mortal and was a contributing cause of deceased's death. The evidence further reveals that both during the initial struggle and later, when the sergeant endeavored to gain possession of the carbine, accused's finger was on its trigger. There is substantial evidence in the record, therefore, from which the court could conclude that both during the initial struggle and when the sergeant endeavored to pull the gun from accused's grasp the latter intended to fire the gun and that the action of the sergeant was not an independent intervening cause of deceased's death.

While the evidence shows that deceased threatened to "kick" accused and advanced toward him, such action was not of such a nature as to warrant the belief that he was in danger of death or great bodily harm at the hands of the deceased and that it was necessary to kill to avert the danger (par. 148a, M.C.M., 1928). The testimony and the reasonable inferences therefrom furnish substantial evidence from which the court could properly conclude that the homicide was not excusable, but that accused unlawfully, willfully, and with malice aforethought shot deceased following a declaration, in effect, that if the latter attempted to "kick his ass" that he would kill him and thus find him guilty of the offense charged.

A sentence of death or of life imprisonment is mandatory upon conviction of murder in 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 by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452,454).

5. For the reasons stated above the Board of Review holds the

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record of trial legally sufficient to support the findings and sentence.

(Absent) _____, Judge Advocate.
Colonel, J.A.G.D.

Robert J. L... .., Judge Advocate.
Colonel, J.A.G.D.

James O. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.



ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2044

2 May 1945.

UNITED STATES)

v.)

Private EARL G. WHITE
(16047426), 211th Port
Company.)

Trial by G.C.M., convened at
APO 70, 12 March 1945. Dis-
honorably discharge, total
forfeitures, confinement at
hard labor for fifteen years.
The United States Disciplinary
Barracks, Fort Leavenworth,
Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 64th Article of War.

Specification 1: In that Private Earl G. White, 211th Port Company, did, at APO 70, on or about 28 January, 1945, strike First Lieutenant Kenneth R. Smith, 211th Port Company, his superior officer, who was then in the execution of his office on the face with his fists.

Specification 2: In that Private Earl G. White, 211th Port Company, did, at APO 70, on or about 28 January, 1945, lift up a weapon, to wit a hand grenade against Second Lieutenant James M. Riley, 211th Port Company, his superior officer, who was then in the execution of his office.

He pleaded not guilty to the charge and its specifications, was found

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guilty as charged, and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for fifteen years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence reveals that about 6:30 (R.5,13) on the evening of 28 January 1945, accused, a member of the 211th Port Company, APO 70, entered his organization's area carrying a .45 calibre pistol and fired 8 or 10 times into the air (R.6,7). Captain Norm D. Jones and 2nd Lieutenant James M. Riley, of accused's company, who were in the officers' quarters across the road heard the firing and went to the company area. They were told that accused had been doing the shooting and saw him standing 10 or 12 yards away. Lieutenant Riley walked "two or three paces" toward accused who reached into his belt and pulled out a .45 pistol and held it cocked at his side (R.7,9,14,19), saying, " 'Don't come any closer, lieutenant. I'm doing the firing. I'm doing the shooting now' " (R.13). The Lieutenant ordered accused to give him the pistol (R.9,19) and the latter replied " 'If you want the gun, come and get it' " (R.10). The Lieutenant advanced toward accused and "secured his arms through the side". Accused cursed the Lieutenant and the officers and non-commissioned officers of the company in the most vile language. Lieutenant Riley testified, "He seemed to be in a condition of almost hysteria, very violent in his language and manner" (R.14). After "a short period of struggling with him", the Lieutenant gained possession of the pistol (R.13), threw it toward Captain Jones who was standing behind him (R.9,14), freed accused (R.20) and told some of the non-commissioned officers standing nearby to take accused away and quiet him. Accused immediately reached into his belt and pulled out an "M-1 Anti-Personnel Grenade" holding it in his left hand with a finger of his right hand in the safety pin (R.14). Accused shouted wildly "he would blow us all to hell" (R.6,14,19). Lieutenant Riley again seized accused and held his wrists preventing him from pulling the pin of the grenade (R.14). Accused cursed the Lieutenant and said, " 'If you don't let me loose, I will pull the pin' " (R.8). Lieutenant Riley asked Lieutenant Kenneth R. Smith who had arrived at the scene to help him (R.14,16). As Lieutenant Riley secured the grenade, accused "whirled around" (R.14) and Lieutenant Smith tripped and fell down (R.10,14,17). Accused fell "or jumped" on Lieutenant Smith and while in that position struck the latter on the face with his fist (R.11,16), and was "tearing at his shirt and struggling with him" (R.14). Accused was seized by some of the men standing nearby. He cursed Lieutenant Smith and made a second attempt to strike him (R.16,18), and was then taken to the stockade (R.6).

The defense introduced no witnesses and the accused elected to remain silent.

4. It is clear that accused offered violence against Lieutenant Riley when that officer attempted to take first a pistol and then a hand grenade from him. It is further evident that accused struck Lieutenant Smith who had come to the assistance of Lieutenant Riley. Each of the officers was then in the execution of his office (par. 134a, M.C.M., 1928; Winthrop, Mil. Law & Prec. p 571). It does not appear that accused was under the influence of liquor or otherwise not mentally responsible for his actions. He was cognizant that Lieutenant Riley, at least, was an officer as he called him "Lieutenant".

Accused's conduct was violative of Article of War 62, and furnishes substantial evidence from which the court could find him guilty as charged. The punishment imposed is authorized.

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

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Leslie J. Roberts, Judge Advocate.
Colonel, J.A.G.D.

James O. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General,
A.P.O. 924, 3 May 1945.

To: Commanding General, USASOS, A.P.O. 707.

1. In the case of Private Earl G. White (16047426), 211th Port Company, 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 the execution of the sentence.

2. Before the sentence is ordered executed in this case it is recommended that the accused be hospitalized for the purpose of determining his sanity. There is no evidence in the record of his trial, the report of investigation, or in any of the other accompanying papers which casts any light explanatory of the extraordinary conduct of the accused which led to his prosecution. No witness before the court was questioned respecting his observation of the state of accused's sobriety or of his knowledge as to the cause of the accused's conduct in firing his pistol 8 or 10 times into the air. The report of investigation of the charges is likewise silent with respect to the mental condition of the accused or his sobriety, except for the statement of the investigating officer that he had "no reasonable ground for belief that the accused is, or was at the time of the offense charged, mentally deficient deranged or abnormal". A most extraordinary statement under the circumstances and reflecting an insufficient investigation of the charges. The affidavit of Staff Sergeant Lyles Glenn forming part of the report of investigation contains the following statement:

"On the night of Sunday January 28 1945, Private Earl G. White came into the camp and without cause took out his pistol and began firing it. He fired about ten times then he wanted to know "what Mother *** doesn't like it". So in about five or ten minutes Captain Jones and Lt Riley came over to find out who did the firing and at the same time White came out saying that he was the man and he wanted to know who didn't like it. Lt Riley took the Pistol from him and then White had a hand grenade in his hand and said he was going to pull the pin out of it and blow the Lieutenant and himself up."

The conduct of the accused as described above is not that of a normal man and further inquiry into his mental condition at the time is indicated.

3. When and if copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:
(CM A-2044).


ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2050

10 May 1945..

UNITED STATES)

v.)

Private DONALD C. WULLNER)
(12167289), Company "F",)
127th Infantry.)

Trial by G.C.M., convened at
APO 32, 7 April 1945. Dis-
honorably discharge, total
forfeitures, confinement
for life. The United States
Disciplinary Barracks, Fort
Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 75th Article of War.

Specification 1: In that Private Donald C. Wullner, Company 'F', 127th Infantry, did, at the Villa Verde Trail, Luzon, Philippine Islands, on or about 12 March 1945, while before the enemy shamefully refuse to rejoin his Company which was then engaged with the enemy.

Specification 2: In that Private Donald C. Wullner, Company 'F', 127th Infantry, being present with his company while it was engaged with the enemy, did, at or near the Villa Verde Trail, Luzon Philippine Islands, on or about 10 March 1945, shamefully abandon the said company and seek safety in the rear.

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

Specification 1: In that Private Donald C. Wullner, Company 'F', 127th Infantry, having received a lawful command

from Lt. Colonel Charles R. Meyer, his superior officer, to rejoin his company, did, at the Villa Verde Trail, Luzon, Philippine Islands, on or about 12 March 1945, willfully disobey the same.

Specification 2: In that Private Donald C. Wullner, Company 'F', 127th Infantry, having received a lawful command from Colonel Frederick R. Stofft, his superior officer, to rejoin his company, did at the Villa Verde Trail, Luzon, Philippine Islands, on or about 12 March 1945, willfully disobey the same.

He pleaded not guilty to, and was found guilty of, the charges and specifications, and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence reveals that on 9 March 1945 the first and third battalions of the 127th Infantry were engaged with the enemy on the Island of Luzon, P.I.. The second battalion, although held in reserve, was in close proximity to the enemy and that night Japanese infiltrated into its positions and two were killed. Accused was a member of Company "F" of the second battalion. Early on the morning of 10 March Company "F" was attached to the first battalion and moved out of its reserve position (R. 7, 11). That day accused absented himself without leave. He surrendered at the office of the Provost Marshal, 32nd Infantry Division, in the town of Agno two days later and was returned to his battalion's forward command post (Pros. Exs. A, B).

Captain Herbert C. Woodson, the battalion Executive Officer, asked accused "what the trouble was". He said, "Sir, I just can't go forward. * * * I am afraid!" (R. 8). Accused was ordered to remain until the arrival of Lieutenant Colonel Charles R. Meyer, the battalion Commander, at which time accused told him that he could not go forward. The colonel said, "I will send you forward under guard, make you go forward, and rejoin your Company!". Accused replied, "Sir, once the guard leaves I will run out, I will leave, I can't stay forward!" (R. 8, 12). The colonel explained to accused that all of the men were afraid (R. 12) and that it was his obligation to his country and to his family to go forward with the rest of his company but accused said, "Sir, I can't do it. I will only cause trouble and leave again at the first opportunity * * * If I would leave I would cause further harm to the men in the unit * * * somebody will get hurt because it was my fault, because I will run away * * *!" (R. 8, 10, 22). He said that he realized that he would be subject to trial by court-martial and might be sentenced to life imprisonment or to death.

The colonel three times ordered accused to go forward and accused refused each time (R. 8). The colonel offered to assign accused to another company which did not know his background and further stated that if accused accredited himself at the front he would then be assigned to the P and A Platoon where the work would not be so hard (R. 8, 13). Accused again refused, was told he was under arrest, and Captain Woodson was directed to take him to the Regimental Command Post. The captain testified " * * * enroute I stopped and asked * * * /him/ to sit down. * * * I was just trying to talk to him as a padre you would say I guess, to see if there was any personal matter worrying him. * * * but he told me very straight forwardly he appreciated what I said and what I was doing but it was no good he couldn't rejoin his Company" (R. 9). Accused was taken before Colonel Frederick R. Stofft, the Regimental Commander, and told him also that he could not go forward to rejoin his company. The colonel ordered him to go back to his organization in the line and accused said that he was frightened; that if he went back he would "do the same thing over again" (R. 16) and that he "would mess things up up there and would probably get other people killed besides himself" (R. 18). The colonel informed him of the penalties which might be imposed upon him for refusing to obey the order to go forward but accused said "he would take whatever the court-martial would offer" (R. 16). The several officers testified that accused "wasn't jittery or anything". He appeared "calm" and "very casual" (R. 9, 13, 16) during the conversations related.

The defense introduced no witnesses and accused elected to remain silent.

4. The evidence clearly establishes that on 10 March 1945 accused, being present with his company before the enemy, misbehaved himself by abandoning his company (Specification 2, Charge I), and upon being returned to his battalion's forward command post refused to go to the front lines to rejoin his unit (Specification 1, Charge I). Such conduct is violative of Article of War 75 and the record fully supports the court's findings of guilty of Charge I and its specifications.

In the two specifications of Charge II accused is charged with the willful disobedience of orders of two of his superior officers to rejoin his company. Such disobedience is clearly established by the evidence. However, it was the refusal to obey those orders, with the additional allegation of the aggravating circumstances that his company was then engaged with the enemy, which was made the basis of Specification 1 of Charge I. Although the offenses alleged in that specification and the specifications of Charge II were separate and distinct, they grew out of what was substantially one transaction and the sentence should be limited to that prescribed for the major offense. Inasmuch as there is no limitation upon the sentence which may be imposed upon conviction of any of the offenses alleged, no prejudice resulted to accused from the multiplication of charges.

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

(Absent), Judge Advocate.

Leslie Schuch, Judge Advocate.
Colonel, J.A.G.D.

James A. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 924,
15 May 1945.

To: Commanding General, 32nd Infantry Division, A.P.O. 32.

1. In the case of Private Donald C. Wullner (12167289), Company "F", 127th 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 the execution of the sentence.

2. Before final action is taken in this case it is recommended that further consideration be given the matter of the appropriate sentence to be ordered executed. In my opinion the circumstances of this case do not justify a life sentence. In brief the facts are as follows: A 22 year old soldier, ten days to two weeks after joining his company as a replacement, came under fire for the first time and immediately left his company for safety in the rear. Two days later he presented himself at the office of the Division Provost Marshal and was taken back to his battalion command post; subsequently, several officers, including the Colonel of his regiment, talked to him in an effort to persuade him to rejoin his company. This was of no avail, the soldier stating that he was afraid and that if he went up to the front he knew that he would again seek safety in the rear and that his conduct might cost the lives of other men. Even when told that he could be sentenced to death for refusing to go forward he said he understood that and persisted in his refusal.

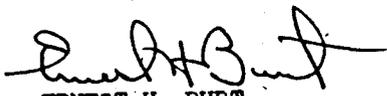
It should be borne in mind that all conduct violative of Article of War 75 does not justify either the death penalty or life imprisonment and neither is a mandatory sentence. Probably the majority of offenses under this Article, while possibly deserving a severe sentence do not fall within the category of those deserving the death sentence or imprisonment for life. In the instant case there is no evidence as to the

the exact circumstances existing when the accused abandoned his company; there is no evidence that at the time of leaving the company it was engaged in combat with the enemy as distinct from preparation therefor; there is some evidence that the accused at the time of seeking safety in the rear was under artillery and mortar fire. Except that his departure toward the rear lessened the strength of his unit by one man there is no evidence that he otherwise put in jeopardy the life of any of his comrades. It is not difficult to imagine a circumstance where a soldier forsakes his comrades, including the wounded, in the face of the enemy and when every rifle shot is needed; in such a case the death penalty might well be merited. In a slightly less serious instance a life sentence might be justified, but as stated above the majority of these offenses, while serious, do not justify either the death penalty or life imprisonment. In this connection the magnitude of a 20 year term of confinement, for example, should not be lost sight of.

In conclusion in connection with this subject of appropriateness of sentence there is now being reviewed in this office the record of trial of a 2nd Lieutenant of Infantry who was convicted of refusing to go forward with his platoon during an attack against the enemy in violation of Article of War 75. Although he had not specifically been ordered to go forward, he stated, as in the instant case, that he would not go forward and that they could court-martial him if they wanted to. The sentence of the court-martial provided for dismissal, confinement at hard labor for 5 years, and a fine of \$500. The reviewing authority remitted the fine and the Commander in Chief, SWPA, as the confirming authority, reduced the term of confinement to one year. The basic offense by the Lieutenant is essentially the same as that of the soldier in the instant case. Both through fear sought safety in the rear and refused to rejoin their commands, preferring to be court-martialed instead. Considering the action of the Commander in Chief in reducing the five year term of confinement in the case of the Lieutenant to one year it seems hardly necessary to comment further respecting the inappropriateness of the life sentence in the instant case. It is recommended, therefore, that the term of confinement be reduced to one more nearly in keeping with the average sentence of confinement as reflected in the furnished statistical data, that the execution of the dishonorable discharge be suspended, and that a local place of confinement be designated.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM A-2050)


ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.



ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria.
Australia.

Board of Review
CM A-2070

13 May 1945

UNITED STATES

v.

Private First Class FRANCIS
E. LIVINGSTON, (37017906),
892d Chemical Company Air
Operations.

} Trial by G.C.M., convened at
} APO 710, 11 April 1945. Dis-
} honorable discharge, total
} forfeitures, confinement for
} ten years. The Federal Reform-
} atory, El Reno, Oklahoma.

OPINION by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 Private First Class Francis E. Livingston, 892nd Chemical Company Air Operations, did, at APO 73, on or about 5 March 1945, with intent to commit a felony, viz, sodomy, commit an assault upon Nestor Garcia, by willfully and feloniously striking the said Nestor Garcia in the face with his fist.

Specification 2: In that Private First Class Francis E. Livingston, 892nd Chemical Company Air Operations, did, at APO 73, on or about 5 March 1945, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anum with Nextor Garcia.

He pleaded not guilty to the charge and its specifications, but guilty of assault in violation of Article of War 96. He was found guilty as

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charged and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. The reviewing authority approved the sentence but reduced the period of confinement to ten years and designated the Federal Reformatory, El Reno, Oklahoma as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that at about four o'clock on the afternoon of March 5, 1943, the accused, Private Francis E. Livingston, a member of the 892nd Chemical Company, APO 73 and Private First Class Harold Dauson, were in Dauson's tent drinking cherry wine. With them was a Filipino boy, Nestor Garcia, fifteen years of age. About six o'clock the three of them went to the house of Garcia which was about 2 miles from their camp (R.7). Livingston and Dauson finished drinking about a half-bottle of wine making a total of two quarts which they had consumed (R.10). They remained there until about ten o'clock that night at which time the accused and Garcia left, the accused stating that he was going back to camp to get some beer (R.8); Dauson remaining there the balance of the night (R.9). Accused and Garcia proceeded to camp, went to the ice box in the kitchen where accused drank "much beer", and Garcia drank about one-third of a glass which accused gave him (R.17). From the kitchen they went to accused's tent where he obtained two canteen cups and a blanket. He handed the blanket to Garcia and they started to the latter's home. Upon nearing a river accused stated to Garcia that he wanted to take a bath and they went about fifty feet from the road (R.23) where accused spread the blanket on the ground. He then pulled Garcia down and forceably took off his pants and got on top of him while he was lying on his back (R.19). The accused then attempted to commit the act of sodomy per anum on Garcia, but failing he hit Garcia "very hard" with his fist on the right eye and the mouth causing him to bleed from the mouth (R.20). He then committed sodomy per anum. After the act was consummated, Garcia arose and accused, who was pointing his gun at him (R.21), said that he should say nothing to anybody and that if he did that he /accused/ would "kill me and he will kill also my father and mother" (R.21). Accused then took Garcia back to camp where they spent the balance of the night, Garcia stating that he could not go home because he could not see his way and was feeling dizzy. Garcia went to his home the next morning where he was observed by Private Dauson at about 7:30 o'clock. His right eye "was bruised and blood-shot and his mouth and lips were swollen * * * He seemed to be crying * * *". He had tears in his eyes" (R.9). He reported to his father the events of the previous night. His father stated that his eyes were swollen and black, his upper lip swollen, he was still bleeding and was crying (R.30). The incident was reported to Lieutenant Summergrad, who "picked up" accused. At that time

blood was seen on the right pocket and collar on the shirt accused was wearing (R.31).

The accused elected to be sworn and testified in substance as did the preceding witness as to events up to the time he and Garcia went to the kitchen and drank beer. He stated that he was not drunk at that time but that Garcia was. They returned to his tent where Garcia took a blanket from Private Sandquist's bed and put it around himself stating that he was cold. Accused started to the gate to get Garcia past the sentry but then decided to go on to Garcia's house. At that time accused was carrying his rifle. Upon reaching the river they became involved in an argument about the blanket. Garcia wanted to buy it, and accused told him "it wasn't mine and I couldn't sell it" (R.36). Accused then struck Garcia "on the eye and on the side of the face" and knocked him down and he [Garcia] started crying. Accused took Garcia's "bolo knife" from him and leaving the blanket on the ground they returned to camp, Garcia returning with him rather than to his home because he "couldn't see" (R.36). Garcia awakened accused the next morning about six-thirty and was given his bolo, and returned to his home (R.37). Accused remembered all the happenings of the night before except that he did not know what became of the blanket. He specifically denied committing or attempting to commit sodomy on Nestor Garcia (R.37).

4. The accused admitted that at the time and place alleged he committed an assault upon Nestor Garcia, a Filipino boy 15 years of age, but denied that he attempted to commit or committed the act of sodomy. That the assault was of serious proportions is shown by the physical condition of Garcia the next morning at which time he was still bleeding. His first attempt to commit sodomy on the boy was frustrated but after striking him on the face with his fist and knocking him down he was able to complete his despicable act. While the testimony of the victim and the accused is in direct contradiction, the court rejected the accused's version and accepted that of the victim. Such determination lies solely within the province of the court (cf sec. 881, Vol II, Wharton's Crim. Evid. p. 1520). There was abundant evidence in the record to support the court's findings that accused committed the assault with intent to accomplish an act of sodomy, which act he subsequently consummated.

The accused is 22 years of age. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The sentence imposed is authorized for the offenses of which accused was found guilty, recognized as offenses of a civil nature and so punishable by confinement in a Federal penal institution by section 276, Criminal Code of the United States (18 U.S.C. 455) and by Section 107, Title 22 of the District of Columbia Code.

5. For the reasons stated above the Board of Review holds the

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record of trial legally sufficient to support the findings and sentence.

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Isaac J. Tokent, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
 In the Branch Office of The Judge Advocate General
 Melbourne, Victoria,
 Australia.

Board of Review
 CM A-2099

18 May 1945.

UNITED STATES)

v.)

Private First Class ERNEST
 J. HARRIS (36794999), 345th
 Aviation Squadron, 21st
 Service Group.)

Trial by G.C.M., convened at
 Headquarters, Fifth Air Force,
 APO 710, 10 April 1945. To be
 hanged by the neck until dead.

HOLDING by the BOARD OF REVIEW
 STAGG, ROBERTS, and MURPHY,
 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 First Class Ernest J. Harris, 345th Aviation Squadron, 21st Service Group, did, at APO 920, on or about 23 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corporal Phillip Taylor, 345th Aviation Squadron, 21st Service Group, a human being, by shooting him with a .45 calibre submachine gun.

He pleaded not guilty to the charge and its specification, was found guilty as charged and sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence but the confirming authority disapproved the same and ordered a rehearing. No member of the court which first heard the case sat as a member of the court at the subsequent trial. Upon the rehearing accused pleaded not guilty to the charge and its specification, was found guilty as charged and sentenced to be hanged by the neck until dead, all members of the court concurring in the findings and the sentence. The reviewing authority approved and the confirming authority confirmed the sentence. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence reveals that at about 10:00 o'clock A.M. on 23 August 1944 the accused, deceased, and other members of the 345th Aviation Squadron, 21st Service Group, were on a barge near Biak Island, N.E.I., APO 920. The accused was carrying in his front pockets two heavy clips of ammunition for a machine gun causing his pants to "sway in the front". The deceased made a remark that accused's "Daddy must have been an old man * * * Because his pants were bagging in the front". Accused resented the remark and deceased replied "You must want to whip my ass" (R. 10, 24). A sergeant then "broke it up" (R. 10, 42). Upon arriving at their destination a short time thereafter the men were divided into groups for work, the accused being assigned to deceased's squad. All the men at that time were carrying arms as they had been told that enemy snipers were in the area. Accused was armed with a submachine gun and deceased with a carbine. Several witnesses observed accused standing behind the rest of the men "with his hands on his hips", with his submachine gun slung over his shoulder (R. 13, 14, 28, 37) "like he was thinking about something" (R. 40). The deceased approached the accused and "asked him when was he going to start to work. He / Taylor / said 'No use everybody killing himself and you do nothing. I told you to forget about what happened this morning because, if you start anything, I will hurt you.' He said 'You are a much younger fellow than I am. Forget about it.'" (R.15, 23, 32). Accused replied "'OK' he would go to work" (R. 32). Deceased then walked to where a group of men were standing, "lit a cigarette, and was resting on his left knee smoking a cigarette" (R. 16, 29, 38). About three minutes thereafter (R. 30) accused approached deceased "a little in the front of him" (R. 31) and fired a burst of about six rounds. When hit the deceased turned and faced the accused who told him to "take the gun off his shoulder" which deceased did not do. Accused then "stepped over and pulled it off" and let it fall to the ground (R. 17, 26, 39). Deceased fell to the ground and said "Oh, you got me" (R. 32) or "You win, Lefty" (R. 18). Accused at that time said about three times "You threatened my life" (R. 21). Deceased was removed from the scene and shortly thereafter was examined by a captain of the medical corps who pronounced him dead as the result of five gunshot wounds from a .45 calibre weapon (R. 45, 49), one in the left arm, three in the right arm, and one in the lower part of the chest (R. 8).

The accused elected to be sworn and testified in substance as did other witnesses as to the occurrence on the boat adding that deceased at that time said:

"* * * 'Shut up, then, or I will be on your ass' like that.. He kept hollering at me. 'I warned you never to fuck with me' just like that. I said 'I am not bothering you.' He said 'All right, just remember that. I am going to get you.' Sergeant Mays said 'Break it up.'" (R. 52) .

"Well, I hadn't forgotten about the threat Taylor promised to me, so I decided I wouldn't go too far back in the woods. They had

said the Japs was in that area. I was working right along with the other fellows cutting brush along the side so, a few minutes we were bending over our machetes, my back got tired. I straightened up for five or six minutes. I wasn't doing anything. Just then, Taylor hollered over to me. I was not even working near him. When he walked over to me, some of the fellows looked up. He said 'Harris, how come you are not working?' I said 'I did work. I was just taking a break.' He stood looking. A fellow by the name of George Office had his gun. He took the gun from George Office and said 'I might have to use this gun' something like that. He come over towards me and said 'You been fucking with me all morning trying to start something.' He said 'You are a younger man than me, Harris, but I wouldn't hurt you with my fist for anything.' He said 'I will kill you' just like that. He said 'Now get on back to work.' He said that as if he wanted me to refuse to go back to work, something like that. He said I hadn't worked at that time, sir. That is when I just knew he was going to get me and try to pick some argument out of me and he would shoot me, either back when we was on the boat or back in the area. (R. 53, 68).

* * *

Q Did you shoot Corporal Taylor?

A Yes, sir, I did.

Q Why did you shoot him?

A I shot him because I thought he was going to shoot me." (R. 54, 59).

He further testified that he shot deceased because he was in fear of his life knowing that deceased had previously attacked two of his friends coming up behind one and hitting him with a brick, and another time hitting a sergeant with a bottle, both incidents happening in 1943 (R. 60, 61). He related another incident where deceased, in 1944, attacked an "old man" with a tent pole (R. 62). He further testified that when he shot deceased he (deceased) "was rising up and making quick moves (R. 66) * * * making these big movements facing me" (R. 67); that at the time he fired, deceased's gun "was hanging on his shoulder almost about to come off" and "I thought he was taking it off" (R. 70).

The defense called several of accused's unit who testified as to his good character and reputation and likewise as to the vicious and quarrelsome nature of the deceased (R. 75, 80, 82). The accused, at his own request, again took the stand at the conclusion of the trial and stated:

"* * * at that time I really didn't know whether I was intending to kill Taylor or not. After I shot him, I was sorry I got him.

It wasn't because I was facing a court-martial or anything like that. It was mostly because of the indignation it brought on my family and the sorrow on his. I believe, that, if I had known, I wouldn't be here today. At the time I shot him, I couldn't say I was intending to kill him or anything like that." (R. 87).

4. The evidence is clear and the accused admits that at the time and place alleged he shot and killed the deceased with a .45 calibre submachine gun. He was found guilty of murder which is the unlawful killing of a human being with malice aforethought (par. 148a, M.C.M., 1928). Malice is implied in every intentional and deliberate homicide unlawfully committed if there be no circumstances to mitigate, excuse, or justify the act (Miller, Crim. Law, p. 271; CM 237022, Hughes, XXIII B.R. 217, 228). There was testimony that after deceased had spoken to the accused about not working and told him to forget about their previous quarrel, that he (deceased) walked away, knelt down, and lit and was smoking a cigarette. Several minutes later accused approached to within about 3 feet of deceased and with no threats by word or deed upon deceased's part fired a burst from a submachine gun into his kneeling body, killing him. Accused's statements that he thought deceased was going to kill him, that he was "making quick moves * * * making these big movements facing me" and that while deceased's gun was on his (deceased's) shoulder that it was "about to come off" were flatly contradicted by numerous eyewitnesses.

To excuse a killing on the ground of self-defense one must reasonably believe that his life is in danger or that he is in danger of suffering great bodily harm and that it is necessary to kill to avert the danger (Allison v. United States, 160 U.S. 203, 217; Acers v. United States, 164 U.S. 388, 392). Whether accused shot deceased with malice aforethought as alleged in the specification; whether his actions were excusable on the ground of self-defense, or whether he acted under the heat of sudden passion induced by fear of deceased were questions of fact for the determination of the court-martial (Kinard v. U.S., 96 F. 2d 522; Stevenson v. U.S., 162 U.S. 313; Michigan v. Toner, 187 Nev. 386; Wyoming v. Sorrentino, 224 P. 420). By its findings the court determined that the homicide was not excusable and further determined that it was committed with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, and thus found accused guilty of murder. The record contains substantial evidence upon which such findings could be predicated.

A sentence of death or of life imprisonment is mandatory upon conviction of murder in violation of Article of War 92.

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

(Absent)
_____, Judge Advocate.
Colonel, J.A.G.D.

Carlton Roberts
_____, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy
_____, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

1st Ind.

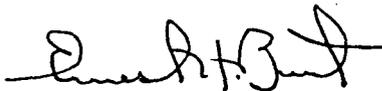
Army Service Forces, Branch Office of The Judge Advocate General, A.P.O. 924,
20 May 1945.

To: Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. In the case of Private First Class Ernest J. Harris, 36794999, 345th Aviation Squadron, 21st Service Group, 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 the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM A-2099)



ERNEST H. BURT,
Brigadier General, U. S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 4, USAFP, 19 Jul 1945)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2100

15 May 1945.

UNITED STATES)

v.)

Second Lieutenant ISAAC
S. HARPOLE (01314385),
25th Infantry.)

Trial by G.C.M., convened
at APO 322, 21 February
1945. Dismissal, total
forfeitures.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 96th Article of War.

Specification 1: (Findings disapproved by reviewing authority)

Specification 2: In that Second Lieutenant Isaac S. Harpole, Company "G", 25th Infantry, did, at APO 322, on or about 3 December 1944, wrongfully and unlawfully solicit a false statement from Pfc. James T. Johnson, Company "G", 25th Infantry, by saying to him "If you are questioned about the case say that a white sergeant told you to get on the truck and that a white man was driving the truck", or words to that effect which solicited statement was false, was a material matter and was known by the said Second Lieutenant Isaac S. Harpole to be false.

CHARGE II: Violation of the 63d Article of War.

Specification: In that Second Lieutenant Isaac S. Harpole, Company "G", 25th Infantry, did, at APO 322, on or about 9 January 1945, behave himself with disrespect toward

Colonel J. Prugh Herndon, his superior officer, by saying to him angrily and contemptuously, "No one can shake his fist at me; I can court martial you for that and these men will be my witnesses; why, I could knock you on your ass if I wanted to"; or words to that effect.

He pleaded not guilty to the charges and their specifications and was found guilty as charged. He was sentenced to dismissal, total forfeitures and confinement at hard labor for one year. The reviewing authority disapproved the findings of specification 1 of Charge I, and approved only so much of the sentence as provides for dismissal and total forfeitures. The confirming authority confirmed the sentence as approved by the reviewing authority. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of the Judge Advocate General, Melbourne, Victoria, Australia.

At the beginning of the trial accused entered a plea to the jurisdiction of the court on the ground that the provisions of Article of War 70 had not been complied with in that there had not been the required pre-trial investigation. The testimony of the investigating officer and another witness was taken after which the law member ruled "there has been substantial compliance with paragraph 35 [M.C.M., 1928]. It is apparent that the investigation was inefficient but substantial enough to deny the motion" (R. 9). However, the question becomes academic as pre-trial investigation is not mandatory and its omission does not constitute fatal error (CM 229477, Floyd, XVII B.R. 149).

3. The evidence for the prosecution reveals that on 1 December 1944 the accused was in charge of a detail from Company "G", 25th Infantry, which was unloading a ship at APO 322. About 3:30 A.M. the accused sent for Privates First Class Woodrow Wilson, James T. Johnson and Willie T. Howard of the detail and asked Private Wilson if he [Wilson] could drive a truck. Upon receiving an affirmative reply accused advised him that he wanted him to take some meat to the company, and instructed him to wait there until a "non-comm" arrived and he would show him what truck to drive (R. 10). Shortly thereafter Wilson was advised by the sergeant in charge of the motor pool (R. 21) which truck to drive and with Privates Johnson and Howard and two men from "H" Company they sat in the truck for a short while until a sergeant in a jeep came by and told them to "follow the truck that was behind him" (R. 18). They followed the truck to the area of the 3664th Quartermaster Trucking Company where they unloaded seven quarters of meat and some eggs from the truck they had been following on to their own and delivered them to "H" and "G" Companies (R. 18). The meat in question had been unloaded from the S.S. Van Outhoorn and had not been "tallied in" to the quartermaster and had not been issued (R. 16-17). Subsequently the accused called Lieutenant Johnson, Privates First Class Johnson, Wilson, Howard, Whitley and DeJean, the last mentioned two being from Company "H", to his tent and, according to the testimony of Privates Howard and Johnson, told them if they were questioned

they should say a white sergeant told them to get on the truck and that a white "guy" was driving (R. 14, 18). The testimony reveals that Private Wilson, a colored soldier, drove the truck and Private Howard, a colored soldier, told the others to get on it (R. 14, 19).

The prosecution introduced in evidence a statement by the accused in which he stated, in substance, that on the date in question while in charge of an unloading detail of the S.S. Van Outhoorn, he was approached by "an unidentified colored man" who said "We are getting some meat" and asked him if he wanted some for his company. Accused replied in the affirmative. He then secured a truck and called three of his men and told them "to go to the truck and someone would show them where to pick up some meat which they were to take to Company 'G' area". He stated:

* * *

At this time, 0330 hrs, 1 Dec 44, no meat was being discharged from the 'S.S. Van Outhoorn', consequently there were no trucks with meat in them on or about the Dock, insofar as I know. Therefore, it is my presumption that the meat involved in this deal must have left the dock at some time prior to the time at which the unidentified colored man approached and propositioned me.

As for the details as to which truck Wilson drove to pick up the meat and who, if anyone, besides Johnson and Howard went with him, and as to where the exchange of meat from one truck was effected into the truck driven by Wilson, I do not know any of these facts from my own knowledge.

* * *

This transaction involved no exchange of money or compensation of any kind. The meat and eggs were ultimately consumed by the men of Company G along with rations issued to the Company through normal channels.

* * * " (Pros. Ex. "A")

On 9 January 1945 Colonel J. Prugh Herndon, Port Commander, Base "F", APO 322, was making an inspection of a ship which was being loaded with cargo, the accused being in charge of the loading detail. Not being satisfied with the progress of the work Colonel Herndon spoke to the accused "calling to his attention the fact that only half of the men were working and explaining to him that we had a lot of cargo to load and that it was necessary to use all the men" (R.24). Colonel Herndon testified that at that time he emphasized his point by raising his hand and "pointing my finger at the accused * * *the accused accused me of shaking my first fist at him but I told him I was not doing so but pointing

my finger at him". The accused "answered by stating he could court-martial me, that he wouldn't stand treatment from any person like that; that I was shaking my fist at him and he looked around at others on the deck and said 'these men will be my witnesses' and said 'No one can shake his fist at me. I could knock you on your ass.'" (R. 25). The colonel testified that he left the ship and went to his office, followed by the accused who there said "that he could 'knock me on my ass.'" He said all of this in a threatening and discourteous manner" (R. 25, 27). Colonel Herndon ordered accused to leave the office, which order was obeyed. Accused's Regimental Commander was notified of the incident and was requested to relieve accused from duty at the dock (R. 25). Colonel Herndon stated that the gesture of shaking his finger was "quite a habit" and that in speaking before a group of people "I generally use my hands in doing so" (R. 26).

The accused called Second Lieutenant Arthur A. Johnson, of Company "H", 25th Infantry, who testified that he was present when accused had a conversation with the men from "G" and "H" Companies at which time accused stated to them "that they were trying to straighten the case out and he asked for anyone who had any information to step forward. And other than that why there was no statements made to the effecting question" (R. 30). At no time did he hear accused say anything to the men about "white men" or instruct any of them to say, if questioned, that a white sergeant told them to get on the truck or that a white driver was driving the truck. He could not remember if he was present "during the entire time that the accused was there with these men" (R. 30).

Privates First Class Maurice Whitley and Walter DeJean of Company "H", 25th Infantry, were present when accused, Lieutenant Johnson, and two men from Company "G" had a discussion in accused's tent as to the event alleged in specification 2, Charge I. They testified that at no time did they hear the accused state anything about a white sergeant getting a truck or a white driver driving it (R. 31).

The accused elected to remain silent.

4. There is direct testimony that the accused at the time and place alleged told an enlisted man, if questioned, to give a false statement. Such conduct on the part of an officer might properly have been laid under Article of War 95 and unquestionably amounted to a violation of Article of War 96 (CM 230829, Mayers, XVIII B.R. 65, 92). While several witnesses stated that they heard no such instructions, the court in whose province lies the determination of controverted issues of fact, the weighing of the evidence and the judging of the credibility of the witnesses (CM A-2062, Williams) chose to believe the testimony presented by the prosecution. Such testimony warranted the court finding the accused guilty as charged. The evidence is uncontradicted that at the time and place alleged the accused behaved with disrespect toward Colonel J. Prugh Herndon, his superior officer

(Charge II). His words spoken to the colonel at the ship, continuing to argue with him and using threatening and vulgar language at his office clearly brings accused's conduct within the provisions of Article of War 63. The evidence fully supports the court's finding accused guilty of this offense.

Dismissal and forfeitures are authorized by both Articles of War 96 and 63 of which the accused was found guilty.

5. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings as approved and the sentence.

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Richard Robert, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 924,
15 May 1945.

To: Commander in Chief, Southwest Pacific Area, A.P.O. 500.

1. In the case of Second Lieutenant Isaac S. Harpole (O1311385) attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½. you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM A-2100)

Ernest H. Burt
ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 3, USAFP, 18 Jul 1945)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

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Board of Review :
CM A-2109

24 May 1945.

UNITED STATES)

v.)

Second Lieutenant HOWARD L.
RICE (0490567), Company "M",
130th Infantry.)

) Trial by G.C.M., convened
) at APO 33, 10 March 1945.
) Dismissal, confinement for
) one year. The United
) States Disciplinary Barracks,
) Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that 2d Lieutenant Howard L. Rice, Company "M", 130th Infantry, did, at APO 33, c/o Postmaster, San Francisco, California, on or about 19 February 1945, misbehave himself before the enemy by refusing to go forward with his platoon, which was then actively participating in an attack upon the enemy, and elements of which were alerted to move forward to the knowledge of the accused.

He pleaded not guilty to the charge and its specification and was found guilty of the specification except the words "with his platoon which was then actively participating in an attack upon the enemy and elements of which were alerted to move forward, to the knowledge of the accused", substituting therefor the words "during an attack upon the enemy in which elements of his platoon were actively engaged by stating to his commanding officer and within the hearing of other military personnel, 'I can't go back up there. I can't go back. I can't take it, you can court-martial me if you like, but I won't go back', or words to that effect", of the excepted words not guilty, of the substituted words guilty and guilty of the charge. He was sentenced to be dismissed the service, to pay to the United States a fine of \$500.00 and to be confined at hard labor for five years. The reviewing authority approved only so much of the sentence as

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pertains to dismissal and confinement and the confirming authority confirmed the same but reduced the period of confinement to one year. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, was designated as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on 19 February 1945 the 130th Infantry was engaged with the enemy in an attack near the Cauringan River (R. 22) in the Philippine Islands. Companies "L" and "K" made the initial attack, Company "L" having the task of taking Hills #1 and #2 (Pros. Ex. A) which were approximately seven hundred and six hundred and fifty yards, respectively, in advance of the position occupied by Company "L", called "L" Company Hill. (R. 21). Company "I" was held in reserve and Company "M" was to give general support for the two assaulting companies. After a preliminary artillery barrage the attack started at 7:00 o'clock A.M. (R. 24). The second machine gun platoon from Company "M", commanded by the accused, located on "L" Company Hill gave supporting fire to the troops attacking Hills #1 and #2 for about 45 minutes and was then ordered to cease firing (R. 32) but was kept alerted (R. 35). Thereafter some of its men went forward and assisted in evacuating the wounded (R. 58). The platoon was relieved at about 4:00 P.M. on the following afternoon of 20 February (R. 41). When the firing of his platoon ceased, the accused and his instrument corporal were ordered forward by Captain Wallace (R. 68, 143) to make a reconnaissance for machine gun positions on Hills #1 and #2 (R. 55, 67). The accused and the corporal proceeded from "L" Company Hill toward Hill #1 (R. 56) for a distance of from eight to twelve hundred yards where they encountered mortar shell fire or hand grenades which forced them to take cover (R. 57, 59). Staff Sergeant John J. Burke testified that he heard accused say to his instrument corporal while at Hill #2 -

"* * * that he didn't know what the hell he was doing up there; he was supposed to be reconnoitering for new positions and the hill wasn't even taken yet. He said that even if we did take the hill the Japs would surround us and he said that he was going back to a safe place."

(R. 111).

They remained there about 45 minutes (R. 60) and returned to the platoon at about 11:00 A.M. where accused stopped at the C.P. which was located near the machine guns (R. 62, 77). Here he was contacted by Sergeant Hubert R. Barrer, platoon sergeant of the second platoon. Accused ordered the sergeant "to get the second section ready to displace forward" stating "Well, they need a section up there right away" (R. 69, 73). Accused stated to Lieutenant Tobin about that same time "Boy, it's bad up there. I'm no combat soldier. I'm not going back up there. They can court-martial me or do anything they want but I'm not going back up there" (R. 80). Lieutenant Tobin replied "I know it's bad up there and that's what we're here for" and he accused said

again 'They can court-martial me or do anything they want to but I'm not going back'" (R. 80, 81). Lieutenant Tobin further stated that "He / accused / was hot and aside from that I didn't notice anything unusual. He spoke quietly as he always does" (R. 82); "He seemed to be in perfect shape" (R. 85). Accused then reported to Captain Wallace, who testified that accused within "earshot" of a number of enlisted men (R. 101) said "'There are no machine gun positions up there. I couldn't find any'. Then he blurted out this 'I can't go back up there. I can't take it. You can court-martial me or do anything you wish but I'm not going back up there. I'm going to the rear'." (R. 91, 92). Captain Wallace then told him to "go to the rear and report to the Doc." (R. 92, 100). As to accused's physical condition at that time Captain Wallace testified:

"Well, in the first place, of course, it was a hot day and we were all sweating but he talked steadily and when he made the statement I asked him if he was all right or if he was suffering from heat exhaustion and he said no. Otherwise he seemed normal. (R. 92)

* * * He was hot but his voice was clear and it took him no time to tell me his intentions or to tell me what taken place on the hills." (R. 93).

Upon being asked -

"Did it ever occur to you that if he sat down for a while and drank some water that he might have been alright?"

Captain Wallace replied:

"At the time no because the statements were deliberate and I think he was in full control of his faculties and he talked as a man should and the statements were very clear and I knew he was in earnest because subsequently he said 'You can court-martial me or do anything you wish but I won't go back'. That to me was conclusive that he was aware that he was doing a wrong thing and that he didn't give a damn about the consequences." (R. 98).

Captain Wallace further testified that this was accused's first combat experience (R. 104) and that he did not order the accused to again go forward; nor did accused refuse to obey any such order (R. 99) but that had he been available "he would have had his proportionate share of the duty which at that time was to get the wounded back. He would have been ordered to go forward" (R. 106).

Sergeant Barrer saw accused that afternoon near the rear aid station and at that time heard him say "I was up there once and I'll not go back again" (R. 70).

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Major Alfred S. Ash, Regimental Surgeon of the 130th Infantry (R. 118), was in charge of the aid station located about one half mile to the rear of the C.P.. On the morning in question he was treating battle casualties which were being evacuated from the forward aid station (R. 119). He noticed the accused, another officer, and some enlisted men sitting about 45 or 50 feet away. After having finished his work he was approached by the accused. Major Ash testified:

"* * * I inquired from Lt. Rice if he had an EMT tag and he said no. I asked him what was bothering him. I assumed that he was suffering from a slight exhaustion case but he made the statement that he couldn't take it up there at the front and he looked in fairly good condition to me. I asked him if he had any pain and he said no that he couldn't take it. I took his pulse and gave him a casual check and told him that he could report to the officer in charge of the area but that I would not send him to the hospital" (R. 120).

Major Ash further testified that accused's pulse was "rapid", that he did not appear "abnormally nervous", appeared "normal under the circumstances" and was "mentally sound" (R. 121, 122).

The accused elected to be sworn and testified that on the morning in question he had only one mission assigned to him by Captain Litz (killed in action later that day) and that was to deliver fire on Hills #1 and #2 until the infantry reached the base of the Hills at which time a smoke bomb signal would be given for him to mask his fire and that he was then "to wait back here on 'L' Company Hill and that he [Capt. Litz] would send for me when and if he got ready to use me on these two hills" (R. 141). Upon seeing the smoke bomb signal he gave the order to cease firing and the mission of his platoon was then completed (R. 142). At that time Captain Wallace "came up and ordered me to go forward on that reconnaissance" (R. 143), and to take a man from his section with him (R. 144). Calling his instrument corporal, Di Christoferro, they proceeded to Hill #1, approximately 800 yards away. Upon arriving he contacted Captain Litz who informed him there were no positions for machine guns up there. He advised Captain Wallace of this fact by phone and remained there approximately an hour and then moved to Hill #2. Finding no machine gun positions there he was "pretty tired" and sat down (R. 145) and was subject to mortar fire, one shell falling about ten yards from him (R. 146, 147). He remembered nothing thereafter and did not recall Corporal Di Christoferro accompanying him back to "L" Company Hill. He recalled talking to Captain Wallace upon his return but did not remember "when I was talking to him" and had no recollection of giving any order to Sergeant Barrer (R. 148). He did not remember making any statements to either Captain Wallace or Lieutenant Tobin, or anyone else (R. 177) and his first recollection of subsequent events was when he was at the rear aid station when Major Ash came up to him (R. 150). He remembered Major Ash

talking to him but could not "recall the exact conversation" and had no recollection of Major Ash examining him or receiving any orders from him to report to the battalion C.P. (R. 150, 169, 170). He remained at the rear aid station a couple of days. He stated "The adjutant was there and I asked him where I could go since there was no use in my going to the platoon as I was being of no use to them. Well, they sent us to the rear where the Service Company was a couple of days before the investigation. The first knowledge I had of the outcome of it was when Mr. Nagy of the 130th Infantry informed me that they were going to try me. Colonel Blake was in the area that day or the next day and I asked him to send me to the line again and he said no." (R. 151, 187, 202). He stated that "I did not knowingly and willfully make those outrageous statements. I know I did not" (R. 152). On cross-examination he testified that he was first aware of what was going on -

"When I was back at the aid station later on. I sat there for some time, I got up and got a cup of coffee about chow time approximately and Captain Baxter then assigned us a hole.

Q. What day was this? The 19th or the 20th?

A. It might have been that same day late in the afternoon.

Q. By that time you felt entirely normal and could realize what was going on?

A. I knew we had some artillery fire the next day and I was aware of being there. My ear was hurting me a little then. [while at Hill #2] (R. 187).

* * *

Q. Would you say that in your own mind that from that time on your memory, your mind, was more or less blank?

A. Yes, sir. In my own mind I believe it was because learning later of the things I said I know I wouldn't have said those things knowingly and willfully. I am not that kind of a person.

Q. At any time during the past experiences of your entire life have you been subject to periods of lapses of memory prior to the instance under discussion?

A. Well, I have been scared a number of times when I was not able to recall what took place.

Q. In those instances your lapse of memory resulted from fright you say. Were you scared in that area on this particular day?

A. I may have been, sir." (R. 184).

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The accused admitted having made a statement to Colonel Blake, the investigating officer, in which he said "The only thing I am guilty of is not being a soldier. I have tried and have always tried". He added in explanation "Well, for two and a half years I have been a 2d Lt. and no one has seen fit to promote me so I imagined I was not just what they wanted in an officer (R. 173) * * * Frankly, I just don't fit in the military. * * * If I had my choice, war or no war, I wouldn't be in the Army. * * * I have no desire to get out of the Army (R. 195) * * * I figured I would be able to lead men" (R. 199).

Major Kenneth H. Le Fevre, MC, the Division neuro-psychiatrist, testified that on 24 February 1945 he examined the accused at the request of Major Ash (R. 216). His diagnosis was -

"* * * simple chronic adult maladjustment, moderately severe, manifested by nervousness, irritability, and a feeling of being disliked and being picked on, of his inability to be a good soldier, increased by his inability to adapt himself fully to the regimentation of the armed forces." (R. 217).

He definitely "ruled out insanity" and stated that accused knew the difference between right and wrong and was capable of doing the right thing (R. 219). In answer to a hypothetical question if one with the same maladjustments as those present in accused could regain his memory rapidly he replied that it was possible but not probable (R. 222).

4. The specification alleges that the accused did, at APO 33, on or about 19 February 1945 "misbehave himself before the enemy by refusing to go forward with his platoon which was then actively participating in an attack upon the enemy, and elements of which were alerted to move forward to the knowledge of the accused". The court deleted from the specification all of the words following "to go forward" and substituted "during an attack upon the enemy in which elements of his platoon were actively engaged by stating to his commanding officer and within the hearing of other military personnel, 'I can't go back up there. I can't go back. I can't take it, you can court-martial me if you like, but I won't go back', or words to that effect" and found accused guilty of the charge and of the specification as thus modified.

Such substitution by the court did not prejudice the accused as the nature and identity of the offense remained unchanged (par. 78g, M.C.M., 1928). The gist of the offense was misbehavior before the enemy in that he did refuse to go forward during an attack and the substitutions merely set forth the manner in which his refusal was evidenced.

The Manual for Courts-Martial, 1928, states that "misbehavior before the enemy"

"* * * is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article." (par. 141a).

Winthrop states that misbehavior before the enemy may consist in -

"Such acts by any officer or soldier, as -refusing or failing to advance with the command when ordered forward to meet the enemy; going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire; hiding or seeking shelter when properly required to be exposed to fire; feigning sickness, or wounds, or making himself drunk, in order to evade taking part in a present or impending engagement or other active service against the enemy; refusing to do duty or to perform some particular service when before the enemy."
(Winthrop's Mil. Law and Prec., 2nd Ed., p. 623).

There is no contradiction of the evidence that accused at the time and place was "before the enemy". The misbehavior of the accused is clearly established. He had just returned from a reconnaissance where he had been under fire, and was in charge of a machine gun platoon which, he stated, Captain Litz would send for "when and if he got ready to use me on these two hills". His men were being used to evacuate the wounded and Captain Wallace testified that had accused been available he would have been ordered forward to assist in this work. Instead of remaining where his duty required him to be, he announced in the hearing of a number of enlisted men that he could not "take it"; that he would not go back; and that he would stand a court-martial rather than return. Such behavior by an officer undermines and destroys that high degree of morale and confidence in leadership essential to the successful conduct of battle and is clearly misbehavior before the enemy within the contemplation of Article of War 75. (CM NATO-1614, Bull. JAG, Vol III. No. 4, p. 146). His excuse that he remembered nothing after the mortar shell fell near him until that afternoon while at the rear aid station was rejected by the court. Prior to the incident in question he had shown no symptoms of amnesia and when examined by Major Ash a few hours later appeared normal. The determination as to accused's mental accountability was solely within the province of the court (CM A-2100, Harpole).

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5. The charge sheet shows that the accused is 24 years of age and that he entered the service on 18 August 1942 as a second lieutenant.

6. 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 the sentence. A sentence of death, or such other punishment as a court-martial may direct, is authorized upon a conviction of misbehavior before the enemy in violation of Article of War 75.

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Stephen J. Roberts, Judge Advocate.
Colonel, J.A.G.D.

James D. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific, A.P.O. 75, 16 July 1945.

To: Commander-in-Chief, United States Army Forces in the Pacific, A.P.O. 500.

1. In the case of Second Lieutenant Howard L. Rice, 0490567, Company M, 130th 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 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM A-2109).

Ernest H. Hurt
ERNEST H. HURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 5, USAFP, 22 Jul 1945)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2135

6 June 1945.

UNITED STATES)

v.)

Assistant General Utility
Clerk PATRICK M. BRENNAN,
an employee of the War
Shipping Administration,
serving with the armies of
the United States in the
field.)

Trial by G.C.M., convened
at Headquarters, Base K,
USASOS, APO 72, 10 March
1945. Confinement for
seven years. The United
States Penitentiary, McNeil
Island, Washington.)

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

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

2. He was tried upon the following charges and specifications:

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

Specification: In that Patrick M. Brennan, employed by the United States War Shipping Administration, South and Southwest Pacific Areas, as an assistant general utility clerk and a person serving with and accompanying the armies of the United States in the field, did, at APO 72, on or about 7 February 1945, feloniously take, steal, and carry away \$300.00, currency of the United States and 672 pesos, currency of the Philippine Commonwealth of the value of \$336.00, currency of the United States, of a total value of \$636.00, the property of Private First Class Douglas F. Dye, Company E, 383rd Infantry Regiment, 96th Infantry Division.

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CHARGE II: Violation of the 94th Article of War.

Specification 1: In that Patrick M. Brennan, employed by the United States War Shipping Administration, South and Southwest Pacific Areas, as an assistant general utility clerk and a person serving with and accompanying the armies of the United States in the field, did, at APO 72, on or about 30 December 1944, wrongfully, knowingly, and wilfully apply to his own use and benefit one carbine, caliber .30, M-1, No. 42588, of the value of about \$31.75, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Patrick M. Brennan, employed by the United States War Shipping Administration, South and Southwest Pacific Areas, as an assistant general utility clerk and a person serving with and accompanying the armies of the United States in the field, did, at APO 72, on or about 15 January, 1945, wrongfully, knowingly, and wilfully apply to his own use and benefit one gun, sub-machine, caliber .45 M-3 US No. 213203, GL-C 153432, of the value of about \$21.00, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Patrick M. Brennan, employed by the United States War Shipping Administration, South and Southwest Pacific Areas, as an assistant general utility clerk and a person serving with and accompanying the armies of the United States in the field, did, at APO 72, on or about 27 January, 1945, wrongfully, knowingly, and wilfully apply to his own use and benefit one pair boots, jungle, size 10, of the value of about \$3.09, property of the United States and intended for the military service thereof.

Specification 4: In that Patrick M. Brennan, employed by the United States War Shipping Administration, South and Southwest Pacific Areas, as an assistant general utility clerk and a person serving with and accompanying the armies of the United States in the field, did,

at APO 72, on or about 3 February, 1945, wrongfully, knowingly, and wilfully apply to his own use and benefit 199 cartridges, ball, caliber .45, of the value of \$5.51, including seven packages of 20 cartridges each and one magazine for gun, sub-machine; 157 cartridges, carbine, caliber .30, M-1, of the value of \$3.67, including 4 magazines for carbine, caliber .30, M-1; 20 cartridges, rifle, caliber .30, AP, of the value of \$1.10, contained in 4 5-round clips, all of the aggregate value of \$10.28, property of the United States furnished and intended for the military service thereof.

Specification 5: In that Patrick M. Brennan, employed by the United States War Shipping Administration, South and Southwest Pacific Areas, as an assistant general utility clerk and a person serving with and accompanying the armies of the United States in the field, did, at APO 72, on or about 5 January 1945, wrongfully, knowingly, and wilfully apply to his own use and benefit one knife, trench, M-3, and scabbard, of the value of \$1.35, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that Patrick M. Brennan, employed by the United States War Shipping Administration, South and Southwest Pacific Areas, as an assistant general utility clerk and a person serving with and accompanying the armies of the United States in the field, did, at APO 72, on or about 7 February 1945, wrongfully have in his possession with the intention of removing the same from Base K, APO 72, to Sydney, Australia, the following described property: Viz, one carbine, caliber .30, M-1, of the value of about \$31.75; one gun, sub-machine, caliber .45, M-3, of the value of about \$21.00; one pair of boots, jungle, of the value of about \$3.09; 199 cartridges, ball, caliber .45, of the value of \$5.51; 157 cartridges, carbine, caliber .30, M-1, of the value of \$3.67; 20 cartridges, rifle, caliber .30 AP of the value of \$1.10; one knife, trench, M-3, and scabbard, of the value of \$1.35, of the aggregate value of about \$67.47, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Patrick M. Brennan, employed by the United States War Shipping Administration, South and Southwest Pacific Areas, as an assistant general utility clerk and a person serving with and accompanying the armies of the United States in the field, did, at APO 72, on or about 10 January 1945, wrongfully, knowingly, and wilfully apply to his own use and benefit one United States Maritime Commission (Chelsea Ship's Bell), clock, Serial No. 8689, of the value of more than \$50, property of the United States, furnished and intended for use on vessels under the control and operation of the United States.

He pleaded not guilty to the charges and their specifications and was found guilty as charged. The reviewing authority approved the finding of guilty of Charge I and only so much of the finding of its specification as involves a finding that accused did feloniously steal, take, and carry away \$117.00, currency of the United States, and 672 pesos, Philippine currency, of the total value of \$453.00 from the person, and at the time and place, alleged. He approved the finding of guilty of Charge II and of specifications 1, 2, and 3 thereof and only so much of the finding of specification 4 as involves a finding that accused did misapply as alleged 180 cartridges, ball, caliber .45; 20 cartridges, rifle, caliber .30 AP, contained in 4 5-round clips; and 2 clips, carbine, caliber .30, with ammunition, property of the United States, of a substantial value not in excess of \$20.00. He approved the finding of guilty of Charge III and so much of the finding of specification 1 as involves a finding that accused did wrongfully have in his possession as alleged one carbine, caliber .30, M-1, of the value of about \$31.75; one gun, submachine, caliber .45, M-3, of the value of about \$21.00; one pair of boots, jungle, of the value of about \$3.09; 180 cartridges, ball, caliber .45; one magazine caliber .45, M-3, with ammunition; 20 cartridges, rifle, caliber .30, AP; two clips, carbine, caliber .30, with ammunition; all of a substantial value not in excess of \$20.00; and one knife, trench, M-3, and scabbard, of the value of \$1.35, all property of the United States, of the aggregate value of not less than \$57.19, and approved only so much of the finding of specification 2 of said charge as involves a finding that accused did wrongfully have in his possession as alleged the clock therein described of the value of \$10.00. He reduced the period of confinement to seven years and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. It was stipulated between the prosecution and the defense that the accused was at the times and place alleged a civilian employed in the South and Southwest Pacific Areas by the United States War Shipping Administration as Assistant General Utility Clerk, serving with and accompanying the armies of the United States in the field, and subject to military law (R. 50, Stipulation Pros. Ex. 10).

On 7 February 1945 the SS "Sharron" was anchored in the bay at Tacloban, P.I.. Accused came on board that night about 9:00 o'clock (R. 14) to tell the boys "good-bye" as he was leaving the next day for Australia. Private First Class Douglas F. Dye of Company "E", 383rd Infantry Regiment, 96th Infantry Division, was at that time quartered on the ship with seven other soldiers, all doing temporary military police duty (R. 15). About 11:00 o'clock that night Private Dye was playing cards on the deck when orders were received from the officer of the day for several of them to go "Down to the dock" (R. 10). Leaving his "Japanese" pocketbook made of heavy black leather with a red star on it (R. 16, 23) containing approximately \$636.00 in his fatigue pants on a hanger in his quarters, he went to the dock. Private First Class Robert L. Dunn, who occupied the same quarters on the ship as did Private Dye, returned from the dock to the ship to get a duffle bag which he was going to take to camp at White Beach (R. 17, 20) and observed accused alone in their quarters (R. 18). Accused offered to lend Dunn his jeep to go to White Beach at the same time requesting that he be dropped at his quarters at the War Shipping Administration building. Dunn and accused left the ship and accused was driven to his quarters. Upon returning to the dock Dunn was advised by Private Dye that his (Dye's) money was missing (R. 20). With several others they returned to the ship, searched their quarters and the deck, but the pocketbook could not be found. The "regular MP's" were then notified. Privates Dye, Egnatuk, Wimberly and Dunn went to accused's quarters at the W.S.A. office about 2:00 o'clock A.M. where accused was found lying in bed with his clothes on (R. 18, 24, 83). Dye told accused that he wanted his money. Dye testified "The MP's came in then and told him if I thought he had my money, he'd better give it to me. He [accused] said then if I thought he had any money of mine, he would give it to me, or as much" (R. 12) but specifically denied having it (R. 19). At that time a search of both accused and his quarters failed to disclose the money (R. 12, 18). Accused was then taken to the MP headquarters. On the way he "kept arguing" with Sergeant Alexander J. Wortman of the 813th MP Battalion, stating "that he would pay the money back if we'd drop the whole thing" (R. 29). At MP headquarters he again stated to the desk sergeant that he would pay the money back and also told the desk sergeant "You can keep * * * [the \$866.00 taken from his person by the MP's] as bonus [bail] that I'll come back" (R. 30, 32). Upon being questioned by the desk sergeant as to whether he had stolen the money the accused stated:

* * * he hadn't and had no reason to steal the money, due to the fact that he was making plenty of money, and he had \$25,000 in the bank and he had \$50,000 home, * * * He said he had a barracks bag in his quarters, packed and ready to go to Australia, and he said he had stuff in the barracks bag which would get a lot of people in trouble. I asked him

what was in there, and he wouldn't tell me, but he did say he had three bottles of beer which came from the ship Sharron, the U.S.S. Sharron, which he was going to take to Australia to drink on the plane on his way down. He seemed very anxious to get in his barracks bag before he was locked up, and said he had his own personal stuff he wanted to get out before he was locked up." (R. 31).

On 8 February 1945 Sergeant Elden W. Schultz, a "clerk-typist" who lived and worked in the War Shipping Administration building, while looking for a hatchet found a wallet wedged between the window and the studding in the living quarters occupied by accused and himself (R. 35). The Provost Marshal's office was notified and the wallet, an ordinary black pocketbook with a star in it, (R. 49) was turned over to T/Sgt. Evans A. Owens of the Provost Marshal's office. An examination of the pocketbook revealed that it contained \$117.00 in American currency and 1014 pesos in Philippine currency of the total value of \$624.00 (R. 49) and a social security card (R. 37) issued in the name of Douglas Franklin Dye Jr. (R. 49) and "certain indistinguishable pictures, some addresses, a certificate certifying that Private Douglas Dye was a member of the Imperial Domaine of the Royal Dragons" (R. 49). Apparently the contents had not been disturbed for "Some of the bills stuck together, and they were very evenly placed in the wallet" (R. 36).

On 8 February 1945 Sergeant Owens went to the Tacloban airstrip where he took possession of a sea bag which had been left there the previous day by the accused who stated at that time that he would pick it up the next morning when leaving for Sydney, Australia (R. 33, 38). Upon being opened at the Provost Marshal's office it was found to contain a carbine, value \$31.75; a submachine gun, value \$21.00; a trench knife and scabbard marked "1942, US M-3", value \$1.35; a pair of jungle boots, value \$3.09; a ship's clock marked U.S. Maritime Commission, value \$10.00 (R. 39, 45) and the following of a total value of about \$10.28: 1 clip, .45 caliber, M-3, with ammunition; 4 clips, .30 for .03 rifle, with ammunition; 1 ammunition pouch, carbine with 2 clips, carbine, .30 caliber with ammunition and 9 boxes containing a total of 180 rounds of .45 ball ammunition (R. 39-44; Pros. Exs. 1 to 8 incl.; Stipulation Prox. Ex. 10). Lieutenant Commander Robert E. Norris testified that accused was assigned to his command about 23 December 1944 as a civilian employee. He had no knowledge of any carbines or ship's clocks being issued to civilian employees (R. 45).

The accused elected to be sworn and testified that on the night of 7 February 1945 he went aboard the ship "William Sharron" to say goodbye to the boys as he was leaving for Australia the following day. He had "a couple of beers" with the ship's captain and then went to the deck where the boys were playing cards. He asked them if they had any beer and upon being advised by one of the MP's that "he'd found nine or ten cases" a case was brought up from the locker, and "we got a little tight; not only myself * * * but the MP's and the lieutenant of the MP's and the ship's

officers * * * (R. 57) * * * we got pretty well under the weather; you know what I mean, half intoxicated * * * (R. 58). When Private Dunn asked if he could use his (accused's) jeep to take some beer to Base K, accused instructed his Filipino driver to "come on aboard and meet the boys, and then take them with their beer up to Base 'K'". Accused testified:

"* * * So we'd been fooling around and kidding around * * * and I seen a couple of pairs of coveralls hanging up in the locker. So I took one pair and put them on, just to play a joke, so help me, just to play the fool and act around as usual-- and this darn thing fell out of the pocket of them coveralls. So I picked it up and threw it right down on the bunk; that was the pocketbook in this case. So I sit me down on a box and I had another couple of beers and after that, I took the coveralls off and hung them up in the locker. Occasionally, I'd notice that doggone pocketbook a-laying there. Finally, instead of putting it back, I picked it up and just stuck it in my pocket--right here in the pocket of my shirt and there it was. I just didn't want to leave it there because if there was anything in the pocketbook and it got taken someone else was going to suffer for it. * * * I went out on the deck and I also went down to the jeep. The jeep was piled up full with beer. They got in the jeep and I told them I wanted to go to the office, and I went up to the finance office * * * I was pretty sick * * * I laid on the bed and that was where I was when they woke me up; when these men come in. And when they come in, the first voice I recognized was Dye's. And when Dye come in, the first thing he said was, 'Where's my money?' and naturally, half asleep, I said 'What money?' I says, 'What are you talking about?' and he says, 'The money you took off the ship.' Right from the start, it was as big a surprise to me as it is to you people right here when I thought of it. I put my hand in my pocket and then the other MP comes around with a .38 and he says, 'All right, all right, let's have the money.' I was just going to show them the pocketbook-- so help me and Lord Jesus strike me dead if it ain't the truth--I want you to believe me because it is the real exact truth--I right then and at that moment--that very moment--had that doggone pocketbook in my hand to give it back. And when that man pointed that gun at me I was scared and I put that doggone pocketbook back there in the window. * * * And when we went to the MP office, why I wanted to pay him there because I only wanted a half an hour or even five minutes, just to go ahead and get this thing straightened out. Gentlemen, I had no more intention of stealing that money than you people sitting right here. * * * I know it looks very very bad because the following morning I was going to Australia * * * (R. 58-60).

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Upon being asked "Why didn't you put it [pocketbook] back in the overalls where it came from" he replied "That, sir, is something I can't exactly explain" (R. 83). He further testified that the "tommy-gun" was given him by the Captain of the "Ben Wheeler" (R. 60) which fact was substantiated by Charles L. Manck, an employee of the War Shipping Administration, who was present at that time (R. 55). Accused claimed that he had found the carbine with the ammunition pouch on "the handle end of the carbine" (R. 63) "in the ditch over here--I don't know the name of the road where it was * * * Of course, I know you've got to give it to the MP's when you find anything like that, but there just wasn't any MP's around. That's why I took that carbine" (R. 61). The clock he claimed was given to him by the Captain of the "Ben Wheeler" who had salvaged it from a damaged ship, the Captain stating, "Mike, you can sure have it, because it don't belong to anybody and none of them belong to anybody at all" (R. 62). The ammunition found in his sea bag he claimed he took off the "Gus Darnell" when it was "automatically stripped" and taken over by the Army for use as a storehouse (R. 62). The clips were given him by a Lieutenant "who used to work with us" (R. 62). The jungle boots he purchased from a sailor for \$1.50 (R. 63). The trench knife was given him by a Filipino who was working for him when he went aboard the "Sharron" to move dead bodies off the ship which had been hit by a "suicide plane" (R. 63-64). Accused further testified that he left the sea bag containing the articles found therein at the airstrip on the 7th of February as he was going to stop at Biak on his way to Australia and give "this stuff" to Colonel Clark, Major Formosa (R. 70), and Captain Berry who were "good friends of mine", stating "I wouldn't get it in anyhow because I'm searched when I get to Australia (R. 66) * * * if it was given to any people in Australia it would have to be like gangsters or something, and about this stuff right here, Australia has got laws that are pretty tough, and if I was a soldier I could probably take the stuff to Australia, but being that I'm a civilian, I couldn't take it to Australia * * * (R. 67-68), taking contraband stuff into any other country is restricted anyhow" (R. 67). He further said that before he left Tacloban on the plane he would have been weighed and "they would have made me leave it behind * * * I couldn't have even got it on the plane, it was too heavy" (R. 68).

4. Accused admitted that at the time and place alleged in the specification of Charge I he, without the knowledge or consent of the owner, took a pocketbook from quarters aboard the SS "Sharron". The pocketbook contained \$117.00 in currency of the United States and at least 672 pesos, currency of the Philippine Commonwealth, and was the property of Private First Class Douglas F. Dye. Accused admitted that he had it in his possession when the owner demanded it of him and that at that time he denied any knowledge of its whereabouts. He further admitted secreting it behind a window sill where it was subsequently found. Some three hours later he was to leave the base where the incident occurred to go to Australia. Accused contended that he took the pocketbook for fear that if there was anything in it and it was taken "someone else was going to suffer for it". From all of such evidence the court could properly infer that accused intended to deprive Private Dye permanently of his property. There is abundant evidence to support the findings of guilty of Charge I and its specification, as approved.

The evidence is equally clear that accused wrongfully applied to his own use the property of the United States described in the five specifications, as approved, of Charge II and specification 2 of Charge III which property was found in a sea bag that accused had left at an airstrip the night before he was to fly to Australia. His statement that he intended to give the various articles to certain officer friends in Biak in itself showed his claim of ownership. He further admitted that he knew that the carbine should have been given to the military police and that the various articles were "contraband". Accused's explanation that he found some of the articles and that others were given to him furnished no defense to his wrongful exercise of dominion over property of the United States. The specifications allege that accused's wrongful acts occurred on six occasions beginning 30 December 1944 and ending 3 February 1945. There is no evidence in the record from which the dates he came into possession of the property can be ascertained. It does appear, however, that accused arrived at AFO 72, where the acts occurred, during the latter part of December 1944. As the offenses clearly occurred within the period of limitations the failure to prove their dates as alleged did not prejudice accused's substantial rights (CM 229977, Proctor, XVII B.R. 259). There is substantial evidence in the record upon which the findings of Charge II and its specifications, as approved, and of Charge III and specification 2 thereof, as approved, may be sustained.

Specification 1 of Charge III alleges that accused wrongfully had in his possession the same property of the United States as that described in the several specifications of Charge II with the additional allegation that he intended to remove the same to Australia. In legal effect the specification alleges only the wrongful possession by accused of the property. The wrongful possession and the misapplication were substantially one transaction and the sentence with respect thereto should be limited to that prescribed for the major offense, namely, the violation of Article of War 94.

The sentence imposed is legally permissible upon conviction of the offenses of which accused was legally found guilty, recognized as offenses of a civil nature and so punishable by penitentiary confinement by Sections 37 and 287 Criminal Code of the United States (18 U.S.C. 82, 466).

5. For the reasons stated above the Board of Review holds the record legally sufficient to support the findings and the sentence.

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Arthur J. Lohat, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
with the United States Army Forces
in the Pacific

Board of Review
CM A-2158

APO 75,
6 July 1945.

UNITED STATES)

v.)

Private JOHN H. TRUJILLO)
(20625836), Casual, attached)
269th Replacement Company,)
12th Replacement Battalion.)

) Trial by G.C.M., convened
) at Headquarters, Base M,
) APO 70, 14 April 1945.
) Dishonorable discharge, total
) forfeitures, confinement for
) ten years. The New Bilibid
) Prison.

REVIEW by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 93rd Article of War.

Specification: In that Private John H. Trujillo, Casual Attached 269th Replacement Company, 12th Replacement Battalion, did, at APO 70, on or about 19 February, 1945, with intent to commit a felony, viz, rape, commit an assault upon Eufracia Devera, a Filipino civilian, by willfully and feloniously grabbing the right arm of said Eufracia Devera with his left hand, pointing a drawn knife at her with his right hand and forcing her into a prone position with his right leg.

He pleaded not guilty to the charge and its specification, was found guilty as charged, and 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 and suspended the execution of that portion thereof adjudging dishonorable discharge. The New Bilibid

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Prison, APO 75, was designated as the place of confinement. The sentence was published in General Court-Martial Orders No. 16, Headquarters Philippine Base Section, APO 358, 18 May 1945 and the record of trial was forwarded to the Branch Office of The Judge Advocate General.

3. The evidence for the prosecution shows that about midnight on 19 February 1945 two colored soldiers, apparently under the influence of intoxicants, one of whom had a gun, went into a house in the Barrio of Buenlag, P.I., occupied by Guillermo Devera, his wife, and their two daughters, Francisca and Eufracia (R. 5, 6). The house, which was entered by a ladder, consisted of a "cellar" or main room and two adjoining rooms, one of which was the kitchen. As they passed through the "cellar" one of the soldiers "thrust a gun" at Francisca who was lying down and they then proceeded to the adjoining room where Eufracia was sleeping (R. 12, 13). At that time Devera and his wife were in the kitchen "preparing food for the pigs". Devera entered the main room carrying a lamp and saw the accused (R. 7) holding the hand of his daughter, Eufracia, who, at that time, was sitting on the floor. He "made a loud noise with a sign of anger" and told his daughter to "remove her hand from the hand of the soldier and go to the kitchen where her mother is" which she did (R. 6). The father testified that at that time the other soldier was standing near the door and "when ever I attempted to go near that soldier, he thrust the gun to my body so that I was forced to go away" (R. 7). After Eufracia had gone to the kitchen "the soldiers went slowly down" and "they went again from house to house in the neighborhood" (R. 7).

Francisca testified that she climbed out of the window of the room where she was lying and from the outside saw both her sister and the soldier sitting down and the soldier was "holding the hand of my sister". She did not see him "do anything except hold Eufracia by the arm" (R. 13).

Eufracia Devera, the alleged victim, stated that on the night in question she was sleeping in "the room" when she was awakened by the noise of the soldiers coming into the house (R. 15). One of the soldiers (accused) came into the room and she "got up and sat down" and he "took me by the hand and went to the extent of getting his dagger" but "was not able to point the dagger because I got up at once and then ran away". When asked, "When he grabbed you by the arm, did he push you down or did he touch you with his leg or any other part of his body?" she replied "No more, sir, just the hand" (R. 15).

"Q. What did you do then?

A. I gave an alibi that I was to urinate outside.

Q. Did the soldier turn loose of your arm or did you pull your arm loose of him?

A. I was the one who removed the hand that grabbed my hand. (R. 15-16)

* * *

"Q. What did he do when he got it [the dagger] out of the sheath?

A. He held the knife and asserted these words, 'Lie down.'

* * *

"Q. After he told you to lie down, what did you do?

A. I stood up at once and made a sign that I was to urinate.

Q. Did he say anything further?

A. No more." (R. 18).

She further testified that subsequently two soldiers were brought to her house but she identified only the accused (R. 16) as having been there on the night in question.

Geronima Bulato testified that she lived near the house of Guillermo Devera and that "One night in February of 1945" she heard a noise in Devera's house. Shortly thereafter she noticed two soldiers coming to her house. They ascended the ladder and attempted to enter her house and pointed their guns at her. She shut the door and after attempting to push the door open with their rifles they left (R. 19). Pedro Devera, a brother of the alleged victim, testified that on the night of 19 February 1945 he saw three soldiers coming out the gate of Mrs. Bulato's house. He notified the "sentinels in the camp" and was present when the soldiers were arrested (R. 20-21). He could not identify them (R. 22).

All of the testimony of the Filipinos was given through an interpreter.

Captain Moreley R. Hartley, AGD, Headquarters Sixth Army, testified that about midnight on the night in question he received a report about "unusual occurrences" and with three or four men of his section and a Filipino officer he walked about three or four hundred yards and met three American soldiers about 50 yards from Mr. Devera's house (R. 24). Two had weapons and were disarmed and all were told to "fall in and go back to camp" (R. 23). At that time enlisted men were required to carry arms (R. 25). The accused was one of these three soldiers (R. 24), all of whom in Captain Hartley's opinion were drunk (R. 52).

The defense introduced several witnesses who testified that they were with the accused on the afternoon and night in question until they were arrested by Captain Hartley. Although they had been drinking, none of them were drunk and at no time did any of them enter the house where the incident in question is alleged to have occurred (R. 26-43 incl.)

The accused elected to be sworn and testified in substance as did the preceding witnesses for the defense (R. 45). He specifically denied being drunk or at the Devera home at any time prior to being taken there for identification (R. 51).

4. The accused is charged with an assault with intent to commit rape by grabbing Eufracia Devera by "the right arm * * * with his left hand, pointing a drawn knife at her with his right hand and forcing her into a prone position with his right leg." Accused pleaded not guilty and, in defense, attempted to establish an alibi. The question for the consideration of the Board of Review is the sufficiency of the evidence to support the court's findings of guilty as charged.

The evidence shows that two colored soldiers, apparently under the influence of liquor, about midnight on 19 February without permission entered the home of a Filipino whom they had never seen before. They passed through "the cellar" where one of his daughters, Francisca, was lying. Accused entered the adjoining room where another daughter, Eufracia, was sleeping but who had been awakened by their entrance into the house. Eufracia sat up and accused sat down by her side and held her hand. At that time he took a "dagger" from his scabbard and told her to "lie down" but made no threat to use the "dagger", nor did he offer her any violence or otherwise attempt to molest her. The girl's father, carrying a lamp, came from the kitchen to the door of the room where the girl and accused were sitting on the floor and attempted to enter it but was prevented from doing so by accused's companion who was armed with a rifle. He called to his daughter to go to the kitchen. The girl, making a "sign" that she wanted to leave the room, removed accused's hand from hers, and with no restraint on the part of accused or his companion, went to the kitchen. Upon this testimony the court found that the accused had assaulted the girl with the intent to rape her.

It is the opinion of the Board of Review that the facts disclosed by the evidence do not afford a reasonable basis for the inference that accused at the time of the assault alleged intended to commit rape. To be found guilty of assault with intent to commit rape it must be inferable from all the circumstances that the design of the assailant was not merely to have an illicit sexual relationship but that he intended to gratify his passions at all events and notwithstanding the opposition offered - to overpower resistance with all the force necessary to the successful

accomplishment of his purpose (Winthrop, Mil. Law & Prec., 688). In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice (par. 1491, M.C.M., 1928; CM 230541, Daniel, XVII B.R. 385; CM 239839, Harrison, XXV B.R. 273; CM 244546, Klinkert, XXVIII B.R. 347).

*** This is a question of law which must necessarily be considered by the Board of Review and does not involve determining the weight of evidence or passing upon the credibility of witnesses. Intent being a mental process can only be inferred, in cases such as this, from the character and degree of the violence applied, the language, threats, demonstrations, and entire conduct of the accused, the place, time, and other circumstances of the attempt, etc. See Winthrop, 2nd Ed., page 688. In other words, evidence as to intent is usually purely circumstantial and, under the rules of law, is not substantial evidence upon which a finding can be made unless it is such as to exclude every reasonable hypothesis except the one of accused's guilt. CM 195705, Tyson, and cases cited. ***

*** The principle applicable to the facts of this case is well stated in Robat v. State (191 Tex. Cr. Rep. 468; 239 S.W. Rep. 966) as follows:

'It is essential that a specific intent to commit rape be established by the testimony, and it must go beyond the mere possibility of such intent. *** The fact that the conduct attributed to the appellant was atrocious and merited punishment cannot take the place of proof establishing the elements of an assault with intent to rape.' (Underscoring supplied)." (CM 199369, Davis, IV B.R. 37).

Accordingly, it has been held that an intent to commit rape was not inferable from the following circumstances:

In late afternoon accused followed a six and one half years old girl to her home. He attempted to kiss her, exposed his private parts and placed his hand under her dress but did not attempt to remove her underclothing. Victim backed away; accused did not attempt to restrain her and left upon another's approach (CM 199369, Davis, supra).

About 1:00 A.M. a 17 years old girl was awakened by accused with his clothing removed standing next to her bed. He took

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hold of her shoulders and kissed her on the mouth. She got out of bed and put on the lights. Accused gave his name and outfit and "without a bit of trouble" she led him to the door and he left saying that he was sorry (Opinion concurred in by The Judge Advocate General) (CM 220805, Peavy, XIII B.R. 73).

A 14 years old girl and her 9 years old sister were followed home by accused who grabbed victim from the rear. She fell to the ground on her stomach and he fell on top of her and put his hand on her leg under her dress, halfway between the hip and the knee. She knocked his hand away and he started to replace it but a stranger came to the door of the house and he fled (CM 239839, Harrison, supra) (Approved by The Judge Advocate General).

Accused joined party of men and women previously unknown to him. At his invitation to go to his room to feed his dog, one woman accompanied him. He threw her on the bed, locked the door and turned out the lights, said he wanted to "get hot", pulled up her skirt and opened his trousers. She screamed once, a man answered, but she screamed no more. He suddenly desisted. Held: The encouragement she had lent to his advances obviated the likelihood of intent to achieve his desire by any force necessary (CM 245081, Whittiker, XXIX B.R. 123).

Accused, while out walking with an Army nurse, "pinned" her to a tree and forcibly kissed her. He asked for another date that night and she consented "provided he behaved himself". That evening he forcibly seated her upon the ground, placed himself on her and attempted to have sexual intercourse. She screamed and struck him in the face. He struck her but immediately desisted from his attempts and assisted her to rise and took her home (CM 244546, Klinkert, supra) (Holding approved by The Judge Advocate General and findings disapproved in accordance therewith by the President).

Contrasted with such cases are those wherein a finding of assault with intent to rape was sustained. In each of them the accused by his actions clearly demonstrated an intent to accomplish an act of sexual intercourse by any force necessary but desisted before achieving his purpose (e.g., CM 229141, Allen, XVII B.R. 57; CM 232790, Brandon, XIX B.R. 193; CM 234286, Phelps, XX B.R. 313; CM 236101, Barker, XXII B.R. 285; CM 252657, Crumpecker, XXXIV B.R. 127; CM 252929, Thompson, XXXIV B.R. 207).

Assuming that the evidence is susceptible to the conjecture that accused entered the house for the purpose of having sexual intercourse, tested by the

applicable law and the established precedents, it is the opinion of the Board of Review that the circumstances established by the evidence in the instant case fall far short of furnishing a basis from which it could be inferred that accused intended to overcome all resistance to accomplish such purpose. As a matter of fact the evidence shows that at no time did he attempt to force his will or exercise any restraint upon her. She removed his hand without protest from him and, when she signified by making a sign that she wanted to leave the room, he did nothing to prevent her. It follows that the record is not legally sufficient to support the findings that accused assaulted Eufracia Devera with intent to commit rape.

The evidence does establish, however, that the accused unlawfully held the hand of Eufracia Devera. Although the force applied was slight, accused nonetheless thereby committed an assault and battery in violation of Article of War 96 (p. 312, Miller, Crim. Law; sec. 813, Wharton, Crim. Law). Such offense is included within the specification upon which accused was tried, and he is legally guilty thereof. The maximum authorized punishment therefor is confinement for six months and forfeiture of two-thirds pay per month for a like period (CM 220805, Peavy, supra; IV Bull. JAG 89).

5. The Board of Review takes judicial notice that the New Bilibid Prison, the place of confinement designated in the instant case, is now known as the Philippine Detention and Rehabilitation Center.

6. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to sustain only so much of the charge and specification as involves a finding that accused did commit an assault and battery upon Eufracia Devera at the time and place alleged in violation of Article of War 96 and legally sufficient to sustain only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of two-thirds of accused's pay per month for a like period.

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Mark A. Stewart, Judge Advocate.
Colonel, J.A.G.D.

James R. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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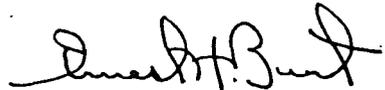
1st Ind.

Army Service Forces, Branch Office of The Judge Advocate General, APO 75,
7 July 1945.

To: Commander in Chief, United States Army Forces in the Pacific, APO 500

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$ is the record of trial in the case of Private John H. Trujillo (20625836), Casual, attached to 269th Replacement Company, 12th Replacement Battalion.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that so much of the findings of guilty be vacated as exceeds a finding of guilty of assault and battery by wrongfully "grabbing the right arm" of Eufracia Devera in violation of Article of War 96, that so much of the sentence be vacated as exceeds confinement at hard labor for six months and forfeiture of \$33.33 per month for six months, and that all rights, privileges, and property of which the accused has been deprived by virtue of the parts of the findings and sentence so vacated be restored.



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

Incl:
Record of trial.

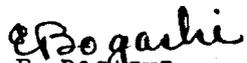
AG 201-Trujillo, John H. (Enl) 2d Ind.
(6 Jul 45) JA

GENERAL HEADQUARTERS, UNITED STATES ARMY FORCES, PACIFIC, APO 500,
15 July 1945.

TO: Commanding General, Philippine Base Section, APO 358.

For compliance with first indorsement.

By command of General MacArthur:



E. BOGASKI
Major, AGD
Asst. Adj. Gen.

1 Incl
n/c

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BASIC: Ltr fr ASF, BOJAG, APO 75, dtd 6 Jul 45, CM A-2158, Review
by the Board of Review.

PBJA 250.4 3rd Ind.
HEADQUARTERS, PHILIPPINE BASE SECTION, APO 358,

TO: Assistant Judge Advocate General, BOJAG, APO 75.

First indorsement complied with.

FOR THE COMMANDING GENERAL:


L. H. GOODNOW
1st Lt., AGD
Asst. Adjutant General

Incl: n/c

(Findings vacated in part in accordance with recommendation of
Assistant Judge Advocate General. GCMO 130, PBS, USAFWP, 23 July 1945.)

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Military Police Company and Private Louis Szeker, Headquarters Squadron, Far East Air Service Command, acting jointly and in pursuance of a common intent, did, at APO 565, on or about 22 April 1945, by force and violence and by putting her in fear, feloniously take, steal and carry away from the person of Private Hannah K. Hammel, a wrist watch, a cigarette lighter, and two diamond rings, the property of said Private Hammel, total value about \$100.00.

They pleaded not guilty to the charges and specifications and were found guilty of Charge I and its specification and of Charge II and so much of its specification as alleges that accused took the watch, of a value of about \$19.75, at the time and place and in the manner alleged. They were sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentences but reduced the period of confinement of each accused to twenty years and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution reveals that on the afternoon of April 22, 1945, Private Hannah K. Hammel a WAC, 41 years of age and a widow for 9 years, was at Sentani Airstrip, Hollandia, New Guinea, where she was to take a plane to join her unit at APO 707, which had preceded her while she was in a hospital. Upon finding that her records had not arrived she was "waiting around" and became engaged in a conversation with Ffc Mitchell A. Boyer (R.81). She was then directed to go across the road to a WAC casual camp. Private Boyer asked her if he could come to the camp and requested her "to get a girl for another fellow". About 6:30 P.M. Boyer arrived at the WAC camp with S/Sgt. Buster K. Hurley, but Private Hammel had been unable to get another girl. After talking a short while Boyer observed a weapons carrier standing nearby with two soldiers in it, one of whom "he knew back in the States". He asked her to go over and meet him which she did. The soldiers in the weapons carrier introduced themselves as "Louis" [accused Louis Szeker] and "Boyd" [accused William F. Swindle] (R.82). After talking a short time she went to the casual camp and got coffee for all of them which they drank. The accused drove off and she, Boyer, and Hurley then went to the "rec hall" (R.18,83). At about 7:00 P.M., the accused returned and the five of them sat on some logs near the Red Cross kitchen. While there accused Szeker produced a bottle of "Cherry liquor" and all drank some (R.84), Private Hammel taking "two swallows" (R.117). The accused left the party six or eight times during the evening and upon returning

the last time accused Szeker stated that he knew where some steaks could be had at a mess-hall "at the top of the hill". The five of them got in the weapons carrier but upon arriving they found the cook was gone. Some one brought some canned sausages and bread and they returned to the place near the Red Cross kitchen where accused Szeker produced five cans of beer which they drank. About 10:00 o'clock all of them except Private Hammel took another "drink" after which Private Hurley left. Boyer then stated that he was going back to camp and Szeker said they would carry him back and asked Private Hammel to "come along". She said that she did not want to leave the area but Szeker stated, "It isn't outside of the area, it's right down this road". She got in the vehicle, sitting between the two accused with Boyer standing on the running board. Upon arriving at his camp Boyer got off and Szeker suggested that the three of them return to the mess hall and get something to eat. It was then a quarter to eleven. Private Hammel stated that she wanted "to be in by eleven". Accused Szeker stated that it was "just a few minutes up there; * * * You'll be back on time", adding "I know all these MP's. * * * We're MP's" (R.88,121), and they drove off. After a few minutes she stated, "Looks like we ought to be at the mess hall by now" to which Szeker replied, "You aren't going to the mess hall * * * You're going to get * * * Fucked" (R.88). She replied, "No' * * * I ain't * * * Let me out" (R.90). The car was stopped (R.123) and she attempted to get out but accused Swindle "got ahold" of her (R.88) and dragged her into the back of the vehicle (R.91,125,126,127) and pushed her down while Szeker * * * "grabbed ahold" of her leg. She stated that Swindle * * * "unbuttoned my breeches and pulled them down below my hips", Szeker helping him (R.129). Her "underpants" were also removed (R.130). During this time she was screaming (R.94) and calling, "Let me get up and let me get out". "He [Szeker] told me to quit calling for help, * * * 'There ain't nobody here to hear you'" (R.93-94,124). * * * "then Swindle got over and got onto me and I fought him off and finally he gave up, * * * Szeker held me first when Swindle was trying the first time" (R.92,133). Szeker then got on her and she "Tried to fight him * * * [but] wasn't able to push him" (R.93-94). Accused Szeker then committed an act of sexual intercourse upon her. Accused "Swindle came back before I could get up again and then Swindle did the same thing" (R.95). During the entire occurrence she stated, * * * "I was just fighting and calling all the time * * * They held me there. I put up all the fight I could" (R.129). "They got me back in the front seat between them again and said, 'Let's go get Ben and let him in on this'" (R.95). They proceeded toward "Ben's tent" and at that time "Swindle started to take my watch off my wrist * * * the catch on the bracelet hung up and Louis [Szeker] helped him get it off my arm" (R.96). She tried to keep them from taking the watch but * * * "I was wedged in between Swindle and Louis and they pulled my arm down and they got the watch" (R.96). The watch was "One you get at the PX - a Boulevard" of a stipulated price of \$19.75 (Ex. 4--R.96,103). She also missed two rings, dog-tags, locker

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keys, and a Ronson cigarette lighter of a stipulated value of \$3.00. She testified that the wrist watch and cigarette lighter were taken from her by the accused but that she subsequently missed the other articles when she undressed at the hospital (R.113).

At about 0100 hours an MP at one of the gates near the enlisted men's area saw a weapons carrier, driven by accused Szeker, coming from the direction of the WAC's casual camp going toward MP Headquarters. He noticed a "girl lying in Swindle's arms" (R.50). He did not talk with them at that time. Upon arriving at "Ben's tent" Swindle stated, "He's asleep; let him be," or "alone" or something" (R.96). In about 15 or 20 minutes they returned and the same MP "just waved them through" and they drove toward the WAC casual camp (R.51). The car proceeded to the "social engagement gate" of that area where Privates McKee and Slusser, MP's, were on duty (R.57). Szeker was driving and Swindle had "His right arm * * * around her shoulders". They stopped the car and Swindle asked the guards if they " * * * wanted a piece of tail" (R.58) and "was laughing when he said it". The girl "was practically lying down on Private Swindle's shoulder * * *" (R.59). Swindle then asked them for a cup of water and "whether we wanted a drink of whiskey or not" (R.59,62). Swindle took a drink of water and the girl also took one stating that she was sick and attempted to "throw up" (R.59). Private McKee stated that she made no complaint other than stating, "I am sick" (R.61), and at that time she " * * * appeared to be pretty well drunk" (R.61). Private Slusser stated that at that time the girl " * * * sat on Swindle's lap" and "She looked as if she had been drinking" (R.65), and when " * * * they asked us if we wanted intercourse with her" (R.66) he stated that it was said loud enough so the girl could have heard it, however, "the girl did not say anything" (R.67). The girl testified that at that time -

" * * * I told the MP I needed help and Louis said to the MP, 'Don't you want to get some of this,' and the MP said, 'Better carry that girl back where you got her'" (R.104-105, 152).

"Then they carried me like the MP said to a road just a few minutes - they stopped the vehicle and Swindle got out and walked around the other side of the vehicle and I got down off the seat and run - and run off the road and hid in the bushes and after a few minutes they left" (R.104-105,156).

"I got out on the road and I called - I started to call; I called for help, and I run into the WAC area calling for help" (R.106,157).

Private First Class Virgil E. Owens, a guard at the barracks " * * * where

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the women are placed awaiting transportation" (R.223) heard a woman screaming and "*** Yelling for help ***" about a hundred and fifty feet from his post. He saw Private Hammel running toward him (R.224) and asked him if he was a guard. She was "scared - that was obvious" and he could not understand all she was saying. He helped her up the hill and could detect the odor of alcohol on her breath. She stumbled a couple of times "*** I don't think she was completely drunk, because she could walk pretty well". Upon approaching the enclosure "She broke loose and started running" to the rear of the barracks building (R.226).

First Lieutenant Henri Baufford, the officer of the day, was sitting in his tent about 2:00 o'clock on the night in question. He heard someone "holler" for help four or five times and immediately went to the gate at the women's enclosure where he saw Miss Hammel just inside the gate, running to the barracks. He followed her into the building and found her lying on the floor. She told "some of the girls in there" what had happened, and stated, "Get those guys! Get those four guys that raped me!". She kept hollering. The Lieutenant testified, "*** I held her by the wrist and told her to keep quiet and tried to tell her to quit making all that noise. I slapped her as I thought she was hysterical and when I slapped her she called me a * * *". Lieutenant Baufford called Captain George Traina, M.C., who drove an ambulance to the WAC barracks. Upon arrival Private Hammel " * * * came running out to the ambulance from the orderly room and a couple of minutes later Lieutenant Baufford came up on the other side". She said, "Please help me! You will help me? They don't believe me. You will believe me won't you?". She then got in the ambulance with Captain Traina who testified, "She first of all mentioned that she had been raped by three men, and I tried to quiet her down, and she mentioned at the same time that she had been out in the afternoon. She was rather confused as to names. She mentioned two or three names. I didn't pay much attention - just tried to quiet her down. She mentioned some jewelry had been stolen by the two men who had raped her. First she said three, then she said two did" (R.183-184). Upon arrival at the 51st General Hospital she was examined by Captain Traina. He found "No cuts or bruises. The vagina was normal; had no more than, or had normal moisture in it. I looked at my finger. However, a complete examination would require a vaginal examination for discharge" (R.189). Her breath smelled as though she had been drinking (R.184,194). Captain Traina further testified that when she walked from the ambulance to the orderly room she stumbled, "Her voice was clear" and that at first she was hysterical but "She quieted down considerably" (R.184-185). About ten o'clock on the morning following the incident Private Hammel was examined at the hospital by Major Harold G. Nix, M.C., who found "*** a superficial laceration of the right cheek and a contusion of the lip" (R.203). At that time he

took a smear from her vagina and sent it to the hospital to be tested for sperm (R.202). The result of the test was not shown (R.207). Captain Francis A. Riley, M.C., examined Private Hammel on April 25, 1945. At that time "She had a small abrasion underneath where the clasp of the brassiere would be - that would be on the left side, about equal with the lower edge of the shoulder blade. She had abrasions over the right knee in the patellar area * * * Knee cap area; on the left knee was also a small abrasion. She had a small contusion over the coccyx; that is the small bone at the end of the spine. On the left side, she had one thumb mark, one contusion over * * * the head of the femur, and three other contusions around on the buttocks"(R.233).

About 2 o'clock A.M., on the night of April 22, 1945, Private Wilfred M. Watts was on guard in the WAC area in the vicinity of where the incident in question occurred (R.70). He heard a girl in the direction of the WAC casual camp "scream * * * She hollered 'Help' about four times" (R.71). He immediately reported it to the guard at the main gate who called up the guard-house. Upon receiving this report T/5 Eugene Englehardt, Corporal of the Guard, went to the vicinity where the screams had been heard but found nothing. Upon returning to the main gate he noticed accused Swindle standing beside a weapons carrier. He asked him what he was doing there and he replied that "he was looking for a bottle of whiskey" (R.73). First Lieutenant James M. McGrew was notified at about 3:00 A.M., of the incident and subsequently placed accused Swindle under arrest (R.245). At about 7:00 A.M., on that same day he had a conversation with accused Swindle in his [Swindle's] tent, questioning him as to his presence at the main gate at one-thirty that morning. He asked him " * * * whom this young lady was that was seen with him." Swindle replied that he did not know the name of the girl, she was a Red Cross girl, neither did he know the name of his companion (R.238). Later that day the Lieutenant saw both accused in the guard house and asked if they knew where the watch and cigarette lighter were. Accused Swindle " * * * started replying no, he didn't" when accused Szeker approached and stated, "'You know darn well you have them. Let's give them up. We are in this thing deep enough'" (R.240,241). Accused Swindle then stated that he had given them to someone " * * * he didn't remember * * *", but then stated that " * * * if we would let him out of the cage he would be able to locate them * * *" (R.241). Corporal Nicholas J. Fisher accompanied him to his [Swindle's] tent where " * * * He reached behind his mosquito net into a fatigue jacket - into one of the pockets and brought out the watch, and I asked for the lighter, and he reached in and also brought out a lighter" (R.245). The prosecution introduced in evidence [Prosecution Exhs. 7 and 8] the statements of each of the accused. The Law Member stated to the court that nothing in either statement of the accused could be considered as to the innocence or guilt of the other (R.282,283). They follow:
[Swindle]

"Last night, * * * Lewis Szeker and I and the girl

[Hannah K. Hammel] drove off. We went away back to a quiet spot on a small road off the main road, and parked. The place where we parked the car is about three miles from the 22d Replacement Depot. * * * I got in the weapons carrier with the girl and Szeker. I made advances toward the girl. She screamed and pushed me off two or three times. I forced myself upon her and my private parts entered her private parts. There was complete penetration.

"During the act of intercourse she continued to scream, but I persisted in the act of intercourse. Due to the fact that she resisted and fought so much, I finally got up from the girl without having a discharge. We drove the girl to within a short distance of the WAC Casual Camp, and let her out. She walked in by herself.

"All of us had been drinking. I had several drinks and I was drunk, but I knew what I was doing all during the course of the evening.

"This morning, Hannah K. Hammel's wristwatch and cigarette lighter were taken from my possession". (Pros. Ex. 7).

[Szeker]

"Last night, at about 2250 hours, * * * I went in the back of the weapons carrier with Hannah Hammel and had intercourse with her. There was complete penetration. My private parts entered her private parts, and a discharge therein took place. After I had intercourse I stood up * * * we then took her to a short distance from the WAC Replacement Area, and she walked the rest of the way.

* * * *

"All of us had been drinking, but everyone seemed to know what he was doing. I certainly knew what I was doing". (Pros. Ex. 8).

Each accused elected to remain silent. The defense called Captain Joseph L. Morrow, M.C., a psychiatrist, who testified that on 28 April 1945 he gave accused Swindle a psychiatric examination and found him of

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"* * * sane mind, not suffering from any disorder of the personality, psychoneurosis, or pathologic deviation of the personality * * * I found him to be of an immature personality, a type of individual whose behavior, by reason of his immaturity, might be less restrained and controlled than a more mature individual" (R.272), and that he was a sane and responsible member of society with a "mental age of seven and eight" years (R.277). It does not appear from the record that there was an examination of accused Szeker. In answer to a hypothetical question, he stated that the staggering and stumbling of Private Hammel could have been a normal and natural consequence of her experiences on the night in question (R.234).

4. The accused are charged with the crime of rape which has been defined as "the unlawful carnal knowledge of a woman by force and without her consent" (par. 148b, M.C.M., 1928). The evidence is undisputed, and each accused admits that at the time and place alleged he had carnal knowledge of Private Hannah K. Hammel, who testified that it was by force and without her consent. The extent and character of the resistance required by a woman to establish her lack of consent, accused having been charged with rape, depends upon the relative strength of the parties, their ages, and the surrounding circumstances (52 C.J. 1019; 44 Am. Jr. 905-906; sec. 675, Underhill's Crim. Evid. 4th Ed.; CM 239356, Brown; CM 240674, Rinke). The record contains abundant evidence from which the court could find that each of the accused had carnal knowledge of Private Hannah K. Hammel as alleged.

The accused are likewise charged with the offense of robbery, which 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" (par. 148f, M.C.M., 1928). There is abundant evidence to support the findings of the court that the accused are guilty of this offense. The victim testified that both accused took her wrist watch from her by force and it was subsequently found in accused Swindle's possession.

After arraignment and pleas the defense counsel made a motion that the specification of Charge I be re-drafted on the grounds that it was duplicitious, citing the Manual for Courts-Martial, "Two or more persons cannot join in the commission of one offense of a kind that can only be committed by one person". The court properly refused the motion. In a case where two accused are charged in a similar specification with rape, it was held:

"* * * While their joinder may be an improper form of pleading, each was directly associated with the other in a common venture, and a joint charge is appropriate as being within the application of the recognized rule of law that

one who aids and abets another in the commission of an offense is chargeable as a principal. Therefore, in view of these concomitant circumstances of concerted action, though there is present that aspect wherein each accused is factually an independent rapist, the joinder cannot be deemed to have injuriously affected the substantial individual rights of accused." (CM NATO 1121, III.Bull. JAG 62.)

No errors injuriously affecting the substantial rights of the accused were committed during the trial. The sentences as approved are permissible upon conviction of the offenses charged herein. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape or of robbery, each recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 276 and 284, Criminal Code of the United States (18 U.S.C. 455; 463), respectively.

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

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Luther J. Roberts, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES.
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2184

7 June 1945.

UNITED STATES)

v.)

Technician Fourth Grade ALBERT
T. BENTON (39558478), 11th
Airborne Parachute Maintenance
Company.)

Trial by G.C.M., convened
at APO 468, 12 May 1945.
Dishonorable discharge,
total forfeitures and con-
finement for life.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 Fourth Grade Albert T. Benton, 11th Airborne Parachute Maintenance Company, did, at or near APO 75, on or about 22 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corazon Ferre, a human being by stabbing her with a knife.

He pleaded not guilty to the charge and specification, was found guilty as charged, and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence but did not designate a place of confinement and forwarded the record of trial to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia, pursuant to Article of War 48. Inasmuch as the instant case does not require action by the confirming authority, it will be treated as having been forwarded pursuant to Article of War 50½.

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3. The evidence reveals that accused, a member of the 11th Airborne Parachute Maintenance Company, spent the nights of 20 and 21 April 1945 at a house on Natividad Street, Manila, P.I., occupied by Corazon Ferre, deceased. On the morning of 22 April, Fidel Froilan, to whom accused's clothing had been given to be laundered, came to the house. Froilan testified through an interpreter that he then saw accused and deceased downstairs eating and that they went upstairs together (R. 18). He later heard them arguing in the bedroom (R. 14, 18). Froilan went upstairs and endeavored to "break up the quarrel" (R. 18) or "fight" but accused tried "to frighten him by socking him with his fist" (R. 15). Deceased, followed by accused, went toward the window and the Filipino noticed a knife blade protruding from accused's hip pocket (R. 19) but also testified that accused came downstairs alone and then went back upstairs at which time he (witness) saw accused and noted that he had a knife in his pocket (R. 14). The knife was introduced in evidence as Prosecution's Exhibit 2. (At the conclusion of the trial it was withdrawn and no description of the knife is contained in the record or accompanying papers.) Froilan left the house in search of a member of the Military Police and did not see the events which subsequently transpired there.

Ramona Gonzales, from an adjoining house, saw deceased attempting to get out of the window on to a roof over the kitchen and a soldier endeavoring to restrain her. Deceased succeeded in freeing herself from the soldier, dropped from the roof to the ground and went into the kitchen. There Corazon was met by a soldier. Because a fence and a bamboo screen partially obstructed her view Ramona was then able to observe their bodies only from "the chest down to the knee" (R. 11). She saw the soldier's hand rise and then saw deceased fall. The soldier "drug her from the door to the kitchen" and out of her sight (R. 10). At no time did the witness see anything in the soldier's hands (R. 12). A sketch of the premises was made by the witness and exhibited to the court but was not attached to the record of trial.

About 1150 hours that morning Corporal Stanley F. Wylie was summoned to the house where the incident occurred. The door was apparently locked and there was no response to his knocking. A Filipino showed him a way to get into the house through an upstairs rear window. Upon entering the house he went down the stairs and found accused opening the door that he (the Corporal) had previously knocked upon. Accused turned to him and said, "It's a pretty serious situation. We must talk the matter over" (R. 20). He showed the Corporal the body of Corazon Ferre lying in a pool of blood just inside the kitchen and a "crude knife" and an ice pick on the living room table. The Corporal went outside, told a soldier to get an ambulance, and returned to the room. While he and accused put deceased on an army cot in the living room accused "said that during the night some money had been stolen from him and he was trying to recover it. He said that if she had only given him back 50 pesos that he would have been satisfied" (R. 22). The MP's arrived and accused voluntarily stated that:

"* * * in the living room Cora started facing him with an icepick. He ran by the kitchen sink pulling a knife from the wall while Cora was entering the room behind him. She in turn entered the room and took from the wall nearby a bottle and threw it at Sgt Benton. In turn he threw a pottery bowl at her. From there it was rather vague, but he did show the spot where she was when the accused stabbed her." (R. 21).

Accused was asked why he had stabbed the woman and he answered, "what would you do if someone pulled an ice pick on you, and was going to stab you?" (R. 23). A broken bottle and pieces of crockery were lying on the floor (R. 22, 39). An ice pick, a piece of a broken bottle, and a piece of pottery were introduced as Defense Exhibits A, B, and C, respectively.

An autopsy was performed upon deceased which revealed two sharply incised wounds in the back, one through the body into the heart and the other in the chest cavity and the lung, an incised wound on the face and another on the posterior surface of the left shoulder (R. 8). Either of the major wounds would have caused death. From their nature they could not have been inflicted when deceased was facing her assailant unless she had been bent forward at the time (R. 9).

Accused was taken before the Commanding Officer, 35th Criminal Investigation, and, after being warned of his rights under the 24th Article of War, was asked if he wished to make a statement. He replied in the affirmative and stated that he had gone to the girl's house "to get some place to sleep", having refused her offer "to be with her". He stated:

"* * * I explained that I would be willing to pay the night's lodging and she agreed. At that time, we entered the house. I asked her if she had any whiskey. She answered, 'Yes'. She brought in a bottle. That night I had some drinks. I don't remember how many, and I did not leave the house. I asked her if it was possible to get someone to press my clothes. She said 'Yes.' Then I took my clothes off and she told me to take everything out of my pockets. Then she folded my clothes up and sent them out to be pressed. All my belongings I had placed on a table in the living room where I had been drinking. When I had finished drinking, I gathered all my belongings up and took them up stairs where the bedroom was located. I then placed my personal belongings on a small table that was next to the bed and went to bed.

"The next morning when I awoke I asked her what time my clothes would be ready to which she answered shortly. That was approximately 6:30 AM. I had waited on the clothes a short time and then asked her if she had anything more to drink. She went

and got a bottle and brought it in to me. At approximately 9:30, the clothes were brought in. I took the clothes and returned upstairs. I put my clothes on. Then I counted the money that was on the table before putting it in my pocket. I asked her how much I owed her for the nights lodging, the whiskey and the breakfast and also the clothes. She told me I owed her twenty-five pesos. When I finished counting my money I discovered I was approximately one hundred and seventy-three pesos short. Then I asked her if she took it. She said 'No.' I told her I was willing to pay for my expense there, but that I didn't want to lose that much money. She still insisted that she didn't touch it. Among the belongings that I had placed on the table the night before, was a celloid cigarette case which contained an empty cigarette package. While we were arguing she seemed to be afraid. She grabbed the cigarette case and ran across the bed and jumped out the window. In this motion, she took some money out of the cigarette case and threw the case down. At that time I went down stairs. She was also down stairs. She had arrived from the back entrance. The room at the foot of the stairs there is a small bed. When I arrived in the room she was sort of leaning on the bed. She reached down at the foot of the bed and brought out an ice pick object. When I saw the ice pick, I was naturally somewhat frightened at the moment so I turned and ran into the kitchen. She was running after me. As I passed through the kitchen, I passed a sink. Right above the sink was a butcher knife. I grabbed the butcher knife and momentarily stopped and turned. She must not have known that I had taken the butcher knife because she was still running after me. At the moment that I stopped and turned she grabbed the whiskey bottle and threw it at me. In order to get out of the way of the whiskey bottle, I jumped over a small partition that joins the kitchen and a kind of a back porch. Then I turned again and started into the kitchen. As I came in the door she was still coming through the kitchen with the ice pick in her hand. There was a small flower pot on a ledge right at the door. I picked up the pot and threw it at her. It hit her somewhere around the forehead. She kind of bent down still holding the ice pick. At the same time I threw the flower pot I started toward her. She was about three foot from me then. When I reached her I stabbed her with the butcher knife. During all this she was still holding the ice pick and was striking at me. I don't remember whether I stabbed her first in the chest or in the back. To the best of my recollection, I stabbed her twice.

"When this was over there was a loud commotion on the outside. I went to the front door and closed it not knowing whether the people outside would try to enter or not. Then I went back to the kitchen, picked up the ice pick, and brought the two weapons back into the living room and laid them on the table and waited. It was approximately ten minutes before the Military Police arrived of which they carried the investigation, from there. The girl's house number, to the best of my knowledge, is number 1250. I knew her by the name of 'Cora'. The time of the stabbing was approximately 11:45 or 11:50.

"I have read over this affidavit and I find it to be true to the best of my knowledge and belief. No threats or promises were made by anyone in order to get this statement from me and I sign this affidavit on my own free will." (Ex. 3).

Accused was examined by a psychiatrist on or about 8 May 1945 who "found him to be suffering from no mental aberration or mental abnormality" (R. 25).

Accused chose to be sworn as a witness. The occurrences as testified to by him were almost identical with those appearing in the statement he gave to the Military Police on the day of the fatal stabbing. He further stated that when deceased held the ice pick she was between himself and the front door of the house (R. 30) and that he knew of no exit from the back yard which was surrounded by a wall about 7 feet high made of tin (R. 31, 34, 35-36). He also testified that he grabbed the hand in which deceased was holding the ice pick but she wrenched loose (R. 37). When asked "Did you intend to kill her?" he answered, "No, sir. * * * I don't believe it ever entered my mind to kill the girl", and "Why did you stab her twice?" said, "I don't know, sir. It all happened so quick that I don't know, sir" (R. 38).

4. Corazon Ferre died on 22 April 1945 as a result of sharply incised wounds in her back which penetrated her heart and lungs. Accused admitted having stabbed her. He attempted to justify his act by claiming that deceased, who had stolen some money from him, attacked him with an ice pick and he stabbed her in self-defense. Accused was charged with and found guilty of the murder of Corazon Ferre.

Murder is the unlawful killing of a human being with malice aforethought (par. 148a, M.C.M., 1928). Malice is implied in every intentional and deliberate homicide unlawfully committed if there be no circumstances to mitigate, excuse, or justify the act (Miller, Crim. Law, p. 271; CM 237022, Hughes, XXIII B.R. 217, 228). To excuse a killing on the ground of self-defense one must reasonably believe that his life is in danger or that he is in danger of suffering great bodily harm and that it is necessary to kill to avert the danger (Allison v. U.S., 160 U.S. 203, 217; Acers v. U.S., 164 U.S. 388, 392). Whether accused stabbed deceased with malice aforethought as alleged in the specification, in

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which event he would be guilty of murder as alleged; whether his actions were excusable on the ground of self-defense in which event he would not be guilty thereof; or whether he acted under the heat of sudden passion induced by fear of deceased in which event he would be guilty of the offense of voluntary manslaughter only, were questions of fact for the determination of the court-martial (Kinard v. U.S., 96 F. 2d 522; Stevenson v. U.S., 162 U.S. 313; Michigan v. Toner, 187 Nev. 386; Wyoming v. Sorrentino, 224 P. 420).

It was the province of the court to accept or reject the testimony of accused or of any of the witnesses. By its findings it rejected accused's defense and found that the homicide was committed willfully, deliberately, unlawfully and with malice aforethought. There is substantial evidence sufficient to warrant the findings of the court.

A record of trial by general court-martial should "set forth a complete history of the proceedings had in open court" (par. 85b, M.C.M., 1928) so that the reviewing authority and others required to review the record may have before them all of the evidence considered by the court in reaching its conclusion. In the instant case the court had before it a diagram of the house where the homicide occurred but it was not made a part of the record. Because of such failure, the testimony of the witnesses, particularly that with reference to accused's ability to retreat and how much of the incident witness Ramona Gonzales was able to see, although perhaps clear to the court, was vague and indefinite. Like error was committed by the withdrawal from evidence, without substituting an adequate description, of the knife used by accused and the ice pick with which deceased allegedly attacked him, both of which had been introduced as exhibits. In view of the other testimony in the record, the noted errors did not injuriously affect accused's substantial rights.

A sentence of death or of life imprisonment is mandatory upon conviction of murder in 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 by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

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

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Carlton G. Smith, Judge Advocate.
Colonel, J.A.G.D.

James B. Muesley, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2226

13 June 1945.

UNITED STATES)

v.)

Private WILLIAM F. KEPHART)
(19012299), Company "B",)
511th Parachute Infantry.)

) Trial by G.C.M., convened at
) APO 468, 16 May 1945. Dis-
) honorable discharge, total
) forfeitures, confinement for
) twenty-five years.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 1: In that Private William F. Kephart, Company B (then of Company D), 511th Parachute Infantry, did, at or near APO 468, on or about 11 April 1945, in the night-time, feloniously and burglariously, break and enter the dwelling house of Doctor Felipe Sabater, with intent to commit a felony, viz: robbery.

Specification 2: In that Private William F. Kephart, Company B (then of Company D), 511th Parachute Infantry, did, at or near APO 468, on or about 11 April 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Doctor Felipe Sabater, about 138 Pesos, the property of the said Doctor Felipe Sabater, value about \$69.00.

Specification 3: In that Private William F. Kephart, Company B (then of Company D), 511th Parachute Infantry, did, at or near APO 468, on or about 11 April 1945, with intent to commit a felony, viz: robbery, commit an assault upon

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Doctor Felipe Sabater by willfully and feloniously striking the said Doctor Felipe Sabater in the face and on the head with a pistol.

Specification 4: In that Private William F. Kephart, Company B (then of Company D), 511th Parachute Infantry, did, at or near APO 468, on or about 11 April 1945, with intent to commit a felony, viz: robbery, commit an assault upon Mrs. Concordia Illustrie Sabater, by willfully and feloniously threatening to kill the said Mrs. Concordia Illustrie Sabater with a pistol.

Specification 5: In that Private William F. Kephart, Company B (then of Company D), 511th Parachute Infantry, did, at or near APO 468 on or about 11 April 1945, with intent to commit a felony, viz: robbery, commit an assault upon Mrs. Ines Crudo Sabater, by willfully and feloniously threatening to kill the said Mrs. Ines Crudo Sabater with a pistol.

Specification 6: In that Private William F. Kephart, Company B (then of Company D), 511th Parachute Infantry, did, at or near APO 468, on or about 11 April 1945, with intent to commit a felony, viz: robbery, commit an assault upon Marciano Reyes, by willfully and feloniously threatening to kill the said Marciano Reyes, with a pistol.

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

Specification: In that Private William F. Kephart, Company B (then of Company D), 511th Parachute Infantry, did, without proper leave, absent himself from his post and duties at APO 468, from about 25 March 1945, to about 11 April 1945.

He pleaded not guilty to Charge I and its specifications and guilty to Charge II and its specification. He was found guilty of all specifications and charges and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for twenty-five years. The reviewing authority approved the sentence, did not designate a place of confinement, and pursuant to Article of War 48 forwarded the record of trial to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia. Inasmuch as the instant case does not require action by the confirming authority, it will be treated as having been forwarded pursuant to Article of War 50½.

3. The evidence reveals that at about 0200 hours 11 April 1945 accused, a member of the 511th Parachute Infantry, "shoved the door open" and entered the home of Doctor Felipe C. Sabater, a dentist, in Imus, Cavite, P. I. Mrs. Ines Sabater, the doctor's mother, and Marciano Reyes, their servant, were awakened by accused who pointed his pistol at them. She called to her son, asleep upstairs, and he and his wife, Concordia, came down. Accused "struck" the doctor in the side with his pistol and made them all go upstairs. Accused, who had followed, ordered them to sit down, be quiet, and not to move their hands or he would shoot them. The servant left the room but accused ordered him to be called back and upon his return hit and choked him. Accused, continuing to point his pistol at them, then asked for money. Upon instructions from the doctor, his wife went to the "clinic" (another room) and returned with 5 pesos in single peso notes which she gave/accused. The latter said that he was not satisfied and hit the doctor with his pistol. His wife started crying and, saying that she would get some more money, ran to the doctor's room and returned with 132 pesos which she gave to accused. Again accused said that he was not satisfied and for the third time struck the doctor with his pistol. The doctor sent his mother downstairs for a box of coins. Meanwhile his sister-in-law, who had been asleep in another room, had without accused's knowledge gone to a neighbor, Teofilo de Quiroz, for help. The mother, with the coins followed by Teofilo, returned to the room where accused and the others were. Accused told Teofilo to "keep your mouth shut, or else I will shoot you", ordered him to lock the door and give him (accused) the key. The Filipino locked the door and, as he handed accused the key, seized accused's pistol. The doctor took the caburata (iron black-jack) which Teofilo either had in his pocket or was holding and hit accused on the head causing him to fall to the floor and accused was disarmed. During the struggle the gun was discharged, a bullet going into the floor. Accused said, "Here is all the money in my pocket. Get it from my pocket. * * *" (R. 17). The doctor took a sum of money out of accused's pocket and they then pushed him out of the house. A few minutes later the money was counted and it was discovered that they had recovered only the 5 pesos first given to accused. The doctor and Teofilo then left the house, looked for accused and found him fully clothed in bed in the hospital. The doctor asked where his money was and accused tried to hit him with a chair. The Filipinos left and reported the incident to the Military Police. The doctor stated that accused had been in the house for longer than an hour; he did not appear to be drunk as "he speak smooth with low voice". The doctor was asked "What kind of door / through which accused entered / is it?" and answered "Wood." He was further asked "Is it open most of the time?" and answered "No, it is locked."

About 1700 hours 5 May accused, accompanied by two Filipinos, returned to the doctor's house and said to him, according to the doctor -

"I am the one who went in your house, and shake with the hands. Let's forget the past and don't worry, I will return the money tonight" (R. 14).

Staff Sergeant William F. Dubes of accused's company testified that accused was absent without leave from reveille formation on 25 March and was not thereafter present. A duly authenticated extract copy of the morning report of Company D, 511th Parachute Infantry, showing accused absent without leave from 29 March to 24 April 1945 was introduced in evidence as Prosecution's Exhibit 2.

Accused chose to be sworn as a witness. He testified that he began drinking about noon on 10 April. By midnight he had consumed more than two and one-half quarts of whiskey and then remembered nothing until he realized that he was in a house being hit by some kind of club or stick. He next remembered lying by a tree hollering for someone to help him. He managed to get up but fell down again and continued to holler for help. He next remembered being in the hospital; "they were sewing up my head". At that time he put three rolls of bills amounting to about 340 pesos under his pillow. When he next awoke he was still dressed and about 8 Filipinos were standing about asking him questions. Although one reached under his pillow and took one of his rolls of money, he was sick and said nothing. The doctor told the people to leave. The next morning accused discovered that all of the money he had placed under his pillow was missing. Of the Filipino witnesses who testified for the prosecution accused remembered having previously seen only the doctor. He did not remember going to the house "threatening" or "doing anything to anybody" nor did he remember being thrown out. Accused admitted that he had an Army automatic .45 in his pocket when he started drinking and could not account for its loss. With reference to his visit to the doctor's house on 5 May he testified:

"I was missing some money which I never got back. Well, I figured that the one who took my money from under the pillow was in cahoots with the doctor. * * * Because he was the one that was claiming he was robbed, and I figured all the money that I had on me they had given to him. * * * He [the doctor] said he didn't have the money. He said he believed the mayor had it so, I said I would go see the Mayor. If he has it I would get the money. (R. 27) * * * I didn't go to see the mayor. I just left." (R. 30).

4. Accused was charged in specification 1 of Charge I with burglary, in specification 2 with robbery, and in each of the remaining four specifications of that charge with an assault with intent to commit robbery.

Burglary is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein. The evidence clearly establishes that accused in the night-time entered the dwelling house occupied by Doctor Felipe Sabater and his family and by force caused them to hand over to him about 138 pesos, Philippine currency. The court, therefore, properly could find that accused entered the house for the purpose of committing a felony therein. Although the manner of accused's entry is not as clear as

might be desired, it appears that accused "shoved the door open". The opening of a closed door in order to effect entry is, in law, a "breaking" (par. 149d, M.C.M., 1928). There is, therefore, substantial evidence in the record from which the court could find accused guilty of burglary as alleged.

The evidence is equally clear that having entered the house accused, by violence and intimidation, gained possession of money, the property of the doctor, and thus could properly be found guilty of robbery (par. 149f, M.C.M., 1928). The several assaults by accused against the people then present, although separate offenses, were but aspects of the robbery.

In defense accused testified that on the afternoon and evening immediately prior to the incident he had consumed more than two and one-half quarts of whiskey and that he had no recollection of any of the events charged. Whether accused was so under the influence of intoxicating liquor as not to be able to form a specific intent was a question of fact for the determination of the court-martial (CM A-1981, Baker). By its findings the court determined that accused was capable of entertaining the specific intent necessary to the several offenses charged.

The evidence also establishes and accused pleaded guilty to absence without leave alleged in the specification of Charge II.

The punishment imposed is permissible upon conviction of burglary, robbery, and absence without leave. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of burglary and robbery, recognized as offenses of a civil nature and so punishable by penitentiary confinement by the Code of the District of Columbia and by section 284, Criminal Code of the United States (18 U.S.C. 463), respectively.

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

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Richard R. Bond, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

3. The evidence for the prosecution shows that on the evening of 23 April 1945 the accused and Private Clinton F. Brown, both of Company B, 58th Signal Battalion, were on duty carrying messages to and from the I Corps Message Center and the "forward area" of the 25th Division which was in combat near Digdig, Philippine Islands. They were using a one-quarter ton truck which accused was driving (R. 6). When returning from the forward area near Digdig an M.P. advised them that they "had better be careful, there is Japs down in the bushes" (R. 12) whereupon the accused loaded his Thompson submachine gun which he had with him (R. 11). Shortly thereafter they had a flat tire which they repaired and then proceeded to the village of Guimba where they had supper and "three or four drinks" of whiskey (R. 16). They bought another bottle of whiskey and, taking it with them (R. 14), went to the house of a Mr. Velasco where the accused "took a pretty heavy drink * * *". He "was getting pretty well drunk" (R. 13) and was "staggering a little" (R. 23). About 8:00 o'clock that night they resumed their mission to the Message Center (R. 24). About a kilometer from Mr. Velasco's house (R. 24) they had a blow-out, hit a culvert, and went into a field. Brown was thrown out of the jeep hurting his ribs (R. 11) and accused received a small cut above his eye (R. 7, 14, 29, 40, 49). An examination of the jeep showed the "rim was burned up and the 'guy' / tie / rods were bent" (R. 8). After about 30 minutes Private Brown told accused to stay with the car while he (Brown) went back for help (R. 9). Accused replied "'I will be here'" (R. 10), adding "'I guess I made a mess of things'" (R. 11). Brown testified that at that time the accused was seated "At the back of the jeep against the spare tire on the back" and that "He was unsteady on his feet (R. 7) * * * He seemed alright except kinda thick tongue_ from drinking" and was fully aware of all things about him but that "he had a sort of a crazy laugh after he went over to the car" (R. 8). Brown then left and met some Filipino civilians, one of whom asked him "how bad we were hurt", Brown replying that nobody was hurt (R. 9).

Mr. Ramon Casem, who did not speak English, heard the noise caused by the accident, went to the place where it occurred and met several civilians who had congregated there. It was a bright moonlight night (R. 41) and he saw the "two soldiers" drive the jeep from the field to the side of the road. Both got out and examined the accused's injury. They laughed and talked with Fidel Marcos, one of the civilians, for a short time, after which Brown left. Accused was seen to take a drink out of a "big bottle" (R. 47). He then got his gun from the jeep and moved his right hand back and forth, causing a "clicking" sound (R. 34). He again talked in English with Marcos, meanwhile pointing his submachine gun at him. Marcos told the civilians to "sit down * * * You be in line about two meters away so that the soldiers will not say nothing against us" (R. 29). They complied and sat in a line, accused facing Marcos at a distance of about one meter. In about three or four minutes a shot was heard and smoke was seen coming from the muzzle of the gun (R. 31).. Marcos said to the accused "'Yes, yes, sir'", placed his hands on his chest, staggered, and fell to the ground (R. 32). The accused

then put his gun in the jeep and called to some people who were approaching in bulcarts (R. 33). At no time was "any fighting or any type of hostilities" between the civilians present and accused observed nor did the Filipinos have any deadly weapons in their possession (R. 35, 47). Several of the civilians testified that they thought accused to be drunk.

Mr. Charles F. Waxler of accused's unit saw him at the Corps Message Center building at about 2330 hours on the night in question (R. 49-51). He noticed that "He had been drinking and he had a cut, a bruised eye, around his left eye" (R. 49). Accused told him "about the accident he had had with the jeep that he had been drinking" and he also told him "that Brown had tried to grab a ride in" (R. 49-50). At that time Mr. Waxler thought accused "was still drunk", but "he seemed to talk pretty straight talk" (R. 50).

By stipulation (Pros. Ex. 1) it was agreed that Dr. Valentin V. Pardo (M.D.), if present, would testify:

"* * * I examined the cadaver of Fidel Marcos, 45 years old at 2:00 P.M. on 24 April 1945. I found that the bullet entered the sternum passing through the left side of the body, then entered the inner side of the left arm just above the elbow, then passing to the outer side of the left arm just above the elbow. My diagnosis is that the victim died of internal hemorrhage due to the bullet stated above."

The defense called as its first witness accused's companion, Private Brown, who testified that when he left accused at the scene of the accident there were no Filipino civilians present (R. 54). Jack Foley Bailey, W.O.J.G., testified that he had known accused for about three and one-half years and that he had "never known him to be in any kind of trouble, company punishment or otherwise. He has been one of the best men as far as messenger jeep drivers was concerned that we have had" (R. 56).

The accused elected to be sworn and testified that he arrived on the Island on 12 April 1945 and joined his unit on the 17th of the same month and had had no opportunity to become oriented as to habits and customs of the Filipino people (R. 57). He testified, in substance, as above set forth relative to the incidents up to the time Brown left him at the scene of the wreck. He stated:

"* * * I decided I would back the jeep out on the road, got about half way out, the Filipinos came running down through there. I was hit over the head with something. I grabbed my gun and jumped out, when I jumped out why the gun went off. I saw that one of them was hit. I asked if I could help. They all commenced jabbering, so I got in my jeep and started on down the road. I met Sergeant Busam. I got in the jeep with him and came on to the I Corps Message Center, told Mr. Waxler that I had had an accident and he told me he couldn't do much about it for me to go on to bed. I went on down to the dispensary and got my eye fixed up and went on to bed." (R. 58).

He denied having met Mr. Velasco prior to the night in question and claimed that the injury on his head was caused by being hit with "something" when he was backing the jeep out of the road at which time "Some of them [the Filipinos] climbed up in the jeep, others along the side of me" (R. 61). He remembered that Brown was thrown from the jeep when the accident occurred and having heard him state that his back "hurt a little". He also recalled inspecting the jeep with Brown and of then deciding that Brown should go for help (R. 62). He made no claim of having been drunk other than stating that he began to feel the effects of the liquor after he "had taken a couple of drinks" (R. 60).

4. The evidence is undisputed that on the night of 23 April 1945, Fidel Marcos, a Filipino civilian, was killed by a bullet fired from a submachine gun in the hands of the accused. From the evidence the court properly could conclude that the killing was unlawful and with malice aforethought. The latter, essential to the crime of murder, -

"* * * does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. 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. (Clark.)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one 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 a 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 or by a wish that it may not be caused; * * * (par. 148a, M.C.M., 1928).

The evidence that the accused pointed the submachine gun at the chest of an unarmed Filipino civilian for several minutes and then fired it "clearly tends to establish that, whether or not he had any special malevolence toward any particular individual, he was possessed of a 'generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief,' * * * (Liggins v. U.S., 297 F. 881; Allen v. U.S., 164 U.S. 492, 17 S. Ct. 154).

Every person is presumed to intend the natural and probable consequences of his act and the use of a dangerous weapon resulting in a homicide by one having no right to use the weapon at that time and place, and in the absence of mitigating circumstances, is always regarded as evidence of the existence of malice aforethought.

The evidence is clear that at the time of the fatal shooting the accused had been drinking. A number of witnesses stated that before, at the time, and subsequent thereto, the accused was drunk and staggering. The accused made no such claim but stated that he was attacked and hit on the head by Filipino civilians while backing his jeep from the field to the road, that when he jumped out "the gun went off" and that the killing was accidental. His claim that the injury to his eye was caused by being hit by the Filipino civilians when they attacked him while he was in the jeep was negated by his companion Brown who stated that immediately after the accident he observed a small cut above accused's eye, the same injury claimed by accused to have been received in the alleged attack upon him by the Filipino civilians.

It was for the court to determine the accused's mental accountability and whether the act was with malice aforethought or was accidental (II Bull. JAG 427; People v. De Moss, 50 P. 2d 1031 (Cal); Bishop v. U.S., 107 F. 2d 297, 301; McAffee v. U.S., 111 F. 2d 199, 205). By its findings the court-martial resolved the questions against the accused. There is abundant evidence in the record supporting the court's determination.

A sentence of death or of life imprisonment is mandatory upon conviction of murder in 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 by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

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

(Absent), Judge Advocate.
Colonel, J.A.G.D.

William P. Smith, Judge Advocate.
Colonel, J.A.G.D.

James O. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2244

18 June 1945.

UNITED STATES)

v.)

Private HERBERT G. TYREE)
(13014487), Company I,)
148th Infantry.)

) Trial by G.C.M., convened at
) Headquarters 37th Infantry
) Division, APO 37, 25 May 1945.
) Dishonorable discharge, total
) forfeitures, confinement for
) fifteen years. The United States
) Disciplinary Barracks, Fort Leaven-
) worth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 58th Article of War.

Specification: In that Private Herbert G. Tyree, Company I, 148th Infantry, did, at the area of Company I, 148th Infantry, on or about 9 January, 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at the area of I Corps, APO #301, on or about 22 March, 1945.

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

Specification: In that Private Herbert G. Tyree, Company I, 148th Infantry, did, at the area of I Corps, APO #301, on or about 9 March, 1945, wrongfully and unlawfully impersonate a commissioned officer of the Army of the United States, by representing himself as a Lieutenant Colonel, Air Corps, United States Army.

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He pleaded not guilty to the charges and their specifications and was found guilty as charged. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty-five years, one previous conviction for violations of Articles of War 96 and 61 being considered. The reviewing authority approved the sentence but reduced the period of confinement to fifteen years, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution consisted of documentary evidence in the form of extract copies of morning reports, stipulations, and a statement of the accused, all admitted without objection on the part of the defense.

Prosecution Exhibits "A" and "B", extract copies of the morning reports of Company I, 148th Infantry, accused's unit, showed him to have been absent without leave from his organization from 9 January to 22 March 1945.

The stipulated testimony of Staff Sergeant Frank Nelson, 43rd Field Hospital, APO 70, is as follows:

"About the middle of February a First Lieutenant, Air Corps, drove into the 43rd Field Hospital area in a jeep, accompanied by four Filipino women. He had been here on several occasions previously, bringing these Filipino women to visit a Filipino patient. I approached him and told him visiting hours were after 1500I and that morning visits were prohibited. I did not know the Lieutenant's name at that time. I later was told his name was Tyro, Tyree, or something like that.

"The next time I saw him was on or about 17 March 1945. He was looking for Lieutenant Reese with regard to the issue of a Purple Heart to a Filipino guerrilla patient. I noticed he wore the rank of a Lieutenant Colonel, Air Corps. I mentioned to him about his rapid advancement. He stated that he had his choice of promotion to Lieutenant Colonel or being sent to the United States, and that he chose the promotion.

"I had no other contacts with him, but I did see him on several other occasions when he came to the hospital to visit Filipino patients. Prior to 9 March 1945 he always wore the insignia of a First Lieutenant, Air Corps, and, subsequently, that of Lieutenant Colonel, Air Corps." (Pros. Ex. "C").

Major Raymond J. Wyrens saw the accused in a corridor of the hospital about the middle of February wearing the insignia of an Air Corps Lieutenant on his collar. During the following week he observed him on several occasions

"wearing a Lieutenants bar on his cap". On 9 March 1945 he saw him wearing the insignia of a Lieutenant Colonel, Air Corps (Pros. Ex. "D").

First Lieutenant Richard D. Reese talked with accused on 7 March 1945, at which time accused was wearing the insignia of a Lieutenant Colonel, Air Corps. He stated:

* * *

"I then asked him, Tyree, how he became a Lieutenant Colonel while apparently being so young. He told me he had been in the Philippines during the entire period of Japanese occupation and that he had been a 1st Lieutenant prior to the occupation and that upon return of United States Armed Forces he has been promoted directly to Major and that 16 days later he received a letter in the mail making him a Lieutenant Colonel.

"The next time Tyree came to my attention he had been injured in a jeep accident and was, at the time, being treated in surgery. I went to Patient's Property Room to check personally upon his clothing. The clothing turned in by Tyree had attached to the collar the insignia of a Lieutenant Colonel and the insignia of the Air Corps crudely attached to the collar.

"My next meeting with Tyree was while he was a patient in the hospital. He came to me and expressed a desire to leave the hospital to attend a wedding. He asked that he be allowed to pick up his discharge papers rather than have them sent to his organization.

"I saw Tyree at least three more times after he left the hospital. On each occasion he was wearing the insignia of a Lieutenant Colonel, Air Corps." (Pros. Ex. "E").

First Lieutenant Morris Wolin, Corps Military Police, apprehended accused at the home of a Filipino family, Bactad, Urdeneta, on the 22nd of March 1945. At that time accused -

* * * identified himself as Herbert G. Tyree, Lieutenant Colonel, ASN O-665432, Commanding Officer of the 26th Guerilla Force, Philippino Scouts Battalion. When asked for his identification papers Tyree said that his identification papers which included a radiogram confirming his promotion to Major and Lieutenant Colonel in the United States Army had been lost. When taken by us to the Provost Marshal's office at 'I' Corps Headquarters, Tyree was wearing an Air Corps Officer's insignia on his shirt and a Lieutenant Colonel leaf on his cap." (Pros. Ex. "F").

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On 4 April 1945 the accused, after having been advised as to his rights, gave a statement to Major Herald H. Smith, the investigating officer, in which he stated:

"As we hit the beach we moved up a small barrio road. Word was passed down from the platoon leader to take time out and eat a 'D' bar. I told Pvt Lyle Mathews that I was going back in the woods a few yards to the toilet. He said, 'okay'. I told him if the company began to move out before I came back to give me a yell. He said, 'okay'. Twenty minutes later I emerged out on the road again to find my company had moved out. I went up the road toward LINGAYEN as that was the way the outfit was headed when I went to be excused. I went up the road about three kilometers but could not locate them. Then I returned to the spot I started from and went approximately three kilometers in the opposite direction. I asked a soldier from I Corps if he knew where the 148 was located. He said he didn't and that his organization was I Corps Artillery.

"When I could not make contact with my outfit I went back to the spot where I left them. Then I saw a girl down the road who offered to give me something to eat. I went to her house and ate supper. I stayed there that night and the next morning I started looking for my outfit again. After I had walked approximately 4-5 kilometers toward LINGAYEN I had a dizzy spell. I thought it must be malaria. I waited until the spell had passed then returned to the house. That afternoon I was in bed with chills. The girls at the house treated me for nine days.

"In the following weeks I tried repeatedly to find my outfit but no one seemed to know where it was. I tried to find out where the outfit was by asking soldiers on the road in and around BINMALEY. MP's told me the outfit was 'on up ahead' but could give me no definite location. I contacted them three different times.

"On or about 26 January 1945 in BINMALEY I met two enlisted men who said they were from 65th Air Squadron. They gave their names as Joe Long and Fred Allen. Both, by their own admission, were impersonating officers and wore 1st Lt bars. These two men had a jeep and, after meeting them, we began to run around together.

"On or about 21 February 1945, Long and Allen told me they had worn officers insignia for about a month and that they, as officers, were able to go eat at army messes and asked why I didn't wear officers insignia too. I didn't put it on right away but on or about 23 February 1945, while drunk, I permitted them to talk me into putting on a 1st Lt bar and air corps insignia.

"On or about 28 February 1945, Long and Allen stated they thought we'd get along better if one of us was a high-ranking officer. They decided I was elected. So I took two Lt Col leaves from Long and Allen and began wearing them. I wore them until I was apprehended.

"On or about 18 March 1945, I was thinking about the things I had been doing and getting over a long drunk which lasted from a few days before I first wore the Lts bars until I had the accident 9 March 1945, and decided to tell Long and Allen that I was not going to continue posing as an officer but I never saw them again. I decided to turn myself in to the MP's but when they picked me up I changed my mind and tried to bluff it out figuring to try to get back to my outfit myself but they never did turn me loose. Then I told them my true name, serial number and organization."
(Pros. Ex. "H").

The accused elected to be sworn and testified in substance as appears in his sworn statement, adding that when he returned from the "bushes" he found that his pack and gun were missing. He "headed" in the direction in which his company was moving and walked "fast" about three kilometers, but did not overtake them (R. 22). He went to the 718th Engineers and tried to get another gun but did not succeed "because they were short" (R. 10). It was his intention to return to his outfit as soon as he could get another gun (R. 10, 12, 14). He stated that during his absence "I drank as much as I could every time I could get it because I was planning on going back to my outfit", and at no time did he intend to stay away from it permanently. He admitted that he had been "briefed" on the ship about the operations upon landing and stated "I understood that we were supposed to be in reserve" (R. 16). He "presumed" that his Division was fighting and gave as his reason for not joining them that he "didn't have a gun" and "Because I wanted to get drunk and have one more fling" (R. 14). He admitted that he saw one of the dumps of the 37th Division (of which his organization was a part) and that he talked to a 37th Division M.P. who told him that his company was "up ahead" but nevertheless did not state that he made any attempt to rejoin his unit. He further stated that he was a First Scout in his platoon during the Bougainville campaign for which he had been awarded a "Combat Infantryman's Badge" (R. 11).

4. It is alleged that on 9 January 1945 accused deserted the service of the United States and remained absent in desertion until apprehended on

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22 March 1945. The accused admitted the absence alleged, stating that he wanted to "get drunk and have one more fling" and that he was "planning" to return to his unit and denied that it was his intention to desert.

Desertion is absence without leave accompanied by the intention not to return. Such intention may be shown by a much prolonged absence without satisfactory explanation as well as by the circumstances surrounding the absence (par. 130a, M.C.M., 1928; CM 22310 Libonati, XIII B.R. 359 and cases there cited).

Accused's absence of 73 days in a combat zone was "much prolonged". He stated that within twenty minutes after having left his company resting on a road he returned, found them gone, and walked three kilometers in the direction which they had taken but could not find them. He claimed to have made numerous inquiries of military police, one of whom was of his own Division, as to where his organization was located and was advised that it was somewhere "up ahead". He further claimed that he did not return to his unit because he "didn't have a gun" and wanted to "get drunk and have one more fling". These explanations and his admissions that he had been "briefed" as to the contemplated operations a short time before his absence and that he "presumed" his company was in action during the same, together with the fact that he was apprehended while masquerading as a Lieutenant Colonel, furnish sufficient evidence from which the court properly could infer that the accused intended at some time during such absence not to return to the service and warranted the finding of guilty of desertion as charged.

The evidence is undisputed and the accused admitted that on various occasions he represented himself as a Lieutenant Colonel. Such conduct is clearly to the prejudice of good order and military discipline and warranted the court finding him guilty of this offense.

The sentence imposed is permissible for the offenses of which the accused was found guilty.

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

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Carlton J. Lobitz, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2253

29 June 1945.

UNITED STATES)

v.)

Privates FRANK J. LIBRANDI
(32794457), ROBERT B. BAPTIST
(30107455), and THOMAS A. TONER
(13127163), all of Company "B",
160th Infantry.)

Trial by G.C.M., convened at Head-
quarters, 40th Infantry Division,
A.P.O. 40, 19 May 1945. As to
accused Librandi and Baptist: dis-
honorable discharge, total forfeitures,
confinement for 15 years. As to
accused Toner: dishonorable discharge,
total forfeitures, confinement for 18
years. The United States Disciplinary
Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS and MURPHY,
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 several accused were tried in a common trial upon the following charges and specifications:

Accused Private Frank J. Librandi -

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

Specification: In that Private Frank J. Librandi, Company "B", 160th Infantry, did, at A.P.O. #40, on or about 20 March 1945, desert the service of the United States by absenting himself without proper leave from his company, with intent to avoid hazardous duty, to wit: a combat landing operation, and did remain absent in desertion until he surrendered himself at the office of the Provost Marshal at Base "M", A.P.O. #70, on or about 25 March 1945.

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

Specification 1: In that Private Frank J. Librandi, Company "B", 160th Infantry, did, at A.P.O. #40, on or about 18 April 1945, misbehave himself before the

enemy, by failing to report back to duty with his company which was then engaged with the enemy, from the 160th Infantry Regimental Aid Station, and did remain absent from his company until the said Private Frank J. Librandi turned himself in to the Stockade, A.P.O. #40, in the rear area on or about 24 April 1945.

Specification 2: In that Private Frank J. Librandi, Company "B", 160th Infantry, did, at A.P.O. #40, on or about 14 April 1945, misbehave himself before the enemy by failing to report for transportation forward to his company which was then engaged with the enemy, said transportation being available.

Accused Private Robert B. Baptist -

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

Specification: In that Private Robert B. Baptist, Company "B", 160th Infantry, did, at A.P.O. #40, on or about 20 March 1945, desert the service of the United States, by absenting himself without proper leave from his company, with intent to avoid hazardous duty, to wit: a combat landing operation, and did remain absent in desertion until he surrendered himself at the office of the Provost Marshal at Base "M", A.P.O. #70, on or about 25 March 1945.

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

Specification 1: In that Private Robert B. Baptist, Company "B", 160th Infantry, did, at A.P.O. #40, on or about 14 April 1945, misbehave himself before the enemy by failing to report for transportation forward to his company which was then engaged with the enemy, said transportation being available.

Specification 2: In that Private Robert B. Baptist, Company "B", 160th Infantry, did, at A.P.O. #40, on or about 1300, 23 April 1945, misbehave himself before the enemy by failing to report at Service Company, 160th Infantry, for transportation forward to his company which was then engaged with the enemy, after having been told said transportation would be available at 1300, and remained absent from Service Company until he returned to Service Company area on or about 2200, 23 April 1945.

Accused Private Thomas A. Toner -

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

Specification: In that Private Thomas A. Toner, Company "B", 160th Infantry, did, at A.P.O. #40, on or about 20 March 1945, desert the service of the United States by absenting himself without proper leave from his company, with intent to avoid hazardous duty, to wit: a combat landing operation, and did remain absent in desertion until he surrendered himself at the office of the Provost Marshal at Base "M", A.P.O. #70, on or about 25 March 1945.

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

Specification: In that Private Thomas A. Toner, Company "B", 160th Infantry, did, at A.P.O. #40, on or about 14 April 1945, misbehave himself before the enemy by failing to report for transportation forward to his company which was then engaged with the enemy, said transportation being available.

Each accused pleaded not guilty to the charges and specifications upon which he was tried and was found guilty as charged, except that accused Librandi was found guilty of only so much of Specification 1 of Charge II as involves misbehavior before the enemy on or about 21 April 1945 by absenting himself without proper leave from his company which was then engaged with the enemy. The accused were each sentenced to dishonorable discharge, total forfeitures and confinement at hard labor, accused Librandi and Baptist for 15 years each and accused Toner for 18 years. The reviewing authority approved the sentences and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement for each accused. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. Because of the confused state of the evidence and its inconsistencies, the Board of Review finds that to review the same it must, for the most part, consider the testimony of each witness separately.

Captain Thomas B. Lynch, a witness for the prosecution, testified that he was the Commanding Officer of Company B, 160th Infantry, from 1 March to 16 April 1945. The three accused joined that company about 4 March. They were given passes and failed to report back at the properly appointed time. Upon their return, about 8 March, the Captain told them the reason he wanted them to be there was "primarily so they could get the proper quantity and sizes in equipment * * *" (R. 10). From 4 to 8 March and from 14 to 21 March the entire company was engaged in furnishing beach details loading ships with combat equipment. The Captain testified that the men were told their next operation would consist of "combat in cities" and for three hours a week for three weeks prior to the date the company sailed, orientation or training aid classes were held. By 19 March the heavy equipment and the men's "A" bags had been hauled to the beach and they "had been supplied with everything with the exception of a few items of web equipment" (R. 11). Only their personal baggage, cots,

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and tents (R. 15) remained in their area. On 21 March the company was given a warning order, the next day they were told they would sail and the company embarked on about 23 March for _____. The Captain stated that "We told our men at their last orientation class that we were going in support of the operation that was being engaged in at that time." but he did not know whether any of the accused were present at the meeting (R. 17). The three accused did not sail with the company (R. 11) nor had they been issued passes which would have accounted for their failure to be present. (R. 16).

The Captain testified that he signed the company morning reports for 20 March and for 11 and 16 April. He read an entry from the report of 20 March showing the three accused absent without leave as of 2200 hours that day; an entry from the report of 11 April showing them from absent without leave to arrest at _____ (turned themselves in) and confinement at Base "M" on 1100, 25 March; and an entry from the report of 16 April with reference to accused Librandi and Baptist showing them from confinement at Base "M" to duty on that date (R. 11, 12). Neither the morning reports nor extract copies therefrom were introduced in evidence. Captain Lynch testified that he knew that the accused were absent without leave only because the First Sergeant so reported to him; that he did not make a personal investigation thereof (R. 14), and that the date he last knew that the accused were in his area "for sure" was 6 March (R. 18).

About 11 April accused Librandi and Baptist were brought before Captain Lynch and Lieutenant Colonel Herman A. E. Jones, the Battalion Commander, in the Service Company, 160th Infantry, in the city of _____. Colonel Jones told the two accused that "their company was to be moved up the next day for a combat mission" (R. 19) and that "any attempt to shirk their duty in connection with the attack would be considered as a violation of the Article of War dealing with the attempt to shirk hazardous duty" (R. 13). They were placed in the custody of two sergeants to be returned to their company. The balance of Colonel Jones' testimony was, almost in its entirety, legally inadmissible and will not be here recounted. Baptist said that something was wrong with his knee or foot and was sent to an aid station. Librandi, "to the best" of Captain Lynch's "knowledge" spent that night in the company perimeter (R. 13).

Staff Sergeant John Adams testified that he was the supply sergeant of the Service Company, 160th Infantry, and that one of his duties was to process incoming casualties. He stated that the three accused arrived at the Service Company with other casualties about 1500, 12 April by boat from _____. He took them to the billeting area and told them he would be back in the morning to get an inventory of the equipment they would need and "to stay in the area until 1600" (R. 21). He testified, "All that I told them was that I was equipping them to send them to their companies. The only thing further I could have possibly said was that it would be to the front" (R. 24). The next morning the three accused were issued their weapons. The following day or the day thereafter they were not present to receive their web equipment (R. 22) and a notice was placed on the bulletin board for them to report.

The next day, "approximately" 16 April, accused Librandi and Baptist were seen in the area, put on a Headquarters Company truck, and taken to their company (R. 23, 26). On the following day accused Toner was located in the area and was placed in the stockade. Sergeant Adams testified that it was possible for the sergeant (now deceased) in the billeting area to have given the accused permission to be absent as it was, "mostly up to this sergeant" but "I don't think he did" (R. 25).

Technical Sergeant Lewis A. Stumborg, Acting First Sergeant of Company B, testified that the company was "a front line installation" from 16 April "to the present time" (19 May 1945) and during that period had been in the vicinity of Hill 3155. He was with the several accused as a casual on 12 April and saw them at the Service Company area. The casualties had been instructed to "stay around in the area there for equipment" (R. 34).

Technician Third Grade Quilici, who was at the regimental aid station about 16 April, testified that the "middle man" of the three accused (otherwise unidentified in the record) came to the aid station for treatment of a hammer toe. Upon instructions from the surgeon, Quilici put cotton under accused's toe and then turned him "lose without any instructions" (R. 29). On cross-examination defense counsel showed witness a paper bearing the name of Captain Rosenthal, 1st Battalion Surgeon, and the words "Librandi, Frank J. referred for orthopedic examination" (R. 29). The paper was not introduced in evidence or explained. Technical Sergeant Terance M. O'Donald, who supervised the running of the aid station, in the presence of accused yelled to Sergeant Quilici that Major Jones (otherwise unidentified) had said "nothing could be done for the toe on this Island" (R. 30). In answer to the question, "And your instruction was?" he stated "To send the man back to his outfit" (R. 31), but it does not appear from the record that he so instructed accused.

At 1215, 21 April accused Librandi walked into the prison office at a stockade maintained by the 40th Military Police Platoon at _____, three or four miles behind the front lines and stated that he was turning himself in because he had left his regiment that morning and was absent without leave (R. 32-33).

Staff Sergeant John Adams of the Service Company further testified that on or about 23 April he saw accused Baptist "after he had been released" from the Service Company. Baptist then stated that he came out of the hospital the previous morning". The Sergeant told him to stay in the area and that at 1300 hours a truck would be in front of the orderly room to take him to his company. Baptist was not there at the appointed time and the truck was sent forward without him. About 1900 or 2000 hours that day accused Baptist was again seen in the area and was placed in the stockade (R. 23, 24).

First Sergeant Homer L. Durbin of the Service Company called as a witness for the defense, testified that on several occasions he had gone to the building where the casualties were billeted and "found it vacant or practically vacant". There were other places in the company area the men could

have been without being out of bounds (R. 35). On cross-examination he admitted that the three accused had been reported to him as absent without leave (R. 36). Private First Class Nick J. Patti testified that accused Librandi was present on 18 April when his company attacked Hill 3155. Patti also saw accused the next morning but did not see him during the two subsequent attacks on the hill.

Each of the three accused elected to remain silent.

4. Each accused was charged with, and found guilty of, desertion in that on or about 20 March he did absent himself without leave with intent to avoid hazardous duty (Charges I). The evidence reveals that the accused were with their company at APO 40 from about 4 to 20 March, then engaged in loading its organizational equipment upon an LST. They had been issued combat equipment and were receiving training in "combat in cities" which, they were advised, would be the company's next operation. The company commander read entries from the company morning reports which stated that the three accused were absent without leave on 20 March, that they turned themselves in on 25 March at another organization and that two of the accused returned to duty on 16 April. Neither the reports nor extract copies thereof were introduced in evidence. The requirement of the best evidence rule that the instruments themselves should have been introduced in evidence may be considered to have been waived in the absence of objection by accused (par. 116a, M.C.M., 1928). This testimony, however, was of no probative value to establish the absence without leave on 20 March as Captain Lynch, the officer who signed the morning reports, testified that he had no personal knowledge of the absence of the several accused and that the morning report entry of 20 March was made only from information furnished him by his First Sergeant. An entry of "AWOL" on an organization's morning report is prima facie proof of absence from the station, camp, or post of that organization. It acquires presumptive authority because it is required that entries therein be made by an officer who has the duty to know the matter so stated and recorded (par. 117, M.C.M., 1928). This prima facie authority may be accepted without objection but if it appears that the entry is based on hearsay then it is incompetent to prove the facts stated therein. In the instant case the morning report entries of accused's absence without leave and their subsequent return to military control were clearly hearsay. The entries were not made competent because they were based upon official reports to the commanding officer, written or unwritten, nor did the failure of the defense to object waive the defect (Dig. Ops., JAG 1912-40, sec. 395 (21); CM 231357; Adams, XVIII B.R. 179; CM 235717, Bickmore, XXII B.R. 219; CM 239554, Haas, XXV B.R. 199).

However, independent of such inadmissible testimony, from the competent evidence that the several accused did not sail with their company and that they had not been issued passes which would have excused them therefrom the court properly could infer that they were absent without leave and, in view of the circumstances surrounding such absence, that it was with the intent to avoid hazardous duty. It follows that there is substantial evidence in

the record from which the court could find each of the accused guilty of Charge I and its specification.

5. Each of the accused was charged with misbehavior before the enemy by failing to report on or about 14 April for transportation to his company then engaged with the enemy, said transportation being available (Toner, Charge II; Baptist, Charge II, Spec. 1; Librandi, Charge II, Spec. 2). A careful reading of the record and giving to the competent testimony every intendment fails to disclose any substantial evidence to sustain the several findings of guilty. It would appear from the testimony that the accused, together with other casualties, were received by the Service Company, 160th Infantry, about 12 April at _____. Librandi and Baptist were told that they were going into combat. The Sergeant in charge of the processing of the casualties told the three accused that he was equipping them to send them to their company. The accused received their weapons but were not present to receive web equipment which was issued on either 14 or 15 April. The record reveals that on 16 April accused Librandi and Baptist were found in the area, placed on a Headquarters Company truck and taken to their company and that accused Toner was seen in the area the next day and put in the stockade. The record does not reveal that they were told how long they were to remain in the Service Company area before they were to rejoin their organization or that they received any order to report on or about 14 April at the Service Company for transportation to their unit. Although the accused might have been absent without leave from the Service Company they were not so charged, and such absence is not included within the offenses alleged in the instant specifications.

6. Accused, Baptist, in Specification 2 of Charge II, was charged with misbehavior before the enemy in that on 23 April he did fail to report at the Service Company at the appointed time for transportation to his company then engaged with the enemy. The evidence established that upon arrival at the Service Company on or about 12 April, this accused was told by the Battalion Commander that "they were to be moved up for a combat mission" and another witness testified that accused Baptist's company was a "front line installation" from 16 April until the date of trial (19 May 1945). The evidence further established that on 16 April Baptist was sent to his company. On 23 April he was seen again in the Service Company and was ordered to be present at the orderly room at 1300 where there would be a truck to take him to his company. Accused was not there present at the appointed time nor was he seen in the area until about seven hours later.

The willful violation of orders or the refusal to perform some particular service may constitute "misbehavior" within the contemplation of Article of War 75. A soldier is "before the enemy" within the meaning of that article of war not only when he is in direct contact with the enemy but also when he is part of a tactical operation which will in the normal course of events lead to such contact or at a rear echelon of his organization, the forward element being at the time engaged with the enemy (Winthrop, Mil. Law, p. 623; Davis, Mil. Law, p. 415; par. 141a, M.C.M., 1928; III Bull. JAG 379; IV, id, 11). As the regimental Service Company was, in effect, the rear

echelon of accused's organization which was then actively engaged with the enemy, Baptist's failure to be present as directed for transportation forward may properly be charged as misbehavior before the enemy in violation of Article of War 75, and the evidence sustains the findings of guilty thereof.

7. Accused Librandi was charged in Specification 1 of Charge II with misbehavior before the enemy in that on or about 18 April he failed to report back to duty with his company, then engaged with the enemy, from the 160th Infantry Regimental Aid Station until he turned himself in at the stockade, APO 40, on or about 24 April 1945. By substitutions and exceptions the court found him guilty of the included offense of misbehavior before the enemy by absenting himself without leave from his company on 21 April while it was then engaged with the enemy. The evidence established that accused about noon on 21 April turned himself in at a stockade saying that he had gone absent without leave that morning. His confession, corroborated by the circumstance that he turned himself in at a stockade not his place of duty, being evidence touching upon the corpus delicti (CM 240329, Kingston, Curtis, XXVI B.R. 27 and cases there cited) is sufficient to sustain a finding that accused was absent without leave on 21 April. The record contains the further evidence that accused had been told that his company was going to engage in combat. A defense witness testified that accused participated in an attack with his company on 18 April and it appears that Company B was "a front line installation" from 16 April until 19 May. The court could therefore infer that accused was absent without leave from his company while it was before the enemy. Absence without leave under such circumstances may be punished as a violation of Article of War 75. It follows that the record is legally sufficient to sustain the court's findings of guilty with respect to the instant specification.

8. Two errors in the preparation of the record of trial should be noted.

a. The record shows that all procedures preliminary to the taking of the testimony (such as the opening of the court, the announcement of the members present, introduction of counsel, the swearing of the reporter, et cetera) were thrice repeated, once for each accused. The form of the record of a common trial should follow that of the trial of an individual accused, as set out in Appendix 6, Manual for Courts-Martial, 1928, page 260 with appropriate modifications to reveal that more than one accused was present and that each introduced counsel, was afforded the right to challenge, was arraigned and pleaded to the offenses upon which he was tried.

b. The names of all places were omitted from the record. A record of trial by general court-martial should "set forth a complete history of the proceedings had in open court" (par. 85b, M.C.M., 1928) so that the reviewing authority and others required to review it may have before them all of the evidence considered by the court in reaching its findings. None of the testimony of the witnesses should be omitted and if for security reasons the names of places or other matters are considered by competent authority to be secret the record should be so classified.

9. Although the record is replete with hearsay and otherwise inadmissible testimony, in view of the admissible evidence in proof of the several offenses of which the accused were legally found guilty, their substantial rights were not prejudiced thereby.

The sentences imposed are permissible for the offenses of which each of the accused was legally found guilty.

10. For the reasons stated above the Board of Review holds the record of trial not legally sufficient to support the findings of guilty of the specification of Charge II and Charge II with reference to accused Toner, Specification 1 of Charge II with reference to accused Baptist, and Specification 2 of Charge II with reference to accused Librandi, and further holds the record legally sufficient to support the findings of guilty of Charge I and its specification with reference to each of the several accused and Charge II and Specification 2 thereof with reference to accused Baptist and Charge II and Specification 1 thereof with reference to accused Librandi, and legally sufficient to support the several sentences.

(Absent), Judge Advocate
Colonel, J.A.G.D.

Harold J. Collett, Judge Advocate
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate
Lieutenant Colonel, J.A.G.D.

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1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, A.P.O. 75,
8 July 1945.

To: Commanding General, 40th Infantry Division, A.P.O. 40.

1. In the cases of Privates Frank J. Librandi (32794457), Robert E. Baptist (30109455), and Thomas A. Toner (13127163), all of Company "B", 160th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of the specification and Charge II with reference to accused Toner, Specification I of Charge II with reference to accused Baptist and Specification 2 of Charge II with reference to accused Librandi, but legally sufficient to support the sentences, which holding is hereby approved. It is recommended that you disapprove the findings of guilty just referred to, whereupon, under the provisions of Article of War 50A, you will have authority to order the execution of the sentences.

2. In view of the insufficiency of the record to support the above described findings of guilty consideration should be given the question whether the sentences should be modified. It is particularly recommended that consideration be given to a reduction of the sentence approved as to Toner who stands convicted of one offense only, whereas the other two accused stand convicted of two serious offenses and yet received lighter sentences. The two prior convictions by special courts-martial in the case of Toner are not considered sufficient justification for a three year period of confinement in excess of that imposed upon Librandi and Baptist.

3. When copies of the published orders in these cases are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in these cases, please place the file number of the record in brackets at the end of the published orders, as follows:

(CM A-2253).

ERNEST H. FURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2254

22 June 1945.

UNITED STATES)

v.)

Private EDWARD GRENNELL
(37053028), 3450th
Quartermaster Truck
Company.)

) Trial by G.C.M., convened at
) Headquarters, Base K, USASOS,
) APO 72, 19 May 1945. Dis-
) honorable discharge, total
) forfeitures, confinement for
) fifteen years. The United
) States Disciplinary Barracks,
) Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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.

Specifications: In that Private Edward Grennell, 3450th Quartermaster Truck Company, APO 72, did, at APO 72, on or about 18 February 1945, feloniously and unlawfully kill Maria Tonido, a civilian, by running over her with a motor vehicle 2½ ton cargo 6 x 6.

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

Specifications: In that Private Edward Grennell, 3450th Quartermaster Truck Company, APO 72, did, at APO 72, on or about 18 February 1945, draw a weapon, to wit, a .45 Cal. automatic pistol, against Major Thomas W. Flimmer, his superior officer, who was then in the execution of his office.

He pleaded not guilty to the charges and their specifications, was found guilty as charged, and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for fifteen years. Evidence of one previous conviction by special court-martial for violation of Article of War 96 was considered by the court. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution shows that shortly before 2200 hours a show in Company "C" area, 153rd Engineer Construction Battalion, near Tacloban, P.I., ended. About eight hundred people attended the show and "hundreds of people" were crossing the highway or moving down it (R. 7). The speed limit in this area was five miles per hour (R. 11) and the area was lighted by a 500-watt flood light (R. 12); " * * * the light was good. All the trucks were sitting there and had their lights on * * *" (R. 28). About that time a truck driven by the accused entered the area with "a roar" and making a lot of noise at a speed of about fifteen or twenty miles per hour. (R. 7, 36). " * * * Everyong started hollering for the people to get out of the road" as the truck was "coming pretty fast" (R. 27). A little girl (Maria Tonido) was struck by the front bumper of the truck and then run over by one of its rear wheels from which injuries she died at 2230 hours that same night.

Major Thomas W. Plimmer and First Lieutenant John B. Pope had just left the show and were entering their jeep when the truck passed. Major Plimmer, noting the speed of the truck, yelled "Stop that truck" and with Lieutenant Pope pursued the speeding truck which went down the road approximately fifty yards where it was forced to stop because another truck had blocked the road (R. 7). Upon arriving where the truck had stopped Major Plimmer stated to the accused " * * * You know, you just ran over a Filipino girl and probably killed her", and ordered accused to get out of the truck. Accused said "I didn't hit no Filipino girl" adding "That's no way to talk to a man". Major Plimmer replied "Anyone who'll drive a truck like that down through a crowd of people isn't a man" (R. 7). He again ordered accused to get out of the truck which accused did and with a pistol in his hand said to Major Plimmer "There isn't anybody going to talk to me like that". At that time Lieutenant Pope reached for his hand and accused turned and threw him off "alongside the ditch where the truck was" at the same time pointing the pistol at the Major (R. 22). Major Plimmer again told him that he had hit a little girl down the road and accused stated "Let's go back and see", at the same time telling Major Plimmer "You go first". After proceeding down the road a short distance Major Plimmer ordered accused to give him the pistol which accused refused to do, stating "No, we're going down to see about this Filipino girl". Major Plimmer again ordered accused to give him the pistol and again he refused to do so, and continued to point the gun at him (R. 18).

Upon arriving at the spot where the little girl was struck by the truck they found that she had been taken to the dispensary. Major Flimmer told accused to accompany him to the dispensary in his (Major Flimmer's) jeep, accused replying "'No, we're riding in my truck, and I'm driving it'" (R. 9). Lieutenant Pope and the accused returned to where accused's truck was parked at which time Lieutenant Pope ordered T/4 James A. Dolan (R. 27, 32) to get in the truck with the accused and "go to the dispensary". The Lieutenant, the Major, and T/5 Billy T. Brandon then followed the truck to the dispensary. Upon arriving they parked their jeep and Lieutenant Pope and Corporal Brandon went to the former's quarters to get his carbine. Upon returning to the dispensary they met Major Flimmer who stated that accused's truck had not stopped but had gone on down the road (R. 22). Several of them then got in the jeep and proceeded down the road for about a quarter of a mile where they found Sergeant Dolan (R. 23). Sergeant Dolan testified that after passing the dispensary the accused drove his truck about fifty yards further to the motor pool. He further testified that when accused started to back out "I turned to look at him, [and] he stuck a gun in my side" at the same time saying "'I've got a gun. I'm going up the road the other way. You can come if you want to'" (R. 32). Sergeant Dolan went with him. When accused shifted the gears the Sergeant attempted to wrest the pistol from him and a fight developed for its possession during which both of them fell from the truck which had stopped. The accused succeeded in retaining possession of the pistol and said to Sergeant Dolan "'Now, you white bastard, I'm going up the road and you're staying here'" and then drove off.

First Lieutenant Max Kopelman, CMP, of the Provost Marshal's Office, having been notified of the incident, arrested accused the following day. At that time accused was in his tent "lying on his back, with a pistol on his person" (R. 41, 45).

The accused was positively identified as the one driving the truck on the night in question by Major Flimmer, Lieutenant Pope, T/5 Brandon, T/4 Dolan and Pfc's Pyne and Sullivan (R. 10, 23, 28, 33, 37, 40). Several Filipino witnesses testified they had known the accused for approximately two months (R. 43, 48) and identified him as the person driving the truck which killed the little Filipino girl, one of them adding that at that time accused's wife was on the front seat with him and that when the truck stopped she jumped out (R.47). The Filipinos likewise testified that they saw accused pointing a pistol at Major Flimmer.

The accused elected to be sworn and testified that at approximately 5:00 o'clock P.M. on the day in question he and a motor sergeant left the motor pool to bring in a truck for repair. They returned to the motor pool about 6:30 or 7:00 o'clock and he then went to his company area, arriving there at about 7:30 P.M. and started "shooting dice a while". He "finally got in a card game with the guards and the rest of the fellows" and "We gambled together and I stayed in the company. It was after 12

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when I left" (R. 53). He specifically denied ever having been to the area of the "C" Company theater of the 153rd Engineers (R. 54, 56), and stated that when arrested the pistol found on his person was one he was holding for a corporal while the corporal "took a shave" (R. 54). He denied ever having seen Major Flimmer, Lieutenant Pope, or any of the other witnesses prior to the time that all were present at the MP station on the day following the accident in question (R. 55). He specifically denied ever having drawn a .45 caliber pistol on "any superior officer" (R. 55):

Corporal Hugh E. Johnson testified that he met accused at 2100 hours in the company area at which time accused was gambling. He left the game at 2330 hours and accused was still there (R. 68). Sergeant Raymond Hudson saw accused in the area at 7:00 o'clock P.M. and again at 12:00 o'clock at which time he was outside a tent where gambling was in progress (R. 71).

4. The accused is charged with and was found guilty of involuntary manslaughter which is defined as -

"* * * 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, or in performing an act required by law" (par. 149a, M.C.M., 1928).

The evidence for the prosecution reveals that at the time and place alleged the accused drove a truck at a rate of speed of from fifteen to twenty miles an hour along a road which was crowded with people who were leaving a show. He struck and killed a Filipino girl and continued down the road for approximately fifty yards where his further progress was halted by another truck which blocked the road. There was evidence that the speed limit in this area was five miles per hour but there was no testimony that accused knew of such regulation. However, the accused's actions were likely to endanger life and he was culpably negligent in driving his truck at the time and place and in the manner proven (CM 217590, Lamb, Jr., XI B.R. 275; CM 236138, Steele, XXII B.R. 313).

"The general rule is, irrespective of statute, that if a motorist, by gross carelessness or culpable negligence, implying an indifference to consequences in driving his machine, causes the death of another, he is guilty of manslaughter." (3 Blashfield's Cyclopedia of Automobile Law, section 44).

There is abundant evidence in the record warranting the court finding accused guilty of involuntary manslaughter as charged.

The evidence for the prosecution is equally clear that the accused drew a weapon against his superior officer, Major Plimmer, who was then in the execution of his office.

Accused denied both of the alleged offenses and offered an alibi as his defense. This defense was rejected by the court in whose province it lies to determine issues of fact, weigh the evidence, and judge the credibility of witnesses.

The sentence imposed by the court is permissible.

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

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Walter J. Roberts, Judge Advocate.
Colonel, J.A.G.D.

James B. [Signature], Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES

In the Branch Office of The Judge Advocate General
with the United States Army Forces
in the Pacific

Board of Review
CM A-2262

27 July 1945.

UNITED STATES)

v.)

Captain EDGAR G. DAVIS (01288866),)
Headquarters Company, 368th)
Infantry.)

Trial by G.C.M., convened at APO
926, 16 May 1945. To forfeit
\$50.00 per month for twelve months.

OPINION by the BOARD OF REVIEW
ROBERTS, MURPHY and CLEMENTS
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 64th Article of War.

Specification: In that Captain Edgar G. Davis, 368th Infantry, having received a lawful command from Captain William B. Langworthy, his superior officer, on or about 6 April 1945, to "go below deck within the next five minutes and help get the men out for Abandon Ship Drill", or words to that effect, the said Captain Langworthy then being in the execution of his office, did, aboard U.S.S. L.S.T. Number 1016, at sea, and near APO 565, willfully disobey the same.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to forfeit \$100.00 per month for twelve months. The reviewing authority approved only so much of the findings as involved a failure to obey the order in violation of the 96th Article of War, approved the sentence but remitted \$50.00 per month thereof for twelve months and, as thus modified, ordered its execution. The sentence was published in General Court-Martial Orders No. 10, Headquarters 93d Infantry Division, A.P.O. 93, 7 June 1945.

3. The evidence for the prosecution reveals that at about 11:00 o'clock on 5 April 1945, Major Isaac C. Corns, acting as Troop Commander on-board LST 1016, called a meeting of certain officers and made specific assignments "during the voyage". He designated Captain William B. Langworthy as "Abandon Ship Officer" whose duty was to

" * * * be in charge of all abandon ship drills; that he would make assignments to each of the abandon ship stations; assign the personnel that would go to each of the stations including the officers. * * * He was to have full control and in charge of any abandon ship drill."

The accused was present at this meeting (R. 8) and was appointed Abandon Ship Officer for the station at life raft No. 8 (Pros. Ex. "A"), and WOJG Samuel W. Watts was appointed his assistant (R. 12). At about 1410 hours on 6 April 1945 the abandon ship drill was sounded (R. 8). About five minutes later Captain Langworthy approached accused who was near life raft station No. 8 and stated to him that he (Langworthy) had been requested by Major Corns to "send some officers below decks to get the men up". Captain Langworthy stated, "I asked him to go below and get his men up from below deck". Accused replied "Langworthy, this is my station here. I am not going below deck". Captain Langworthy again repeated the "order" and "asked him to go below deck and get his men out", testifying:

" * * * When he still made no effort to comply with the order, I said, 'Captain Davis, if you don't comply with my order I will have to make an official report on it. He said, 'Go ahead and make an official report if you want to and we will see how it comes out'. I looked at my watch and said, 'Captain Davis, it is 20 minutes after 2:00. You are to go below deck within the next five minutes and help get the men out for abandon ship drill, or if you do not I will have have to give an official report. That gives you until 2:25 to comply with the order.'" (R. 11).

Accused made no reply (R. 19). Captain Langworthy further testified:

" * * * I retired to the approximate vicinity of life raft number 8, when I watched Captain Davis after the order had been given. * * * I had him under observation from 1425 to 1430 and he made no attempt to go below deck. He did not go below deck." (R. 12).

Upon receiving the first request from Captain Langworthy Captain Davis instructed Mr. Watts to "check the hold and make certain all of the men were out". Mr. Watts first went to life raft Number 10 and instructed some men who were there to report to their proper station Number 8. He then proceeded to compartment 206-A just below deck and while passing life raft Number 8 on

the way he heard Captain Langworthy say, "God damn it Davis, you are going to do as you are told. I will give you five minutes to get those men up here" (R. 16, 18-20). Mr. Watts then went below deck and met Major Corns and asked him if all the men were out (R. 16). Major Corns replied, "Yes, they are now" (R. 8) or "the hold was clear" (R. 16). Mr. Watts then reported this fact to Captain Davis (R. 16). Upon being asked:

"How long was it between the time you heard this last conversation between Captain Langworthy and Captain Davis until the time you met Major Corns on the stairs."

he replied, "I would say between three and four minutes" (R. 17).

After leaving the hold of the ship Major Corns met Captain Langworthy on deck and was told by him of his trouble with Captain Davis (R. 8) and that he had given Captain Davis until 1425 hours "to comply with an order" (R. 9). Major Corns then checked his watch with that of Captain Langworthy whose watch then showed 1425 hours (R. 10). Major Corns stated that this conversation was after he had advised Mr. Watts that the hold was clear and that before 1425 hours all of the men were out of the hold (R. 10)

The accused elected to be sworn and testified in substance as did the witnesses for the prosecution as to the events up to the time he was first approached by Captain Langworthy. He stated that on the day in question when the abandon ship signal sounded he immediately left his quarters "on the double" for his life raft station.

" * * * In about a minute or so Captain Langworthy came up to me and said, 'Davis, send below and get the rest of your men'. I immediately turned to Mr. Watts, the assistant abandon ship officer on that station and said, 'Mr. Watts, go below and get the rest of the men and make your report to me'. During the meantime Captain Langworthy had walked away from life raft station number 8. He returned in about a minute in haste and came up to me and said, 'Davis, I want you to get the rest of the men from below'. Then I explained to Captain Langworthy that I was assigned to the station and I had already sent Mr. Watts below to get the men and that I was at the station to check the men and count them as they approached the station. * * * After this conversation, Captain Langworthy said, 'God damn it, Davis, when I give you an order you are going to do as you are told or you are going to get in trouble. I will give you five minutes to get your men', or words to that effect. I turned to where my men were to see how many men would have to be gotten from below. As soon as I got through counting the men, I turned to go down the gangway, that is the little rail between the edge of the ship between where the trucks and vehicles are parked. I saw Mr. Watts approaching to me on the double.

He came up to me and said, 'Captain Davis, all the men are top side', which confirmed my counting the men because I knew how many men were to be at my station. * * *." (R. 21).

He further testified:

"* * * I never did understand the order to mean that Captain Langworthy wanted me personally to go below and get the rest of the men because he knew an assistant was appointed at that station."

and in response to the question, "You didn't go below deck?", answered,

"No, sir; I didn't. I didn't know what he wanted me to do. I had already told Mr. Watts to get the men and he said they were already up." (R. 22).

4. The accused was charged with, and convicted of, willfully disobeying the lawful command of Captain Langworthy to "go below deck within the next five minutes and get the men out for abandon ship drill". The reviewing authority approved only so much of the findings as involved a failure to obey the order in violation of Article of War 96. The evidence reveals that immediately prior to receiving that order accused had instructed a warrant officer to perform the duty; when Captain Langworthy gave the order accused made no reply; and within one or two minutes of the expiration of the time limit fixed in the order for its accomplishment accused was advised, and the evidence showed, that all of the men were above deck.

It is noted that the order did not impose an "obligation to obey * * * to be fulfilled without hesitation, and with alacrity, * * *" (Winthrop, 1920 Reprint, p. 572) common to the usual military order but, by its terms permitted accused, in his discretion, at any time within five minutes to go below deck and "get the men out * * *". The military end sought to be accomplished by the order was to ensure the presence of the men above deck within five minutes in connection with an abandon ship drill, the direction to accused to go below being merely the means to effect its accomplishment. Prior to the expiration of the five minutes within which the accused was required to obey the order its purpose was accomplished, that portion of the order which required accused to go below deck, then having no relation to the accomplishment of any military duty, ceased to be operative and no further obligation with respect to the order rested upon accused. In fact, it would then have been impossible for him to accomplish the military purpose of the order as all of the men were already above deck. It follows that he can not legally be held to have failed to obey the order.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of the court as approved and the sentence.

Harold J. Roberts, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

(Dissenting)
Major, J.A.G.D., Judge Advocate.

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ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
with the United States Army Forces
in the Pacific

27 July 1945.

Board of Review
CM A-2262

UNITED STATES)

v.)

Captain EDGAR G. DAVIS
(01288866), Headquarters
Company, 368th Infantry.)

Trial by G.C.M., convened
at APO 926, 16 May 1945.
To forfeit \$50.00 per month
for twelve months.

DISSENTING OPINION
CLEMENTS, Judge Advocate.

1. The offense of which the accused was convicted, as approved by the reviewing authority, is failing to obey an order of Captain Langworthy, his superior officer, to "go below deck within the next five minutes and help get the men out for Abandon Ship Drill" in violation of the 96th Article of War. It is clear from the evidence and unquestioned that the accused did not go below deck, but that all of the men were up from below deck at the end of the specified five-minute period. (However, the accused did not have first-hand knowledge that the men other than his own men were up from below deck - although the evidence shows that they were.) The majority opinion of the Board of Review concludes that the record of trial is legally insufficient to support the findings of the court as approved and the sentence for two primary reasons:

First -- "The military end sought to be accomplished by the order was to ensure the presence of the men above deck within five minutes in connection with an abandon ship drill, the direction to accused to go below being merely the means to effect its accomplishment."

Second -- "Prior to the expiration of the five minutes within which the accused was required to obey the order its purpose was accomplished, that portion of the order which required accused to go below deck, then having no relation to the accomplishment of any military duty, ceased to be operative and no further obligation with respect to the order rested upon accused. In fact, it would then have been impossible for him to accomplish the military purpose of the order as all of the men were already above deck. It follows that he can not legally be held to have failed to obey the order."

2. I agree that a determination of the legal sufficiency of the evidence rests primarily upon the correctness of the two foregoing conclusions of fact and law. Therefore, this opinion will be limited substantially to a discussion of such two points. The two reasons will be discussed separately. A determination of the correctness of the first reason given turns upon a reasonable interpretation of the order given to the accused, based upon all of the surrounding circumstances. It is necessary to determine what is the essence of the order and whether in carrying out the order the accused was permitted to exercise his discretion as to the manner of performance or whether such exercise of discretion was precluded by explicit terms of the order.

The surrounding circumstances that must be given consideration in interpreting the order given to the accused are the facts that Captain Langworthy was the abandon ship officer in charge of Abandon Ship Drills; that the accused was aware of this fact; that an Abandon Ship Drill alarm was given simulating the actual sinking of a ship under such conditions: that every minute's delay by any officer in carrying out his orders might result in the death of hundreds of men; and especially that a short time prior to giving the accused the final order which he is convicted of failing to obey, Captain Langworthy had given the accused substantially the same order and he and the accused had entered into a discussion in regard to it which tended to interpret and explain the order to the accused.

In regard to the preliminary order given the accused Captain Langworthy testified that during the Abandon Ship Drill he walked over to the life raft station where accused, Captain Davis, was standing and that

"At that time I said to Captain Davis that the men were not coming up from below deck as they should. I said Major Corns requested me to send some officers below decks to get the men up. I asked him to go below and get the men up from below deck. He said, 'Langworthy, this is my station here. I am not going below deck.'"

The accused testified as to this incident as follows (R. 21):

"Captain Langworthy came up to me and said, 'Davis, send below and get the rest of your men.' I immediately turned to Mr. Watts, the assistant abandon ship officer on that station and said, 'Mr. Watts, go below and get the rest of the men and make your report to me.' During the meantime Captain Langworthy had walked away from life raft station number 8."

Mr. Watts testified in regard to this first order given the accused as follows (R. 15, 16):

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"During the course of the life boat drill, Captain Langworthy came up to Captain Davis and instructed him to go below and get the rest of his men. Captain Davis turned to me and instructed me to check the hold and make certain all of the men were out."

The foregoing was evidence before the court in regard to the preliminary or first order given the accused. The evidence in regard to the discussion of this order by Captain Langworthy and the accused and in regard to the subsequent final order given to the accused, which he was convicted of failing to obey, will now be set out.

Captain Langworthy testified that after he had given the first order to the accused, the following occurred (R. 11):

"He said, 'Langworthy, this is my station here. I am not going below deck.' And then I explained to him that my duty was abandon ship officer and that we had to get the men up from below deck and I repeated the order and asked him to go below deck and get the men out. When he still made no effort to comply with the order, I said, 'Captain Davis, if you don't comply with my order I will have to make an official report on it.' He said, 'Go ahead and make an official report if you want to and we will see how it comes out.' I looked at my watch and said, 'Captain Davis, it is 20 minutes after 2:00. You are to go below deck within the next five minutes and help get the men out for abandon ship drill, or if you do not I will have have to give an official report. That gives you until 2:25 to comply with the order.'" (emphasis supplied.)

The accused himself testified (R. 21) in regard to the occurrences after Captain Langworthy had given him the first order:

"He returned in about a minute in haste and came up to me and said, 'Davis, I want you to get the rest of the men from below. Then I explained to Captain Langworthy that I was assigned to the station and I had already sent Mr. Watts below to get the men and that I was at the station to check the men and count them as they approached the station. As a matter of fact there was a constant stream of men coming up to my station and some to others and I wanted to separate them as there had been some change of orders the men did not know. After this conversation, Captain Langworthy said, 'God damn it, Davis, when I give you an order you are going to do as you are told or you are going to get in trouble. I will give you five minutes to get your men,' or words to that effect." (emphasis supplied.)

Corporal Wiggins, a witness, testified as follows in regard to the occurrence after the first order was given (R. 18):

"In a few minutes Captain Langworthy walked up again. At that time Mr. Watts was passing by and he said, 'Davis, go down and get the rest of those men up here.' Captain Davis told him he could not leave his station but 'I sent Mr. Watts.' Captain Langworthy then says, 'God damn you, Davis,' or words to that effect, 'you are going to do as you are told.' He looked at his watch and he said, 'I will give you five minutes to get those men up here.'" (emphasis supplied.)

Private Qualls, a witness, also testified as follows in regard to the occurrences after the first order was given (R. 20):

"Shortly after that Mr. Watts came up to Captain Davis' station and Captain Davis turned to him and said something to Mr. Watts in a very low tone and I didn't hear it. Mr. Watts left and went to the rear of the ship. Shortly after that Captain Langworthy said to Captain Davis, 'Davis, get down below and get the rest of your men up here.' To this Captain Davis said that he couldn't leave his station and had sent Mr. Watts. Captain Langworthy told him, 'God damn you, Davis, you are going to do as you are told!' and then he looked at his watch and said, 'I will give you five minutes to get below and get the rest of those men up here.'"

It must be remembered that "The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. * * * (A.W. 50½). * * *" (CM 150828, Robles; CM 150100, Bruch; CM 150298, Johnson; CM 151502, Gage; CM 152797, Viens; CM 154854, Wilson; CM 156009, Green; CM 206522, Young; CM 207591, Nash et al) (I Bull. JAG 162), and that "We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. * * * (Buntain v. State, 15 Tex. Appeals, 490)". (CM 212505, Tipton; I Bull. JAG 162).

It is abundantly clear that there is ample evidence in the record disclosing that the essence of the final order given to the accused was (as found by the court) that he go below deck himself to get the men out, and that a delegation by him of this duty to someone else would not be satisfactory. Such terms of the order were clear and explicit and there is abundant evidence that the accused as a reasonable man could not have misunderstood them. The following quotation from Winthrop, 1920, reprint, section 882, pages 572, 573 is pertinent:

"The obligation to obey is one to be fulfilled without hesitation, with alacrity, and to the full;⁴ nothing short of a

physical impossibility ordinarily excusing a complete performance. While a certain discretion in the execution of an order may sometimes be permitted to officers high in rank or command, or officers charged with expert or peculiarly responsible duties, the inferior cannot, as a general rule, be permitted to raise a question as to the propriety, expediency, or feasibility of a command given him, or to vary in any degree from its terms. Even where the order is arbitrary or unwise, and its effect must be injurious to the subordinate, he should first obey, postponing till after compliance his complaint and application for redress. (emphasis supplied.)

Footnotes

"4: A military subordinate is compelled to an unhesitating obedience to the very letter of the command received or order issued. Harcourt, 21. 'A subordinate, on receiving an order, must obey promptly and implicitly, * * * must at once comply. * * * In presence of the enemy, more particularly, is this mechanical obedience due.' O'Brien, 83. And see case of Lieut. Dawson, 'charged with hesitating and declining' to execute orders. Simmons sec. 595, note; also De Hart, 165. The obedience must be 'complete and undeviating.' Samuel, 287. In the military service, 'a prompt and unhesitating obedience to orders is indispensable to a complete attainment of the object. * * * Every delay and every obstacle to an efficient and immediate compliance tends to jeopard the public interests.' Martin v. Mott, 12 Wheaton, 30. (emphasis supplied.)

"7: If it were open to a soldier to be the judge of the propriety of the orders given him, there would at once be an end of all military discipline. Harcourt, 14. 'In military affairs it would be intolerable.' Clode, M.L., 75. 'A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives.' Sutton v. Johnstone, 1 Term, 546. 'While subordinates are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance.' Martin v. Mott, 12 Wheaton, 30. Soldiers should obey 'without cavil or inquiry;' they 'have no right to inquire of their superior officer as to the object of a detail upon which they are ordered by him.' Riggs v. State, 3 Cold, 90. And see McCall v. McDowell, Deady, 244-5; Dinsman v. Wilkes, 12 Howard, 403; Tramwell v. Bassett, 24 Ark., 499; 2 Opins. At. Gen., 713. (emphasis supplied.)

"8. Soldiers may complain of the command of a superior, but they are bound in the first instance to obey.' Samuel, 265. 'The orderly and proper course in all cases is to obey orders and afterwards, if any hardship or oppression is practised, appeal to superior authority for redress.' G.O. 40, Army of the Potomac, 1862. And see Harcourt, 16; O'Brien, 82; G.C.M.O. 28, 87, Dept. of the East, 1871.* * *"
(emphasis supplied.)

In the light of the foregoing statements of law, the circumstances in evidence as described above, considered in their entirety, negative the possibility that a reasonable man could construe the order in any way other than that the essence of it was that the accused himself go below deck and get the men, and that such terms were explicit. Captain Langworthy did not give the accused an order which he could carry out through the exercise of his own discretion as to the proper manner of performance, but on the contrary Captain Langworthy, the superior officer, preferred to exercise his own discretion as to the specific manner in which the order would be performed and therefore gave the accused an explicit order which precluded the accused from exercising his discretion. It is the privilege and duty of a superior officer to substitute his own judgment for that of his subordinates by making his orders explicit whenever in his opinion such action appears advisable. In my opinion, it follows that the conclusion of the majority opinion by the Board of Review that the essence of the order was merely to "get the men out" in any manner accused saw fit is clearly erroneous, and there is abundant evidence in the record to support the finding to the contrary of the court as approved by the reviewing authority, and therefore such findings cannot properly be set aside on appellate review.

3. There now remains for discussion the second reason given by the majority opinion of the Board of Review for finding the evidence legally insufficient, to wit:

"Prior to the expiration of the five minutes within which the accused was required to obey the order its purpose was accomplished, that portion of the order which required accused to go below deck, then having no relation to the accomplishment of any military duty, ceased to be operative and no further obligation with respect to the order rested upon accused. In fact, it would then have been impossible for him to accomplish the military purpose of the order as all of the men were already above deck. It follows that he can not legally be held to have failed to obey the order."

That portion of the order which required accused to go below deck could not have ceased to be operative after all of the accused's men were on deck for the reasons stated above to the effect that the very essence of the order

was that accused himself go below deck to get the men up. The duty rested upon the accused to comply with the essence of the order by going below deck and making a search below deck to determine that the men were all up. He was not permitted to rely upon any other method of ascertaining that the men were all up. Such was the order and it was not for the accused to decide whether it was wise or unreasonable. Furthermore, there is some evidence in the record that Captain Langworthy intended for the accused to search for men below deck other than his own men. It is also probable that Captain Langworthy insisted that the accused himself go below deck in view of the fact that the accused had just previously refused to do so and in order that the enlisted men present at the scene would not witness a United States Army Captain failing to obey the order of his superior officer during such a simulated emergency. Such a public act of failure to obey by an officer could very well have an extremely detrimental effect upon the discipline and morale of the entire command. It is not at all improbable that Captain Langworthy had this in mind when he insisted that accused carry out the order as originally given and go below deck himself. The essence of the failure to obey lay in the breach of discipline. In view of all of the above it follows that the order for accused to go below deck did not cease to be operative after the accused's men were up on deck and/or prior to the expiration of the five-minute period.

It is also stated in the majority opinion in effect that accused cannot be legally held to have failed to obey the order for the reason that it was impossible for him to comply with the order after the men were up on deck. As stated in the foregoing paragraph, it was not impossible for him to comply with the essence of the order by merely going below deck and ascertaining there that none of his men were left below deck. Also, the accused did not check below deck to see whether any men other than his own men remained below deck. However, disregarding these facts for the purposes of this discussion at this point, it is obvious that the order was lawful and possible of performance at the time it was given and that any subsequent condition causing the order to be impossible of performance was due to the misconduct of the accused himself in disobeying the terms of the order by wrongfully substituting an unauthorized method of performance. It is elementary that an accused cannot be excused for failure to obey an order of a superior officer on the grounds that it was impossible for him to perform the order when the accused himself has set up the conditions making the order impossible of performance. If a contrary rule were followed, any person receiving a military order who preferred not to obey the order, could, in most cases, merely go out of his way to set up obstacles to make the order impossible of performance and then claim immunity from punishment for disobedience of the order on the grounds that the order was impossible of performance. The fallacy of such a rule is obvious.

The statement that the order was impossible of performance and the accused "can not legally be held to have failed to obey the order" is in the nature of an assertion that it was unlawful. In regard to this entire matter the following quotations are pertinent:

"The willful disobedience contemplated is such as shows an intentional defiance of authority, as where a soldier is given an order by an officer to do or cease from doing a particular thing at once and refuses or deliberately omits to do what is ordered. A neglect to comply with an order through heedlessness, remissness, or forgetfulness is an offense chargeable under A.W. 96. * * * The order must relate to a military duty and be one which the superior officer is authorized under the circumstances to give the accused.* * * A command of a superior officer is presumed to be a lawful command." (MCM, 1928, p. 148 and 149" (emphasis supplied.)

"Although a person cannot be convicted of failing to obey an illegal order, a subordinate who refuses to obey an order does so at his peril." (MCM, 1928, par. 134).

"But to justify an inferior in disobeying an order as illegal, the case must be an extreme one and the illegality not doubtful. The order must be clearly repugnant to some specific statute, to the law or usage of the military service, or to the general law of the land. The unlawfulness of the command must be thus a fact, and, in view of the general presumption of law in favor of the authority of military orders emanating from official superiors, the onus of establishing this fact will, in all cases -- except where the order is palpably illegal upon its face -- devolve upon the defence, and clear and convincing evidence will be required to rebut the presumption. * * * But while a military inferior may be justified in not obeying an order as being unlawful, he will always assume to do so on his own personal responsibility and at his own risk. Even where there may seem to be ample warrant for his act, he will, in justifying, commonly be at a very considerable disadvantage, the presumption being, as a rule, in favor of the legality of the order as an executive mandate, and the facts of the case and reasons for the action being often unknown in part at least to himself and in the possession only of the superior.* * * That the order was merely unjust or unreasonable would, it need hardly be added, constitute no defence to a charge of disobedience of orders under this Article. * * *." (Winthrop, 1920 Reprint, pages 575, 576).

"Obedience to orders is the vital principle of the military life 100-- the fundamental rule, in peace and in war, for all inferiors through all the grades from the general of the army to the newest recruit. This rule the officer finds recited in the commission which he accepts, and the soldier, in his oath of enlistment, swears to observe it.

Footnote

"100, Obedience to command is the chief military virtue, in relation to which all others are secondary and subordinate; it is, for the soldier, 'the first great bond or charter of his service.' Samuel, 266, 283. 'The first and last virtue of a soldier.' Harcourt, 16. 'The first, second, and third part of a soldier is obedience.' Sutton v. Johnstone, 1 Term, 546. 'The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army.' McCall v. McDowell, Deady, 244. 'To insure efficiency an army must be, to a certain extent, a despotism. Each officer * * * is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence.' U.S. v. Clarke, 3 Fed., 713, (Brown, J.) And see Trammell v. Bassett, 24 Ark., 499. 'No other obligation must be put in competition with this; neither parental authority, nor religious scruples, nor personal safety, nor pecuniary advantages from other services. All the duties of his' (the soldier's) 'life are, according to the theory of military obedience, absorbed in that one duty of obeying the command of the officer set over him.' Glode, 2 M.F., 37. And see remarks of Secretary of the Navy in G.C.M.O. 1, Navy Dept., 1882." (Winthrop, 1920 Reprint, pages 571,572).

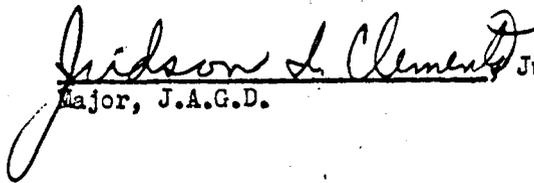
"Disobedience of the lawful order of a superior officer strikes at the very foundation of military discipline and is one of the most serious of all offenses denounced by military law."
(CM 218579, Lawrance (1941), XII B.R. 100).

In view of the foregoing it is, in my opinion, clear that the view that the order was unlawful or impossible of performance is untenable and erroneous. Likewise, I cannot concur in the view that the accused is given immunity from punishment for failure to perform the duty himself if he can show that he delegated the duty to someone else who performed it properly. If such a

view is followed the very foundation of military discipline and order will fall. Any person in the Army commanding others (which includes the great majority of military personnel) could refuse to do any work whatsoever by merely delegating his duties to a subordinate, and setting up the successful performance of the duty by the subordinate as a defense. His superior would have no means of remedying the situation because under such a view he could continue to so delegate his duties with impunity even after he had been specifically ordered to perform them himself.

4. The actions of the accused, the substance and tenor of his admitted statements to Captain Langworthy, along with his obvious knowledge that Captain Langworthy and Major Corns were watching and timing him, viewed in the light of all the circumstances, clearly form a sufficient basis for the court to infer that he understood the gist and essence of the order but chose at his own peril not to obey it. The proof is ample that the order was given, that it was properly transmitted to and understood by the accused, and that accused failed to obey it.

5. For the reasons stated above, I am of the opinion that the record of trial is legally sufficient to support the findings and sentence of the court as approved and I therefore dissent from the conclusion reached by the majority of the Board.


Major, J.A.G.D. Judge Advocate.

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1st Indorsement

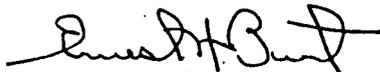
Army Service Forces, Branch Office of The Judge Advocate General, APO 75,
8 August 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$ is the record of trial in the case of Captain Edgar G. Davis (O-1288866), Headquarters Company, 368th Infantry.

2. I concur in the majority opinion of the Board of Review and for the reasons stated therein recommend that the findings of guilty and the sentence be vacated and that all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. In the event that you concur in the above recommendation there is inclosed for your convenience a form of action giving effect thereto.



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

2 Inclosures:

Incl.1- Form of action.

Incl.2-Record of trial.

(Findings and sentence vacated. GCMO 17, USAFP, 20 Aug 1945)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-2274

23 June 1945.

UNITED STATES)

v.)

Private HAROLD BIGBY)
(32689319), 580th Ordnance)
Ammunition Company)

) Trial by G.C.M., convened
) at Headquarters Base M, APO
) 70, 19 April 1945. Dishonorable
) discharge, total forfeitures,
) confinement for fifteen years.
) The United States Disciplinary
) Barracks, Fort Leavenworth,
) Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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: In that Private Harold Bigby (NMI) 580th Ordnance Ammunition Company, having received a lawful command from 2nd Lt. Marion D. Heinze, his superior officer, to "Stay In This Jeep" did at APO 70, on or about 2 February, 1945, willfully disobey the same.

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

Specification: In that Private Harold Bigby (NMI) 580th Ordnance Ammunition Company, at Calasiao Philippine Island, APO 70, on or about 2 February, 1945, with intent to commit a felony, viz, murder, did commit an assault upon Private Henry Smith Jr, 580th Ordnance

Ammunition Company by willfully and feloniously shooting at the said Private Henry Smith Jr with a rifle.

He pleaded not guilty to the charges and specifications, was found guilty as charged and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for thirty years. The reviewing authority approved the sentence but reduced the period of confinement to fifteen years and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution reveals that on 2 February 1945 accused was a member of the 580th Ordnance Ammunition Company. About 2115 hours he entered the company kitchen and cursed the kitchen guard, Private Henry Smith, Jr., because the lights were out. Accused then "goes on around" and "comes back" and began "fooling around the kitchen." Private Smith "flashed" his light on accused and said, "Bigby, go away from the kitchen. If I hadn't seen you I might have shot you". Accused retorted, "Nobody can talk to me like that. I will go back and get my rifle and shoot up every son of a bitch in this company", and then left (R.5). A short time later a shot was fired from "behind a tent" about 75 yards from the kitchen. Accused returned to the kitchen. The First Sergeant, who was talking to Private Smith about the shooting when accused approached, asked him if he had fired his gun. Accused answered "Hell, yes, I fired that shot" (R.9). The Sergeant asked what the trouble was (R.8) and the guard replied, "Bigby was messing around in the kitchen and I told him to go out" (R.8). Accused then said "If you say I was around that kitchen I will shoot the hell out of you" (R.5) and from a distance of about six yards (R.7) leveled a carbine at Private Smith (R.6,7) and fired twice. Neither the First Sergeant nor Smith were hit. They ran but immediately returned to the kitchen and the Sergeant asked accused for his rifle. Accused threw it upon the ground saying, "I ought to knock hell out of you" (R.9), hit Private Smith in the head with his fist, knocking him to the ground, and then kicked him on the side of the face (R.9). Second Lieutenant Marion D. Heinze arrived on the scene and took Private Smith to the dispensary (R.12).

About 5 or 6 minutes after the shooting, First Lieutenant Paul F. Bailey saw accused carrying a carbine slung over his shoulder (R.14). In answer to the Lieutenant's question as to who had fired, accused said that he had discharged the gun accidentally (R.16). The Lieutenant ordered accused to give him the gun. Accused hesitated and then handed it to the officer who found that it had been recently fired, that there was a round in the chamber, that it was cocked and the safety was off (R.14).

Accused began cursing everyone, in particular, the officers of the company and the First Sergeant (R.14), and was taken to the orderly room. Shortly thereafter Lieutenant Heinze returned with Private Smith from the dispensary. Upon seeing Smith, accused said, "If I had my gun, God damn it, I will shoot you." (R.6). The officers then ordered accused to get into a jeep for the purpose of taking him to the stockade. Accused asked Lieutenant Heinze for a cigarette and the latter said that he did not have one. Accused then said, "I'm going to get a cigarette anyhow!" (R.14). Lieutenant Heinze ordered the accused to remain in the jeep (R.12,13) but he nonetheless jumped out "and made as if he was going to run off into the woods" (R.15). Both officers followed, drew and cocked their pistols and "only through the point of a gun" forced him to get back into the jeep (R.12).

Accused elected to be sworn as a witness. He testified that after Private Smith had shone the light on him at the kitchen they started arguing, accused objecting to Smith "saying he was going to shoot me in my ass". He went to his tent and pulled the trigger of the carbine which he had been carrying to see if the safety was on and "it went off" accidentally (R.16,18). He returned (R.18) to where Smith was telling the First Sergeant "a lot of lies" about him "taking stuff from the kitchen" (R.16,23,24) and from a distance of about 5 yards (R.19) " * * * I just got my rifle and automatically shot over his head" (R.16,18,20,24) to stop him from talking any further (R.24,28). He testified that Smith and the First Sergeant "just jumped a little". He admitted that when the Sergeant asked him for his carbine he threw it on the ground, hit Smith and kicked him in the face (R.19). He stated that he then picked up his gun and went to his tent and unloaded it (R.21). He maintained upon cross-examination that he had intentionally fired over Smith's head and did not intend to hit him (R.17,24), saying, "If I pointed the gun, quite naturally I would have shot somebody" (R.17). Accused denied that he told Smith in the orderly room when the latter returned from the dispensary that if he had his gun he would kill him (R.21,24,25). He further stated that after getting into the jeep (R.21,22) he asked Lieutenant Heinze for a cigarette. When the Lieutenant said he had none accused jumped out to get cigarettes, not to run away. He also denied that he had been ordered by Lieutenant Heinze to remain in the jeep, and testified that nothing was said to him by either Lieutenant from the time he got into the jeep until after he had jumped out for the cigarettes (R.18,22).

4. The evidence is clear that accused, having been found by Private Smith, the guard at their company kitchen, "fooling around" the kitchen in the dark, became involved in an argument with the guard and threatened to shoot him. Having left the kitchen he returned with a carbine and from a distance of 5 yards intentionally fired two shots in the direction of the guard,

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then threw down his gun, hit him and knocked him to the ground and kicked him. Accused admitted firing the shots but claimed that he shot over Smith's head to make him stop "telling lies" about him, and did not intend to shoot him. Whether accused had such intent at the time he discharged his carbine was a question of fact for the determination of the court. Accused's statements and actions immediately before and after the shooting furnished sufficient basis for the inference that accused fired his gun at Private Smith deliberately and with the intent to kill him. Had death ensued, the homicide would have been murder. The fact that accused's shots did not hit either Smith or the First Sergeant did not alter the character of the offense (par. 1491, M.C.M., 1928). It follows that there is substantial evidence in the record to sustain the court's findings that accused assaulted Smith with intent to murder as alleged in the specification of Charge II.

Likewise, it is clearly established by the evidence that notwithstanding a direct order given to him by Lieutenant Heinze to remain in a jeep in which he was about to be driven to the stockade, accused deliberately jumped out and sought to run into a nearby wood. The court's findings with reference to Charge I and its specification is therefore sustained by substantial and competent proof.

It is noted that the data on the charge sheet with reference to accused's service and pay, although before the court, was not copied into the record. Such error was procedural and did not prejudice any of accused's substantial rights.

The sentence imposed is permissible for the offenses of which the accused was found guilty.

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

(ABSENT), Judge Advocate
Colonel, J.A.G.D.

William R. Robert, Judge Advocate
Colonel, J.R.G.D.

James B. Murphy, Judge Advocate
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
with the United States Army Forces
in the Pacific

Board of Review
CM A-2284

APO 75,
6 July 1945.

UNITED STATES)	Trial by G.C.M., convened at
)	Headquarters 40th Infantry
v.)	Division, AFO 40, 24 May 1945.
)	As to each accused: Dishonorable
Privates ROBERT W. LUNN)	discharge, total forfeitures,
(37078753), and WILLIAM)	confinement for ten years. The
J. SHEPARD (33385274),)	United States Disciplinary
both of Company B, 185th)	Barracks, Fort Leavenworth,
Infantry.)	Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 in a common trial upon the following charges and specifications:

Accused Private Robert W. Lunn:

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

Specification: In that Private Robert W. Lunn, Company B, 185th Infantry, then Staff Sergeant, having received a lawful command from First Lieutenant James B. Godwin, Company B, 185th Infantry, his superior officer, to return to his company, did, at AFO 40, on or about 29 April 1945, willfully disobey the same.

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

Specification: In that Private Robert W. Lunn, Company B, 185th Infantry, then Staff Sergeant, being present

with his organization while it was engaged with the enemy, did, at APO 40, on or about 29 April 1945, shamefully abandon the said company and seek safety in the rear.

Accused Private William J. Sheppard:

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

Specification: In that Private William J. Sheppard, Company B, 185th Infantry, having received a lawful command from First Lieutenant James B. Godwin, Company B, 185th Infantry, his superior officer, to return to his company, did, at APO 40, on or about 29 April 1945, willfully disobey the same.

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

Specification: In that Private William J. Sheppard, Company B, 185th Infantry, being present with his organization while it was engaged with the enemy, did, at APO 40, on or about 29 April 1945, shamefully abandon the said organization and seek safety in the rear.

Each accused pleaded guilty to so much of Charge I and its specification as alleges that he did fail to obey the order of his superior officer at the time and place alleged, in violation of Article of War 96 and not guilty to Charge II and its specification. Each was found guilty as charged and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentences and designated as to each accused the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General.

3. The evidence reveals that Private William J. Sheppard, a member of Company B, 185th Infantry, APO 40, was on 19 April 1945 sent to the hospital because of combat fatigue. On 21 April he was returned to his company and two days later he again reported to the Battalion Surgeon. The Surgeon told him to stay in the 1st Battalion kitchen area, which was then being used as a rest area for troops returning to combat duty after hospitalization. On 27 April accused Private Robert W. Lunn of the same company reported to the Surgeon with symptoms similar to those of accused Sheppard, but not as severe. He was given a mild sedative and told to report to his company but apparently remained in the kitchen area. Both accused, without leave, went to the hospital at Silay "to visit some friends" (R. 26, 29, 32) and then returned to the kitchen area.

On 29 April Company B was "upon the line" (R. 9), "forward", "in position to jump off" for an attack the next morning (R. 13). About 1500 hours that day, First Lieutenant James B. Godwin, the Acting Commanding Officer of Company B, was in the 1st Battalion kitchen area and sent for both accused. He told them that charges had been preferred against them for their absence without leave. Lunn asked if the charges "had gone in or not" and was told that "they were being sent in". The Lieutenant testified that Lunn "wanted to know what they would do with him" and "I said probably not as much as I would like for them to get" (R. 8). He also told them "that the Company was attacking the next morning and that both of them were going up with us and they were to catch the evening mess truck and come back to the company area" (R. 8) but he did not discuss the duties that they would be required to perform (R.). He asked them if his instructions were clear and they answered in the affirmative. In the presence of the accused, Lieutenant Godwin asked Lieutenant Julian B. Habans, who was in charge of the Field Train, to see that the accused got on the truck. Before "the evening mess truck" left at 1600 hours Lieutenant Habans caused a search to be made of the area but neither of the accused could be found. The truck left without them and they did not participate in the attack the next morning (R. 12,15).

On the morning of 2 May 1945 the accused reported to First Lieutenant Morris M. Greenstein, Personnel Adjutant, 185th Infantry, then stationed at Bacalod, Negros, "All of thirty or forty miles" from where "the front line troops" were at the time (R. 23). They told the Lieutenant that they had come to see him at the suggestion of their previous commanding officer, Captain Davis, whom they had met in the town of Silay. They said that they had been ordered to catch the mess truck and proceed forward to join their company and further stated that they were absent without leave and, "being they were under charges they didn't know what to do about it and were here seeking advice or information" (R. 24). The Lieutenant notified the Provost Marshal that the accused had turned themselves in and they were taken into custody (R. 24).

Previous to the time of their alleged misbehavior the accused had participated in combat on the islands of Panay, Luzon and Negros (R. 16). According to the Battalion Surgeon, neither of the accused was a "sick book rider" or a "gold brick" (R. 19, 20).

Each of the accused elected to testify under oath. Accused Lunn denied that Captain Crane, the Battalion Surgeon, had told him to return to his company, stating that the Captain had mentioned nothing about where he was to go (R. 26) but that he had nevertheless returned to the kitchen area. Accused Sheppard stated that, having been discharged from the hospital, he had reported to Captain Crane who had told him "To go to the kitchen for a few days", but the Captain had not stated how long he was to remain there (R. 32):

They both admitted disobedience of Lieutenant Godwin's order to return to their company (R. 27, 28, 34). Each accused testified that he disobeyed the order because of the statements of the Lieutenant when he discussed the court-martial charges with reference to their absence without leave (R. 27, 33). Lunn testified that Lieutenant Godwin had said "when you go up on the hill the next morning, I hope you get it" (R. 27); and Sheppard testified that the Lieutenant "got pretty sarcastic and started getting rough" (R. 33). From the Lieutenant's attitude both Lunn and Sheppard concluded that they would be selected as leading scouts for the attack the next morning and that they would be assigned duties more hazardous than normally expected of soldiers of their company (R. 30, 33). Each admitted on cross-examination that it was in order to avoid such hazardous duty that he disobeyed Lieutenant Godwin's order (R. 30, 34). Accused Sheppard testified that he was not a trained scout (R. 33), and the reason he had concluded that he would be assigned to scout duty in the attack was because it was the practice in his company to pick for such duty men who were "always messing up" (R. 35).

4. The evidence is clear that each accused did willfully disobey the order of his superior officer to return to his company as alleged in the specification of Charge I.

By Charge II each accused is charged with a violation of Article of War 75 in that, being present with his organization while it was engaged with the enemy, he did on or about 29 April 1945 shamefully abandon the said company and seek safety in the rear. The specification alleges, in effect, that each accused, while before the enemy, misbehaved himself by leaving his company which was then in the front lines.

The evidence establishes that on 29 April 1945 the accused were in the Battalion kitchen area and their company was "in the line" in a position from which it launched an attack against the enemy the following morning. Being advised of the impending engagement and notwithstanding the order of their company commander to go forward to their company, they admittedly went absent without leave and surrendered about three days later 30 or 40 miles to the rear. As Company B was messed by truck from the Battalion kitchen area, the evidence is susceptible to the inference that while in that area each accused was in a rear echelon of his company and in close proximity to the forward element thereof. On 29 April the main body of the company was before the enemy. Under such circumstances, each accused at that time was "present with his organization before the enemy" within the contemplation of Article of War 75 (Winthrop, Mil. Law, p. 623; Davis, Mil. Law, p. 415; par. 141a, M.C.M., 1928; III Bull. JAG 379; IV *id.*, 11). Their conduct in going far to the rear to avoid participating with their unit in an impending attack clearly constituted "misbehavior" before

the enemy and the record contains substantial evidence warranting the several findings of guilty of Charge II and its specification. It is noted, however, that under the circumstances in the instant case the specification would have been more aptly worded had it alleged directly that each accused did misbehave himself before the enemy by failing to rejoin his organization then before the enemy, as ordered by his superior officer.

The sentences imposed are authorized upon conviction of the offenses of which the accused were charged.

5. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings and the sentences.

(Absent), Judge Advocate.
Colonel, J.A.G.D.

Lawrence J. Labat, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES (243)
In the Branch Office of The Judge Advocate General
with the United States Army Forces
in the Pacific

Board of Review
CM A-2320

11 August 1945,

UNITED STATES)

v.)

Private FOURN GRIFFIN (36649104),)
Private First Class THEODORE J.)
PIOTROWSKI (33357390), Privates)
EDWARD C. MAJEWSKI (20131092),)
ALBERT J. HACHEY, JR. (31302538),)
PETE DAVIS, JR. (20461846) and)
FRANK T. LUGO (39419183), all of)
Company A, 155th Infantry.)

) Trial by G.C.M., convened at APO 31,
) 14 April 1945. As to accused
) Griffin: Dishonorable discharge,
) total forfeitures, confinement for
) 20 years. The United States Peni-
) tentiary, McNeil Island, Washington.
) As to accused Piotrowski, Majewski
) and Hachey: Dishonorable discharge,
) total forfeitures, confinement for
) 10, 15, and 15 years, respectively.
) The United States Disciplinary
) Barracks, Fort Leavenworth, Kansas.
) As to accused Davis: Dishonorable
) discharge (suspended), total for-
) feitures, confinement for 5 years.
) The Philippine Detention and Re-
) habilitation Center, APO 75. As to
) accused Lugo: Confinement for 5
) months and 29 days (remitted).

HOLDING by the BOARD OF REVIEW
ROBERTS, MURPHY and CLEMENTS,
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 in a joint trial upon the following charges and specifications:

As to all accused:

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

Specification 1: In that Private Albert J. Hachey, Jr.,
Private Edward C. Majewski, Private Pete Davis, Jr.,
Private First Class Theodore J. Piotrowski, Private

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Fount Griffin, Private Frank T. Lugo, all of Company A, 155th Infantry, and Private John M. Owen, 13th Portable Surgical Hospital, acting jointly and in pursuance of a common intent, did, at APO 31, on or about 28 February 1945, by force of arms, unlawfully enter the Special Service Warehouse of the 13th Air Force with intent to commit a criminal offense, to wit, larceny, therein.

Specification 2: In that Private Albert J. Hachey, Jr., Private Edward C. Majewski, Private Pete Davis, Jr., Private First Class Theodore J. Piotrowski, Private Fount Griffin, Private Frank T. Lugo, all of Company A, 155th Infantry, and Private John M. Owen, 13th Portable Surgical Hospital, acting jointly and in pursuance of a common intent, did, at APO 31, on or about 28 February 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Staff Sergeant Nick E. Geraci forty (40) cases of beer, value about \$76.80, the property of members of the 5th Bombardment Group, APO 719.

As to accused Hachey and Griffin:

Specification 3: In that Private Albert J. Hachey, Jr., and Private Fount Griffin, both of Company A, 155th Infantry, acting jointly and in pursuance of a common intent, did, at APO 31, on or about 27 February 1945, feloniously take, steal and carry away 155 Philippine pesos, 75 Netherlands East Indies guilders and one Zippo lighter, of a total value of \$118.75, property of Staff Sergeant Nick E. Geraci; and 6 cases of beer, value about \$11.52, property of members of the 5th Bombardment Group, APO 719.

As to accused Griffin:

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

Specification: In that Fount Griffin, Company A, 155th Infantry, did, at APO 565-1, on or about 4 September 1944, take and use, without authority, one vehicle $\frac{1}{4}$ ton 4 X 4 No. 20437746, property of the United States of a value of more than \$50.00.

As to accused Hachey and Majewski:

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

Specification: In that Privates Albert J. Hachey, Jr., and Edward J. Majewski, both of Company A, 155th Infantry, acting jointly and in pursuance of a common intent, did, at APO 31, on or about 1 March 1945, wrongfully take and use without permission a 3/4 ton vehicle, assigned to the 429 Signal Construction Battalion, property of the United States of a value of more than \$50.00.

Each accused pleaded not guilty to the charges and their specifications. Accused Griffin, Piotrowski and Majewski were found guilty as charged. Accused Hachey was found guilty of Specifications 1 and 2, Charge I, not guilty of Specification 3 thereof and guilty of the specification of Charge II and of both charges. Accused Davis was found not guilty of Specification 1 of the charge but guilty of Specification 2 thereof and of the charge. Accused Lugo was found not guilty of Specification 1 of the charge, guilty of Specification 2 and of the charge. They were sentenced as follows: Griffin to dishonorable discharge, total forfeitures and confinement at hard labor for 20 years; Piotrowski to dishonorable discharge, total forfeitures and confinement at hard labor for 10 years; Majewski to dishonorable discharge, total forfeitures, and confinement at hard labor for 15 years; Hachey to dishonorable discharge, total forfeitures and confinement at hard labor for 15 years; Davis to dishonorable discharge, total forfeitures and confinement at hard labor for 5 years and Lugo to confinement at hard labor for 5 months and 29 days. The reviewing authority approved the several sentences and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement of accused Griffin and the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement of Piotrowski, Majewski and Hachey. He suspended the execution of that portion of Davis' sentence as pertains to dishonorable discharge and designated the Philippine Detention and Rehabilitation Center, APO 75, as the place of his confinement and remitted Lugo's sentence. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence with reference to Charge I reveals that on the night of 27 February 1945 Staff Sergeant Nick E. Geraci, of the 5th Bombardment Group, APO 719, was detailed by the post exchange officer of that unit to sleep in the Special Service Building to safeguard 1705 cases of beer (R. 38). The building was completely enclosed with burlap except for an 18 inch opening at the bottom. The beer was stacked in two stacks and the sergeant was sleeping between them (R. 31). Upon awakening next morning he discovered that his T-shirt, pants, socks, cigarette lighter, a PX receipt, his billfold containing 155 Philippine pesos and 75 Netherlands East Indies guilders and 12 cases of beer of the value of \$23.04 were missing (R. 32, 25, 38). He reported the loss to the commanding officer who established a 24-hour guard of the building (R. 33).

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On the morning of 28 February Private John M. Owen of the 13th Portable Surgical Hospital went to his former unit, Company D, 155th Infantry, to collect his pay. Learning that there was some beer in the Company A area he went there and entered the tent of the accused Griffin and some of the other accused where he saw about 10 cases of beer (R. 39). Present at that time were all of the accused and several other soldiers whom he did not know. After drinking some beer he left and later returned and continued drinking beer all that afternoon. He testified that during that time he heard someone say that the beer which they were drinking had been stolen the night before from the 5th Bombardment Group. Private Griffin told Owen that the man who was guarding the beer was asleep and that he had taken the man's pants which he showed him stating there was no money in them (R. 40, 41). Owen remained there until "just prior to darkness" when accused Piotrowski drove up in a "peep". Owen, together with Piotrowski, Hachey, Davis, Majewski and "several others" then drove to the area where the Service Building was located, and some one showed them "where the beer was". The "peep" was then abandoned (R. 44). Several of them, including Owen, went to the show but stayed only a short while. Owen "stole" a 6 x 6 truck then "rounded up the boys" and drove with them to the entrance of the Service Building, arriving about 8:30 P.M., where they found Sergeant Geraci sitting on his cot in the building alone, he having allowed the other guards to go to the movies. Upon opening the door and going outside he was approached by three men walking in single file, the first of whom said "Hey, Mac" and when Geraci "looked around toward him" the second man took his rifle. Geraci testified:

"Then I turned to the first man and asked what was going on, and he said: 'We are taking this beer,' and he leveled a submachine gun at me. The other two men had pistols. One of them started cutting the burlap, but quit when the first man grabbed the door and found that it was unlocked. The truck was backed up toward the building." (R. 33).

The sergeant was then ordered to go inside the building by the three men at which time four others jumped off the truck, none of whom he was able to recognize as it was dark (R. 33, 34). Owen testified that accused Davis, Piotrowski and others whose names he could not recall handed him and Hachey, who were in the back of the truck, 40 cases of beer. When the beer was loaded one of the party pointed toward the road and told the guard Geraci to "get going" and after he had walked about 30 feet the truck, whose motor had been kept running, "took off toward the road * * * at an awful speed, really geared up, and knocked down part of the fence there" (R. 34). The sergeant then ran back to the building, secured his rifle and hollered "halt" several times but the truck continued going with "their lights off". The guard did not fire as there were offices across the road and he was afraid

he might hit someone. He reported the incident, secured a jeep, and chased the truck but "didn't find it" (R. 33, 34).

On cross-examination Owen admitted that he had been given "immunity" by the investigating officer (R. 43) "in connection with these offenses". He also stated that on the night in question he "was under the influence of alcoholic beverages" (R. 43) but was "certain that the things I have related are true" (R. 46).

Later that evening Sergeant Bonnie O. Jordan, of Company A, 155th Infantry, who was sleeping in a tent near the one occupied by Griffin and other of the accused, was awakened by the sound of a truck which stopped nearby (R. 47). He heard voices, two of which he recognized as those of accused Hachey and Griffin (R. 48). Private First Class Raphael Debiase was also awakened by the sound of a truck backing up to Griffin's tent. Upon looking out he heard Hachey say "Let's get the beer off the truck" and then saw Lugo, Hachey and Griffin "unloading some cases" (R. 51). Although the night was dark there was a lantern burning in Griffin's tent enabling him to recognize them (R. 52). There were others there but he could not identify them (R. 53). Private First Class Alfred G. Walker saw Majewski and Hachey bring in the tent 10 or 12 cases of beer some time between 10:00 and 12:00 o'clock on the night in question (R. 54).

On 1 March 1945 Private John C. Lopez, of Company A, was standing in a "chow line" and heard accused Hachey say to Piotrowski, "We stole 110 cases of beer in a day and a half. Imagine that!" (R. 55). That day Sergeant Kenneth I. Hammond, an MP, searched Hachey's tent and found him "passed out on a bed". He found 6 empty cases and enough empty cans of beer "which appeared to be sufficient to fill the six (6) cases" (R. 56).

Accused Davis, when questioned by the investigating officer, Major Emory B. Peebles, Jr., stated to him "I admit that I was in on it, but I won't make a statement" (R. 58).

Several witnesses testified that accused Davis was on a truck at the dock on the afternoon of 28 February 1945 from 4:00 o'clock until 9:00 o'clock when he was dropped off at Company A (R. 62). Private First Class Ellis Gallatas, 31st Quartermaster Company, testified that he saw accused Hachey on the night of 27 February 1945 "down at the company" from about 7:30 or 8:00 o'clock with Private Wallace Cichy, and that Davis was there until after the lights went out which was at "11:00 or a little after" (R. 64). Private First Class Jimmie Johnson testified that he saw accused Griffin at the show on the night in question and they returned to camp together (R. 63).

Each of the accused elected to remain silent.

4. The evidence for the prosecution with reference to the specification of Charge II involving Hachey and Majewski reveals that on 1 March Privates First Class George O. Morris and Harold J. Gaither delivered mail to the 155th Station Hospital using a new 3/4 ton weapons carrier (R. 20, 23) which they parked nearby. Upon returning from the hospital the truck was missing. They immediately reported the loss to a nearby MP and then to their commanding officer and were instructed by him to take another truck and "search around to see if we could locate the truck that was stolen". An hour later they saw the stolen truck (R. 22) travelling ahead of them and, passing it, blocked the road. Three men were in the truck, one of whom jumped out and ran toward the bushes. The other two, accused Hachey and Majewski, stated that they had found the truck in a ditch and asked to be allowed to go and be given a break (R. 22). The request was refused and they were delivered to the Provost Marshal of the 13th Air Force (R. 20).

5. The evidence with reference to Charge II involving accused Griffin shows that on 5 September 1944 Private John Edward Barger was at a bridge checking all vehicles in an effort to find a 1/4 ton truck No. 20437746, which had been stolen from his organization (R. 28, 29). Shortly thereafter the accused Griffin and another soldier approached the bridge in a jeep. Barger recognized the car as the one for which he was looking and pointed toward it at which time the driver attempted to turn around but was halted by an MP. Barger testified:

"They said that they didn't steal the jeep, that they were picked up. The driver of the jeep was drinking, sold them some beer and they got drunk, passed out and the next morning the other guy was gone and just these two were left; and that they were on the way to return the jeep when we stopped them." (R. 27).

The occupants were then turned over to the Sergeant of the Guard (R. 30). The value of the jeep was not proven.

6. Accused Griffin, Piotrowski, Hachey and Majewski were found guilty of housebreaking and robbery. There is direct evidence that Piotrowski, Majewski and Hachey unlawfully went into a warehouse at the time in question and, threatening the guard with a submachine gun, took from him 40 cases of beer. While accused Griffin was not identified as being present at that time, he was seen at a show near the scene of the crime shortly before it was committed. Several others than those identified were at the warehouse and assisted in loading the beer on the truck and when the truck arrived in the company area Griffin was present and assisted in unloading the recently stolen property. Such evidence furnished a

sufficient basis upon which the court could infer that accused Griffin was present and participated in the housebreaking and robbery with the other accused. The evidence further warranted the court in finding each of them guilty as charged.

Accused Griffin is also charged with, and was found guilty of, the larceny of the personal effects of Sergeant Geraci and of 12 cases of beer on the night of 27 February 1945 (Spec. 3, Charge I). On the following day accused Griffin told another soldier that the man guarding the beer was asleep and that he (Griffin) had taken his pants and exhibited a pair of khaki pants, stating that they belonged to the man (Geraci) who was guarding the beer the night before. While the various personal articles alleged were not proven to have been taken by the accused the fact that Sergeant Geraci testified that at the time of the theft they were in his pants furnished sufficient evidence upon which the court properly could infer that accused took them as alleged. There is abundant evidence to support the court finding accused Griffin guilty of the larceny.

Accused Griffin is also charged with wrongfully taking and using a government vehicle of a value of more than \$50.00 (Spec., Charge II). The testimony is uncontradicted that a truck of the 489th Amphibian Truck Company was stolen. The following day accused was apprehended in possession of the stolen property. His claim, when apprehended, that he had been "picked up" on the previous day; that he and the driver drank beer and both "passed out"; that the next morning the driver was gone and that he was on his way to return the truck was not accepted by the court. There is no evidence in the record that accused was authorized to use the truck nor that his possession of it was lawful. While the value of the truck was not proven the court was privileged to take judicial notice that a $\frac{1}{4}$ ton 4 x 4 truck in good running condition in a theater of operations was worth more than \$50.00.

Accused Hachey and Majewski were charged with the wrongful use of a $\frac{3}{4}$ ton weapons carrier (Spec., Charge II). They were found in possession of the truck shortly after it had been "stolen" and when apprehended asked to be allowed to go, and requested that they be given a "break". Such request is inconsistent with their statement that they found the truck in a ditch. No value of the truck was proven but there was testimony that it was "new". The court was privileged to take judicial notice that it was of a value in excess of \$50.00. The court properly could conclude from the evidence that they were guilty as charged.

7. Each of the approved sentences is permissible for the offenses of which the several accused were found guilty. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of robbery and house-breaking recognized as offenses of a civil nature and so punishable by

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penitentiary confinement by Sections 34 and 55 of the Code of the District of Columbia.

8. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings and sentences.

Harlan Robert, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
with the United States Army Forces
in the Pacific

Board of Review
CM P-4

6 July 1945

UNITED STATES

v.

Private JOHNY J. R. CHAPMAN
(3A040000), Battery "B", 181st
Field Artillery Battalion.

) Trial by G.C.M., convened at APO
) 310, 20 May 1945. Dishonorable
) discharge, total forfeitures and
) confinement at hard labor for
) ten years. The United States
) Disciplinary Barracks, Fort Leaven-
) worth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
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 Johny J. R. Chapman, Battery B, 181st Field Artillery Battalion, did, at APO 70, on or about 31 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fourth Grade Charles H. Park, a human being, by shooting him with a pistol.

He pleaded not guilty to the charge and its specification and was found guilty of so much thereof as alleged that he did willfully, feloniously, and unlawfully kill Technician Fourth Grade Charles H. Park at the time and place alleged in violation of Article of War 93. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific.

3. The evidence for the prosecution shows that at about 8:30 o'clock on the night of 31 March 1945 Private Johny J. R. Chapman (the accused), T/4 Paul S. Witherspoon and T/4 Charles H. Park, left their area near San Jacinto

P.I., in a 2½ ton truck which accused was driving. After having driven several miles Park requested that he be left at a house of a Filipino on the "main road". The request was granted and accused and Witherspoon continued driving down the road to a house that accused "knew about" (R. 6), arriving there about 10:30 and remaining there for about three hours. Upon returning they "picked up" Park and turned the truck around and continued toward their camp, accused driving, Witherspoon sitting in the middle and Park on the outside. On the way they had a few drinks and an argument developed between accused and Park about accused "being down at that house so long". The truck was stopped, all got out and accused came around the front of the truck and grabbed Park around the neck. Witherspoon "broke them up" and told them to quit fighting. Immediately thereafter Park hit Chapman on the side of the head with a bottle which stunned him for a few seconds after which the argument between them was resumed "about some disagreement they had back in Finschhafen". Witherspoon left and started walking down the road toward camp. After having gone about two or three hundred yards (R. 8) he heard a shot and returned to the truck where he found Chapman standing between the radiator and the fender of the truck. Chapman said to him "I've shot Park". He then observed deceased in the truck "almost inside the door with his face down and his feet hanging out" and his head near the steering wheel (R. 9). Witherspoon "felt of his heart" and determined that Park was dead. At that time

" * * * Chapman asked me to help him put him over in the bushes. I told him no, I didn't want to have anything to do with it and he said if I didn't stick with him, if I told anyone back at camp about it, he would kill me, and he taken Park out of the truck" (R.10).

After accused started dragging deceased, Witherspoon assisted him in putting the body about 6 or 8 feet off the road behind a log. They then got in the truck and started for their camp. Upon reaching a ford accused stopped the truck and, with the assistance of a Filipino who was nearby, attempted to wash the blood from the truck (R. 10). After having been at the ford for about 20 or 30 minutes they resumed their way toward their camp and met Sergeant Neal and Private Burton in another truck. Accused stopped his truck and exchanged places with Private Burton and all returned to camp. When accused "got out of sight" Witherspoon told some of the men that Chapman had shot Park and that he knew where Park was. Captain Moran was "standing there" and gave instructions for Witherspoon and others to get a "peep and go after him" (R. 12). They proceeded as directed and returned to the camp with Park's body (R. 13). Subsequently an autopsy was performed which revealed that death had been caused by a 45 caliber bullet which entered the left angle of the lips and lodged in the muscles of the right neck (Pros. Ex. B).

On the day following the shooting Sergeant Roger D. McIntyre with a Sergeant McGinn, both of the C.I.S., Base "M", APO 70, were called to the 37th

Station Hospital (R. 21) where they found accused in bed "propped up on some pillows * * * he complained that he felt a little weak" but his speech was "clear, coherent, and his sentences were rational". He "complained about his head being sore where he had been hit" (R. 24). After having been duly warned as to his legal rights (R. 22) the accused, under oath, among other things stated:

* * *

"After picking Parks up we headed north toward our camp area. At a point of the road a quarrel broke out between Parks and I, the reason for the quarrel being unknown to me. I was driving, with Witherspoon in the middle of the seat and Parks on the right hand side of the seat. Suddenly Parks hit me on the head with a bottle, shattering the bottle. I stopped the truck and got out. Parks also dismounted and came around the front of the truck and attempted to strike me again. I told him if he did not stop I would kill him. I was pretty mad at this time. Parks went back around and got back into the seat at the right side. I am not sure whether he was fully seated or in the act of getting in when I shot him. I don't know if he was going to get another bottle or not to strike me with. Parks did not fall from the vehicle after I had shot him. He fell toward the steering wheel, but remained on the seat. Witherspoon was somewhere on the right side of the truck. Exactly where, I don't know. I got back into the truck and Witherspoon sat on the far end of the right side of the seat, with Parks in the middle. We turned the vehicle around and headed towards Binalonan. Just before we arrived there, Witherspoon and I lifted the body of Parks from the truck and placed him near the side of the road. We then turned around and drove towards our camp area.

"Right after I had shot Parks, Witherspoon found a bottle of whisky and we both began drinking. I don't know for sure whether or not Witherspoon had been drinking before this. I had not been drinking.

"About three miles east of Manaoag I met Sgt. Neal and Burton who drove up alongside of my vehicle. I stopped and got out of my truck and got into the truck driven by Sgt. Neal, while Witherspoon remained in the truck, and was driven home by Burton. Sgt. Neal and I drove to the Co. Area. I related the whole story to Sgt. Neal. Sgt. Neal then let me out of the vehicle and told me to go to the Medics for first aid. I also told Blair the complete story of the shooting of Parks. While I was hunting for Blair, Witherspoon approached me and aimed his carbine at me and said, "God-damn it,

look out". Somebody disarmed Witherspoon at this time and I ran through my tent. Blair got McReynolds to take me to the Hospital. Sgt. Neal took the .45 cal. automatic from me when I got out of the truck before going to the Medics. The gun was one I had gotten from Sgt. Francingues yesterday evening, 31st March, 1945. He gave me the gun to keep for him and take care of it. What Sgt. Neal did with the gun I do not know." (Pros. Ex. A).

Staff Sergeant Norman R. Francingues corroborated accused's statement as to the manner in which accused acquired the pistol (R. 26).

By stipulation (Pros. Ex. C) it was agreed that accused was examined by a Board of Officers on 9 May 1945 and that the Board's findings were

"That Pvt. Johny J. R. Chapman, * * * is not now insane and was not insane at the time of the alleged commission of the offense of which he is charged; that he is now, and was at the time the alleged offense was committed capable of realizing right from wrong and the normal control of his actions; that he is capable of communicating intelligently with his counsel and of doing the things necessary for the proper presentation of his case. That he is not insane, hospital care is not necessary.

MENTALITY: Normal."

The accused elected to be sworn and testified, in substance, as did Witherspoon and as appeared in his written statement, except that he stated that during the argument, while he was driving, deceased hit him on the shoulder. He further testified, "I couldn't drive with him fighting with me so I stopped the truck. I thought I'd reason with him. I get out. * * * He come all the way around and he come to me, walking sideways with his hand down the side of his leg, and I was standing right straight across in front of the truck * * *" (R. 37) "I was trying to reason with him, standing here, and trying to talk him out of the notion of having any trouble. I didn't want to fight him at all because the man had tried to kill me once before with a trench knife." (R. 38). When deceased hit him with the bottle it broke. He was stunned by the blow which knocked him against the side of the truck after which deceased entered the cab of the truck (R. 39) and was "groping around" and "I thought he was going to kill me; that's the reason I shot him * * * he usually carries a trench knife. I thought maybe he was trying to get that. I don't know what he was trying to get, another bottle, a wrench, or what he was trying to get hold of" (R. 40). He then got in the truck with Witherspoon, who was near the truck, and started back toward Binalonan - "I was aiming, trying to get the man to a hospital" when Witherspoon told him "The boy's dead" and at Witherspoon's suggestion "I take the boy, I lay him right off the side of the road * * * I couldn't have drove that truck no further, that's how bad I was hurt after it was all over" (R. 41).

On the way back to camp he and Witherspoon drank some whiskey which Witherspoon had. Upon meeting Sergeant Neal he got in the truck telling him that "Park was trying to kill me and I had killed him and I shot him" (R. 42). He gave the pistol to Sergeant Neal and requested that he give it to Sergeant Francingues to whom it belonged. Neal placed the pistol in the glove compartment where it was subsequently found by the owner (R. 27). Upon returning to the Battery Area Witherspoon secured a rifle and started to shoot him but was prevented by "a bunch of them" who "grabbed him". The Battery medical orderly bandaged his head after which he was sent to the hospital (R. 42).

4. The accused was found guilty of voluntary manslaughter which is defined as:

" * * * unlawful homicide without malice aforethought
 * * * where the act causing the death is committed in
 the heat of sudden passion caused by provocation" (par.
 149a, M.C.M., 1928).

There is no question, and the accused admitted, that at the time and place alleged the deceased came to his death from a bullet fired into his head by the accused. The record contains no testimony, other than that of the accused, as to the actual shooting. After an argument both got out of a truck and accused grabbed deceased around the neck. They were separated and almost immediately deceased hit accused on the head with a bottle causing an injury which necessitated his being subsequently sent to a hospital. Accused claimed that deceased entered the cab of the truck and he thought he was endeavoring to secure a weapon and that he then shot him in the belief that deceased was going to kill him.

" * * * To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; * * *" (par. 148a, M.C.M., 1928).

The facts remain, however, that at the time of the homicide it was dark; accused did not testify that deceased had a weapon or other dangerous instrument in his possession; deceased moved away from accused and returned to the front seat of the truck and was, when shot, not in a position to do accused

bodily harm. Accused's defense that he was stunned from the blow of the bottle and could hardly stand and thus was unable to retreat is not borne out by his subsequent actions. Shortly after firing the shot he was able to drive the truck and assist in taking deceased's limp body out of the cab and placing it off the road. His plea that when he fired the fatal shot he was in fear of his life was not accepted by the court in whose province lies the weighing of the evidence, determining controverted issues of fact and judging the credibility of the witnesses (Sec. 395 (56) Dig. Ops., JAG, 1912-40; Allison v. U.S., 160 U.S. 203; Brown v. U.S., 256 U.S. 335).

The court in effect found the accused guilty as charged except the words " ' with malice aforethought' 'deliberately' 'and with premeditation' ", the result being a finding of guilty of the lesser included offense of voluntary manslaughter.

5. The sentence imposed on the accused is authorized upon conviction of voluntary manslaughter.

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

(Absent), Judge Advocate,
Colonel, J.A.G.D.

Charles L. Lohr, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
With the United States Army Forces
In the Pacific

30 July 1945

Board of Review
CM P-44

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

v.)

First Lieutenant HUBERT S. ROUSH (O-1686322) and Technician Fifth Grade FURMAN D. KINARD, JR. (34196136), Reconnaissance Company, 632nd Tank Destroyer Battalion.)

) Trial by G.C.M., convened at APO 301, 20 June 1945. Sentence as to accused, Roush: Dismissal, total forfeitures and confinement at hard labor for one year. (No place of confinement designated.) Sentence as to accused, Kinard: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year in the Philippine Detention and Rehabilitation Center.)

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
Judge Advocates.

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

2. The accused were tried jointly upon the following charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Hubert S. Roush and Technician Fifth Grade Furman D. Kinard, Junior, both of Reconnaissance Company, 632nd Tank Destroyer Battalion, acting jointly, under color of authority, and in pursuance of a common intent, did, at APO 70, on or about 12 May 1945, wrongfully and unlawfully extort from Godofredo Dayrit, a civilian, the sum of 54 Pesos, lawful money of the Philippine Commonwealth, by threatening to expose the said Godofredo Dayrit to detention of his person and property for an alleged violation of law.

Specification 2: In that First Lieutenant Hubert S. Roush and Technician Fifth Grade Furman D. Kinard, Junior, both of Reconnaissance Company, 632nd Tank Destroyer Battalion, acting jointly, under color of authority, and in pursuance of a common intent, did, at APO 70, on or about 12 May 1945, wrongfully and unlawfully extort from Consolacion De Bamba, a civilian, the sum of 170 Pesos, lawful money of the Philippine Commonwealth, by threatening to expose the said Consolacion De Bamba to detention of her person and property for an alleged violation of law.

Specification 3: In that First Lieutenant Hubert S. Roush and Technician Fifth Grade Furman D. Kinard, Junior, both of Reconnaissance Company, 632nd Tank Destroyer Battalion, acting jointly, under color of authority, and in pursuance of a common intent, did, at APO 70, on or about 14 May 1945, wrongfully and unlawfully extort from Consolacion De Bamba, a civilian, the sum of 70 Pesos, lawful money of the Philippine Commonwealth, by threatening to expose the said Consolacion De Bamba to detention of her person and property for an alleged violation of law.

Each accused pleaded not guilty to, but was found guilty of, the specifications and the charge. The accused, First Lieutenant Hubert S. Roush, was sentenced to dismissal, total forfeitures and confinement at hard labor for one year. The accused, Technician Fifth Grade Furman D. Kinard, Jr., was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentences. The Philippine Detention and Rehabilitation Center, APO 75, was designated as the place of confinement of accused, Kinard. (No place of confinement has been designated for the accused, Roush.) As to accused, Roush, the record of trial was forwarded for action under Article of War 48. The confirming authority confirmed the sentence and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$. As to the accused, Kinard, the sentence was ordered executed but the execution of that portion thereof adjudging dishonorable discharge was suspended.

The Board of Review, therefore, has examined the record of trial as to First Lieutenant Hubert S. Roush under the provisions of the second paragraph of Article of War 50 $\frac{1}{2}$ and as to Technician Fifth Grade Furman D. Kinard, Jr. under the provisions of the fifth paragraph of such Article.

Both of the accused had previously been brought to trial on 12 June 1945 before a general court-martial appointed by paragraph 1, Special Orders No. 36, Headquarters I Corps, dated 4 June 1945. They

received the same sentences which were adjudged upon the second trial. The reviewing authority, by action taken 18 June 1945, disapproved the sentence as to each accused and ordered a rehearing before another court. The basis for the disapproval as appears from the staff judge advocate's review was, in substance, that there was insufficient evidence to connect Lieutenant Hubert S. Roush with the offense although further evidence was readily available. In view of the inadvisability of trying Lieutenant Hubert S. Roush separately a rehearing was ordered as to both accused and the case was brought to trial before another court which convened on 20 June 1945.

3. The evidence for the prosecution:

On 12 May 1945 about 2030 hours the accused, Kinard, stopped a truck loaded with rice on the highway between the towns of Tarlac and Victoria, Philippine Islands. On the truck were Victorio Lague and his aunt, Mrs. Consolacion De Bamba, along with the driver and three laborers (R. 6-7). An army jeep was parked nearby (R. '8). An "American soldier" (None of the witnesses who testified directly to the incidents related in the specifications could identify either of the accused.) told the occupants of the truck in substance that there was a ban on transporting rice from one province to another and that he would confiscate the rice unless they gave "his lieutenant some money" (R. 6-8). One hundred and seventy (170) pesos of Mrs. De Bamba's money were given to the soldier and the truck proceeded on its way (R. 8-9).

On the same night, 12 May 1945, between 2000 and 2100 hours, two soldiers in an army jeep stopped another truck owned by Godofredo Dayrit on the highway between Tarlac and Victoria (R. 16-17). This truck was likewise loaded with "palay" (rice). The first soldier who got out of the jeep asked Dayrit if he did not know that "rice is prohibited to being exported from one town to another." He then said, "you know if I wanted to confiscate this rice and your truck I could do so" (R. 17); and that "he was going to take us to Tarlac" (R. 19). He then told Dayrit that the matter could be arranged and "to talk to the lieutenant." Another person dressed in military uniform then got out of the jeep and asked Dayrit if he had any money. At first he said he had 84 pesos. When the money in his wallet was counted it was found to be 54 pesos, which sum was handed over to the accused, Kinard, and the truck permitted to go on its way (R. 17-18).

On 14 May 1945 about 2100 hours midway between San Miguel and Tarlac a convoy of trucks under the control of Victorio Lague was again stopped on the road. His vehicle was overtaken by a jeep, and as he expressed it, "An American soldier approached us and asked us if our cargo is rice and I told him that it was rice, then he threatened to confiscate the rice if we don't give his lieutenant some money. Then we give the soldier 70 Pesos." The money paid over was actually the property of Mrs. Consolacion De Bamba (R. 9).

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The witness Lague identified the markings on the bumper of the jeep and testified that "T-0" was on the left side and "R-24" was on the right side (R. 9).

On the night of 12 May 1945 Mrs. De Bamba was riding on the truck that was stopped, and it was her money that was paid to prevent the threatened confiscation (R. 8, 14). On the night of 14 May she was riding on another truck in the same convoy and while it was her money that was paid over by Victorio Lague to avoid the threatened confiscation, the funds were not extorted from her personally (R. 11). She said she did not "give any money to any person that night." (R. 15). Victorio Lague was her employee and the rice which was being transported was her property (R. 11). Victorio Lague also testified that there was no threat to arrest or detain him or take him or Mrs. De Bamba into custody on either occasion (R. 21).

A jeep bearing number "R-24" was the property of the 632nd Tank Destroyer Battalion, Reconnaissance Company, and at the time in question was assigned to the accused, Kinard, although anyone in the organization was permitted to use it (R. 19-20). When questioned by the military authorities accused, Kinard, admitted that he was using the jeep bearing number "R-24" on the nights of 12 and 14 May (R. 21-22) and accused, Roush, likewise admitted being with him (R. 23, 25).

Major Charles P. Landt, I.G.D., then questioned both accused. Each of the accused, after he had been advised of his rights under Article of War 24 (R. 25, 32), admitted his part in the transaction (R. 27-35).

Accused, Kinard, admitted that he stopped civilian vehicles and questioned them concerning their alleged illegal transportation of rice; that he then told them that he would fix it for them and that he would not turn them over to the authorities if they would give him some money (R. 27, 31). "He said he had received 170 Pesos from one person and approximately 50 Pesos from another" and that both these amounts were received on the night of 12 May (R. 27). He admitted that he stopped another truck on the night of 14 May at about 2100 hours between Tarlac and San Miguel (R. 27) and that by using the same approach he used on the night of 12 May received 70 pesos of which half was paid over to Lieutenant Roush (R. 28). Accused Kinard also said that he and Lieutenant Roush had planned the thing beforehand; that he had since given a civilian, Mr. F. R. Domingo, 500 pesos to give the money back to the civilians; and that "he would give anything to get out of the mess." (R. 34).

Accused, Roush, told the investigating officer that he was with Corporal Kinard on the night of 12 May when the trucks were stopped and that "he remained in the jeep or near the jeep at all times" while Corporal Kinard stopped the civilian vehicles and obtained the money.

He also admitted being present on the night of 14 May when the vehicle owned and operated by Dayrit was stopped (R. 29). He admitted having received one-half of 170 pesos paid by Mrs. De Bamba on the night of 12 May and one-half of the 70 pesos paid on her behalf on the night of 14 May, but denied having received one-half of the 54 pesos paid by Mr. Dayrit on the night of 12 May (R. 30). He and Corporal Kinard had planned the stopping of the trucks and "they figured they could make some easy money without getting caught" (R. 30, 33).

4. The evidence for the defense:

Each accused elected to remain silent (R. 40). Their commanding officer testified that he had known them for over three years; that accused, Kinard, was a "sort of a live wire"; that he was a "top-notch in the outfit" (R. 36); accused, Roush, was a fearless patrol leader and a good soldier; and that "He had done a mighty good job since he has been over here" (R. 38). On a patrol mission accused, Roush, had killed nine Japs. He had been awarded the Silver Star for gallantry in action in New Guinea (Ex. 1, R. 37), received a combat appointment as second lieutenant and "we were going to recommend Lieutenant Roush for a DSC" (R. 38).

Captain Robert S. Michalski, Chaplain, 632nd Tank Destroyer Battalion, testified to the good character of the accused, Roush, and said he knew nothing, good or bad, respecting the accused, Kinard (R. 40).

5. The accused are charged with committing an offense "to the prejudice of good order and military discipline" and "of a nature to bring discredit upon the military service" in violation of Article of War 96, and, therefore, it is not necessary to determine whether their conduct constitutes an offense punishable by common law (MCM, 1928, par. 152; Winthrop's Military Law and Precedents, 2nd Ed., 1920 Reprint, pp. 720-732).

Extortion is the "act or practice of taking or obtaining anything from a person by illegal use of fear, whether by force, threats, or any other undue exercise of power; undue exaction; * * *." To extort is "To wrest from a person by force, menace, duress, torture, or any other undue or illegal exercise of power or ingenuity; to wring (from); to exact; * * * " (Webster's New International Dictionary, 2d Ed., Unabridged).

The menace or threat must be of a character to produce some degree of alarm or bodily fear in a reasonable man so as to interfere with that free voluntary action which constitutes consent. (Reg v. Walton 9 Cox C.C. (Eng.) 268; Vol. 2, Wharton's Crim. Law, 12th Ed., sec. 1089). It is not material that the person against whom the extortion was exercised is guilty of the act threatened to be exposed or of the offense charged.

(Reg v. Cracknell, 10 Cox C.C. (Eng.) 408; Reg v. Menage, 3 Fost & F. (Eng.) 310). In the case of State v. Sweeney, 180 Minn. 450 (231 N.W. 225) it was held that a city officer who receives money from one unlawfully conducting a gambling house upon the understanding that the officer will not make trouble is guilty of extortion.

That the accused, Kinard, by threats to confiscate the lawful property of others extracted various sums of money as the price of avoiding the unwarranted confiscation is clearly established by the testimony and his voluntary confession. Difficulty is encountered in connection with the use of each accused's confession against the other. An accomplice or co-conspirator may not be bound by his co-accomplice's recitation of past events made at a time when the conspiracy was at an end (MCM, 1928, par. 114c; Logan v. United States, 144 U.S. 263). Accused Kinard's confession was binding on him alone (Vol. 2, Wharton's Crim. Evid., 11th Ed., sec. 714; MCM, 1928, par. 114c). Likewise, accused Roush's confession was binding on him alone and the court should have been instructed accordingly. However, since each confessed to substantially the same thing the error may be regarded as harmless (A.W. 37).

The accused, Roush, voluntarily confessed his part in the extortion scheme which was executed on 12 and 14 May (R. 29-34). He admitted receiving his share of the sums extracted as alleged in Specifications 2 and 3, but denied receiving his share of the 54 pesos which was extorted from Godofredo Dayrit (Specification 1). Kinard's statement that he gave Roush half of it is not evidence against Roush (Logan v. U.S. supra). The failure to receive the agreed proceeds, however, does not absolve a wrongdoer from responsibility. Accused, Roush, admitted being present on 14 May in accordance with the preconceived plan. He and Kinard had embarked upon a joint scheme of making "some easy money." The plan was being carried out when accused, Kinard, the active participant, extorted 54 pesos from Dayrit. Accused, Roush, is therefore guilty--the same as if he were the active party (Vol. 2, Wharton's Crim. Evid., sec. 732; 18 U.S.C. 550). Dishonor among thieves does not lessen their amenability to prosecution.

It is to be noted that the specifications allege a threat to expose to detention the person and property of Mr. Godofredo Dayrit (Spec. 1) and of Mrs. C. De Bamba (Specs. 2 and 3). Insofar as the first specification is concerned, the proof shows that there was the threat to detain both the person and property of Godofredo Dayrit (R. 18). The record is devoid of proof of a threat to detain the person of Mrs. De Bamba and, therefore, such a finding is not legally supported by the evidence.

Specification 3 alleges that 70 pesos were "unlawfully extorted from Consolacion De Bamba * * * by threatening to expose the said Consolacion De Bamba to detention of her person and property * * * ." The proof shows that Mrs. De Bamba was not in the truck on the night when the 70 pesos

were paid over. She was riding in another truck directly to the rear and was not a participant in the transaction. Nor was a threat of any kind, directly or indirectly, made to her relating to either her person or her property. It is true that Victorio Lague paid out her money to avoid confiscation of her property, but the threat was made to Lague and the extortion was effected from him and not from her.

Under the rule which prevails generally in both Federal and State civilian courts a defendant cannot be charged with one crime and legally found guilty of another. He is entitled to be tried for the crime charged and on the law and evidence applicable to that crime and that one only (Vol. 2, Wharton's Crim. Evid., pp. 1811, 1812). The same rule prevails in military courts despite the great liberality indulged with reference to matters of pleading and procedure under Article of War 37. Thus it has been held that where the accused is charged with larceny of the property of "A" he may not properly be convicted of larceny of the property of "B" even though there is no dispute as to the identity of the property (Dig. Op. JAG, 1912-40, sec. 451 (45); see also Bull. JAG, May 1945, p. 191). Applying the rule of the foregoing authorities to the present case, the evidence is legally insufficient to support the findings of guilty of Specification 3 of the Charge.

As to accused, Roush, a place of confinement was not designated. In view of the fact that the sentence as approved and confirmed does not provide for a period of confinement in excess of one year, confinement in a penitentiary is not authorized (A.W. 42; MCM, 1928, par. 90a). Therefore an institution other than a penitentiary, reformatory or correctional institution should be designated as the place of confinement.

6. For the reasons stated above the Board of Review holds the record of trial, as to each accused, legally sufficient to support the findings of guilty of the Charge and Specification 1 thereunder; legally sufficient to support the findings of guilty of Specification 2 except the words "her person and" in the last line of such specification; legally insufficient to support the findings of guilty of Specification 3; and legally sufficient to support the sentences.

Samuel M. Driscoll, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

(Absent) _____, Judge Advocate.
Major, J.A.G.D.

James V. Robinson, Judge Advocate.
Major, J.A.G.D.

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1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75,
3 August 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, A.P.O. 500.

1. In the case of First Lieutenant Hubert S. Roush (O-1686322) Reconnaissance Company, 632nd Tank Destroyer Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specification 1, of Specification 2 except the words "person and", legally insufficient to support the finding of guilty of Specification 3, and legally sufficient to support the findings of guilty of the charge and of the sentence. The holding is hereby approved. Upon the vacating of the indicated illegal findings, under the provisions of Article of War 50½ you are authorized to order the execution of the sentence.

2. Attention is invited to the fact that a place of confinement has not been designated respecting Roush. It is necessary, therefore, that a facility other than a Federal penitentiary, reformatory or correctional institution be designated.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Findings disapproved in part in accordance with recommendation of Assistant Judge Advocate General. Sentence ordered executed. GCMO 16, USAFP, 16 Aug 1945.)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
with the United States Army Forces
in the Pacific

Board of Review
CM P-45

19 July 1945

UNITED STATES)

v.)

Private ALBERT WILLIAMS
(34529330), 211th Port
Company, Transportation
Corps.)

Trial by G.C.M., convened
at Headquarters Base M,
APO 70, 24 April 1945.
Death.

HOLDING by the BOARD OF REVIEW
ROBERTS, MURPHY and CLEMENTS,
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 Albert Williams, 211th Port Company, did, at APO 70, on or about 26 March 1945, forcibly and feloniously, against her will have carnal knowledge of Mrs. Pacita Lalan Munar, Sobol, Nibalio East San Fabian, Pangasinan, Philippine Islands.

He pleaded not guilty to the charge and its specification, was found guilty as charged, and sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence but recommended that it be commuted to imprisonment for life. The confirming authority confirmed the sentence. Pursuant to Article of War 50 $\frac{1}{2}$, the record of trial was forwarded to the Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific.

3. The evidence for the prosecution shows that on the afternoon of 26 March 1945, Mrs. Pacita Laluan Munar, 20 years of age, of Sobol, San Fabian, Pangasinan, P.I., was asleep in her house with her 1 year and 9 months old child. Her husband was away in camp that day. About 3:00 o'clock she was awakened by a colored soldier who had entered the house. He "had his clothes at the time but his penis was already out" (R. 5). The soldier pushed her and said "'Do you want pom-pom / meaning sexual intercourse_ / or no'". She replied, "'No, I don't want pom-pom'". The soldier again pushed her and drew a knife about nine inches in length, "put it over" her breast, pulled up her clothes and completed an act of sexual intercourse upon her. She stated that while being ravished she remained motionless because he was on top of her and she could not do anything (R. 8). She further stated that she did not scream because she was afraid that he would kill her and her baby (R. 7). After the assault Mrs. Munar went to the home of a neighbor, Mrs. Juana Bautista, related the incident and requested the neighbor to help her by following the negro soldier. Mrs. Bautista saw the soldier leave Mrs. Munar's house and noticed that he was carrying a knife about eight inches long (R. 12). When he left she followed him to the camp which was about a three minute walk from the home of Mrs. Munar (R. 7) and saw him enter his tent but was prevented from entering the camp by the guard. First Sergeant Albert R. Black was notified at about 4:00 o'clock (R. 14) that a Filipino lady wanted to see him and went to the entrance of the camp where she was standing. She told him that she was a friend of a girl who had been assaulted (R. 14), that she could identify the assailant, and pointed out the tent "in which the soldier was" (R. 12). Sergeant Black returned to the orderly room and sent for the company commander, First Lieutenant Leroy R. Wittemire, Jr.. Mrs. Munar, with her baby, and Mrs. Bautista appeared at the orderly room. At that time Mrs. Bautista was very excited and was crying "about half the time" and stated that one of his men had either "pom-pommed" her or tried to. The accused was sent for and upon appearing at the orderly room was identified by Mrs. Munar as the one who had assaulted her (R. 16) and by Mrs. Bautista as the soldier whom she had followed to camp.

The defense called Staff Sergeant Charles A. Jones, of accused's unit, who testified that he left the company area to attend a ball game in a village which was about a ten minute walk from the company area (R. 21). At a quarter to three he saw accused at the ball game and spoke to him. He estimated the time as he had no watch (R. 23). He saw him no more that day.

Technician Fifth Grade Robert Haygood, another tent mate of accused, saw him in the village about 1:30 or 2:00 o'clock on the day in question (R. 24) after the ball game was over. He drank with accused and saw him talking with some girls, "Just feeling them over", and told him to go back to camp as he thought he would get in trouble (R. 26). The witness then

returned to his tent, went to sleep and next saw accused when Sergeant Black awakened him (Haygood) (R. 27).

Private First Class Hobart E. Williams, a tent mate of the accused, testified that at about 3:30 on the afternoon of the day in question the accused came into the tent, took a shower, dressed and was then called by Sergeant Black (R. 18). The accused, at that time, did not have a knife on his person (R. 20). At no time did this witness see any Filipino women point to the tent and if they had he would have seen them (R. 19).

The accused elected to be sworn and testified that about 1:00 o'clock on the afternoon in question he went to the village, attended the ball game, and returned to camp at 3:30 (R. 33). He further testified that at no time that day was he in the house of Mrs. Munar and that he had never seen her or Mrs. Bautista before 4:30 that day when he was called to the orderly room (R. 29). He admitted being in the village with his tent mate Haygood but denied drinking there with him, putting his hands on, or feeling any Filipino women (R. 30).

4. The accused was charged with and found guilty of rape which is defined as "the unlawful carnal knowledge of a woman by force and without her consent" (par. 148b, M.C.M., 1928).

In the instant case the evidence is undisputed that at the time and place alleged Mrs. Pacita Laluan Munar was ravished by a colored soldier. The only controverted issue before the court was the identity of her assailant. The evidence for the prosecution revealed that the accused was the perpetrator of the crime. Mrs. Munar positively identified the accused as the one who committed the act and another witness saw him leaving her house, followed him to camp, saw him enter his tent, and subsequently identified him as the one whom she had followed from the victim's home. The accused denied guilt stating that he had never seen Mrs. Munar before he was called to the orderly room by the First Sergeant and there identified as the one who had raped her. He further attempted to show that he could not have been at the scene of the crime at the time alleged. The court in whose province lies the determination of controverted issues of fact, the weighing of the evidence and the judging of the credibility of witnesses (cf sec. 881, Vol. 2, Wharton's Crim. Evid., p. 1520) resolved the question of identity against the accused and found him guilty as charged. There was substantial evidence in the record of trial to support the court's findings.

5. No errors injuriously affecting the substantial rights of the accused were committed during the trial. A sentence of death or of life imprisonment is mandatory under Article of War 92 upon conviction of rape.

6. For the reasons stated above the Board of Review holds the record

of trial legally sufficient to support the findings and the sentence.

Harland Cole, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson S. Clement, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General with
the United States Army Forces in the Pacific, A.P.O. 75, 21 July 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, A.P.O. 500.

1. In the case of Private Albert Williams (34529330), 211th Port
Company, Transportation Corps, attention is invited to the foregoing
holding by the Board of Review that the record of trial is legally
sufficient to support the sentence, which holding is hereby approved.
Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to
order the execution of the sentence.

2. Before the sentence of death is ordered executed it is requested
that further consideration be given the question whether death is the
appropriate sentence. In my opinion it is excessive and I agree with the
recommendation of the reviewing authority that it should be commuted to
life imprisonment. While the view expressed by your Staff Judge Advocate
that rape is "a most heinous and reprehensible offense" is concurred in
it is an immaterial consideration with respect to the question involved,
that is, whether the appropriate sentence is death or life imprisonment.
The recommended commutation is not a matter of extending clemency, as
suggested by your Staff Judge Advocate, but rather of applying a means of
modifying an excessive sentence to one which is believed both appropriate
and adequate. The 92nd Article of War recognizes that death is not the
appropriate sentence in all cases of conviction for rape since it provides
that either death or life imprisonment shall be imposed for rape.

In the instant case the victim is a married Filipino woman twenty
years of age with a child aged one year and nine months. The rape was
committed without resistance on her part under the overpowering influence
of a knife and the physical strength and weight of the accused. There is
no evidence that the victim suffered any physical harm in connection with

her experience. Under these circumstances it is considered that life imprisonment is the appropriate sentence. This conclusion is believed to be supported by the inclosed statistical data. It may be noted from this data that out of 50 convictions of this offense in which cases the records of trial were processed in the United States only 4 resulted in the death sentence being ordered executed. In 3 of the 4 the victims were 8, 12 and 16 years of age. The fourth victim was the four months bride of a second lieutenant and the rape was accompanied by the application of physical violence and injury. In the light of the established precedents the uniformity of sentence policy of the War Department would also be served by a commutation in this instance.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM P-45)



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 10, USAFP, 4 Aug 1945.)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
With the United States Army Forces
In the Pacific

4 August 1945

Board of Review
CM P-46

UNITED STATES)

v.

Captain CHARLES F. SCHWARZ
(O-1576622), Ord., 245th
Ordnance Service Battalion.)

Trial by G.C.M., convened at APO
322, 16 and 17 May 1945. Dis-
missal; \$3,000.00 fine; confine-
ment at hard labor for two years;
further confinement at hard labor
until payment of fine, not to ex-
ceed two years. United States
Disciplinary Barracks, Fort Leaven-
worth, Kansas.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
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 95th Article of War.

Specification 1: (Disapproved by reviewing authority.)

Specification 2: In that Captain Charles F. Schwarz, Ordnance, 245th Ordnance Service Battalion, did at APO 322, on or about 5 February 1945, with intent to deceive the Main Exchange Officer, Base F, USASOS, APO 322, officially report to the said Main Exchange Officer that on 5 February 1945 the Branch Exchange No. 65 was serving 566 persons for the month of February as a basis for issuance of post exchange supplies, which report was made by the said Captain Charles F. Schwarz with disregard of a knowledge of the facts that said Branch Exchange was serving 140 persons.

Specification 3: In that Captain Charles F. Schwarz, Ordnance, 245th Ordnance Service Battalion, did, at APO 322, on an unknown date in November 1944, wrongfully accept from Staff Sergeant Paul L. McKinney, 3469th Ordnance Medium Maintenance Company, £5 for information as to how the said Staff Sergeant Paul L. McKinney stood on the rotation list.

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

Specification 1: In that Captain Charles F. Schwarz, Ordnance, 245th Ordnance Service Battalion, did, at APO 322, from on or about 1 September 1944 to on or about 28 February 1945, for his own personal gain, wrongfully sell beer in case lots in the company area of the 3469th Ordnance Medium Maintenance Company at a price in excess of twelve shillings, Australian currency, per case.

Specification 2: In that Captain Charles F. Schwarz, Ordnance, 245th Ordnance Service Battalion, did, at APO 322, from on or about 1 November 1944 to on or about 28 February 1945, for his own personal gain, wrongfully cause to be sold at Sales Branch Exchange No. 65, 3469th Ordnance Medium Maintenance Company, watches, fountain pens and cigarette lighters, property of the Army Exchange Service, at prices in excess of authorized sale prices.

Specification 3: In that Captain Charles F. Schwarz, Ordnance, 245th Ordnance Service Battalion, did, at APO 322, from on or about 1 July 1944 to on or about 28 February 1945, for his own personal gain, wrongfully sell through Staff Sergeant Paul L. McKinney and through Branch Exchange No. 65, 3469th Ordnance Medium Maintenance Company, matches and miscellaneous toilet articles issued to his unit for gratuitous issue to the members thereof.

The accused pleaded not guilty to, but was found guilty of, the specifications and the charges, and was sentenced to dismissal, a fine of three thousand dollars, confinement at hard labor for two years, and further confinement at hard labor "until said fine is so paid but for not more than two (2) years in addition to the years hereinbefore adjudged." The reviewing authority disapproved the finding of guilty of Specification 1 of Charge I and approved the sentence. The confirming authority confirmed it and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

At the times hereinafter mentioned the accused was commanding officer of the 3469th Ordnance Medium Maintenance Company, APO 322 (Ex. F).

He was also exchange officer of Post Exchange Branch Number 65 (R. 18), which supplied not only his company but for a time other organizations as well (Ex. G).

Each month from September 1944 to and including February 1945 the accused, in his capacity as commanding officer of the 3469th Ordnance Medium Maintenance Company, requisitioned beer from the Quartermaster Beer Garden, Base "F" for the men of his organization (Ex. F). Beer was rationed and each man was allotted one case per month for which he paid twelve shillings (R. 27, 35, 113). The beer was issued for consumption at the rate of three bottles twice weekly (R. 35).

The actual strength of the organization on a particular day was used as the basis for the beer allotment. If the strength decreased or if for any reason the beer was not consumed on the authorized ration basis, it was to be carried over into the following month as surplus and deducted from the following month's allowance (R. 18, 19). If the strength of the organization increased before the next month's regular allotment, additional beer could be drawn from the quartermaster to meet the increase (Ex. F). In general, the beer allotment to a particular organization depended upon the word of the commanding officer who signed the requisition and arranged for distribution on the authorized ration basis (R. 37-40, Ex. F). In this case the accused not only overstated the company strength (R. 18, 40; Ex. F), but also called for additional beer each month (Ex. F). He at no time carried any overage into the following month although in many instances men were away from the company (in the hospital, detached service, etc.), in which event they did not receive their beer allowance (R. 27, 32, 39, 108).

The key to the locked inclosure where the beer was kept was in the possession of accused (R. 40, 41). He was almost always present when beer was being distributed (R. 73). It is a fair inference from the evidence that there was a substantial number of excess cases of beer each month (R. 39). It was this excess that the accused sold for six and one-half pounds per case (R. 65, 66, 72). One enlisted man after another testified that he either purchased cases of beer from the accused in excess of his regular allowance at six and one-half pounds per case, or that he had personal knowledge of the fact that others had made such purchases (R. 26, 31, 32, 66, 72, 89, 90, 92, 100, 113).

Supplies were obtained by the branch post exchange on the basis of the numerical strength of the several organizations served. On 5 February 1945 the accused submitted a statement to the Main Exchange, APO 322, setting forth that Branch Post Exchange No. 65, of which he was the officer in charge, was serving 566 men (Ex. G). Under the exchange rules this would authorize the withdrawal of supplies for 600 men, since the round one hundred figure nearest the actual number given would be used (R. 84, 86). Accused reported that the strength of his organization was 166 men on 5 February 1945 although, in fact, there were present for duty only 135 men (R. 11, 84-87; Exs. C and G).

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He also listed and counted the men of the 227th Searchlight Battalion, 895th Chemical Company and 530th Engineers, all three of which organizations Branch Post Exchange Number 65 had at one time supplied (Ex. G). All three organizations had left the base prior to 5 February 1945, the day on which accused submitted the strength report (R. 12).

The greater the number of men served by a particular post exchange the greater the amount of supplies it would receive (R. 84). Under the method of operation of the accused, it was to his advantage to receive a large amount of supplies, particularly rationed articles such as pens, watches and cigarette lighters. He could thus make a greater profit since he had directed the post exchange stewards to sell such items in excess of the authorized prices (R. 50-51).

Although the exchange regulations required the posting of prices at which articles may be sold, no such price list was posted or published at Post Exchange Branch Number 65 (R. 31). The accused instructed the enlisted personnel to sell items such as watches, fountain pens, cigarette lighters at prices in excess of the authorized prices, which they did (R. 50-51, 61-68). The money was turned over to him. He in turn accounted to the main exchange on the basis of the authorized price (R. 51, 64, 74).

At the direction of the accused certain "gratuitous issue" articles consisting of matches, soap, razor blades, shaving cream and tooth powder were placed on the shelves of Post Exchange Branch Number 65 for sale in the regular course of business (R. 41, 47, 51-53). They were taken from the supply room and gradually disposed of by sale (R. 45-48) throughout the fall and winter of 1944-45 until the commanding officer, who succeeded the accused, had them removed (R. 51-52, 64). No accounting of the sale of gratuitous issue property was ever made by the accused to the main exchange although the proceeds of the sales were turned over to him (R. 51, 53, 64, 74).

Staff Sergeant Paul L. McKinney testified that on 15 November 1944 at about 2030 hours he asked the accused, in the course of a conversation with him, where he (McKinney) "was on rotation." Accused told him that he was on the bottom of the list. McKinney said he did not think that was true, whereupon accused remarked that if McKinney would make it worth his while he would show McKinney his position on the list. Upon being asked what he considered would be worth his while the accused replied, "five pounds." McKinney then paid the five pounds. He "laid the five pounds on the desk * * *." The accused showed him where he was on the rotation list, picked up the five pounds and put it in his pocket (R. 41-42).

On three occasions from December 1944 to March 1945 the accused exchanged a total of \$1,220 from Australian to American currency (R. 13, 14, 99). He had received some money for native pictures and bracelets

which he sold through Pfc. William J. Dempsey earlier in 1944 (R. 96). Both the pictures and the bracelets appear to have been the property of the accused (R. 95-99). The amount received upon the sale of bracelets after June 1944 was not in excess of 150 pounds (R. 98). The total amount received from the sale of the pictures was from 50 to 60 pounds (R. 96). The Australian pound was equal to approximately \$3.20 in American currency (R. 13). It follows that the total amount received by the accused after June 1944 upon the sale of pictures and bracelets did not exceed \$512.00. The accused had made "a good substantial allotment" to his wife (R. 16). Aside from the Australian pounds which accused exchanged for American dollars from December 1944 to March 1945 and the allotments to his wife from his monthly pay check, the record discloses that he sent his wife \$1,000 on 5 July 1944 and \$2,000 additional in October 1944 (R. 14-16; Exs. D and E).

While Technician Fifth Grade Arvid S. Henman was acting as steward of Post Exchange Branch Number 65, the accused offered him one-third of the profits made by the sale of articles over the listed price (R. 52). The agreement was never carried into effect because Henman went on furlough (R. 53). Technician Fourth Grade Armin E. Peglow, who also worked in the post exchange, received five pounds from the accused in the fall of 1944 as a "little bonus" for selling gratuitous issue articles at the post exchange (R. 65).

4. The evidence for the defense:

The accused elected to remain silent (R. 141).

Five officers, three of them through a stipulation between the prosecution and the defense, testified in substance that the accused performed his duties in an excellent manner, that he was a person of good character, and that he had an excellent reputation for honesty and integrity. Several of them said also that he was honest and trustworthy (R. 117-122).

First Lieutenant Felton L. Byrd, who succeeded the accused in command of the 3469th Ordnance Medium Maintenance Company, upon being recalled as a witness for the defense, admitted that he told his men that any man who wanted to talk to Captain Schwarz was to get his permission. Lieutenant Byrd added, "That was my warning and I was entitled to do so" (R. 123).

Post exchange steward Tec 5 Henman, testified that inspectors from the main exchange frequently visited Post Exchange Branch Number 65 without advance notice and found no fault with it. Henman also testified that it was he who originally obtained the information concerning the strength of the other organizations which were served through the branch exchange (R. 129), and that he made up the report dated 5 February (Ex. G) which the accused signed. Upon cross examination he admitted that he had obtained the information "quite some time previous" to 5 February 1945; that he did not check the figures when making up

the February 5th report; that all the organizations listed as being served by the branch exchange had departed the base except the 3469th Ordnance Company which accused commanded; and that the report was completely false (R. 131). He added, however, that he did not know and was not certain whether the three organizations which had left were or were not on the base at the time of the preparation of the February 5th report (R. 131). The 530th Engineers departed on 12 and 15 October 1944 (R. 105). The 227th Searchlight Battalion departed on 10 December 1944, and the 895th Chemical Company on 15 January 1945 (R. 104).

Second Lieutenant Everett E. Clark testified that he was post exchange officer of the 3469th Ordnance Medium Maintenance Company (Branch Post Exchange Number 65) during the month of July 1944 and that the accused did not become post exchange officer until after 8 or 9 August (R. 133, 134). He said that he "couldn't say exactly" when the accused became acting company commander but that it was prior to 8 or 9 August (R. 135).

Two enlisted men, one of whom was in the hospital and the other on detached service, testified that they received their regular monthly ration of beer from the accused although they were away from the organization for a period of time (R. 137-139).

5. a. Specification 2, Charge I:

The evidence shows that the accused, the officer in charge of a branch post exchange, reported to the main branch exchange from which his supplies were drawn that his branch exchange was serving 566 men when, in fact, it was serving not more than 140 men. The report was made by accused in his official capacity as post exchange officer. It was false and was of such a nature as to induce the main exchange to allot to the branch exchange of accused more goods than it was entitled to receive. It also appears that accused was selling various articles in his exchange at prices in excess of the authorized list prices with resulting profit to himself. That he intended to deceive may be inferred from all the facts and circumstances. The making of a false official report with intent to deceive is conduct unbecoming an officer and a gentleman within the meaning of Article of War 95 (Bull. JAG, September 1942, p. 215, September 1943, p. 342).

In making the report the accused substantially misrepresented the strength of his own organization, which he surely should have known, and included the personnel of three other organizations no longer served by his branch exchange. One of such organizations had departed almost four months before the report was made. Even if it be assumed that the accused did not know how many men his store served, his conduct is nevertheless a military wrong. The certification in his report as true of things he did not know to be true was the legal equivalent of making the report with knowledge of its falsity (Bull. JAG, January-June 1942, p. 23).

b. Specification 3, Charge I:

It appears from the undisputed testimony of Staff Sergeant Paul L. McKinney that he gave the accused five pounds for information regarding his (McKinney's) position on the rotation list. Such conduct constitutes a violation of Article of War 95 (Winthrop's Military Law and Precedents, 1920 Reprint, p. 716). An officer commanding an organization who is so unmindful of the dignity and responsibility of his position as to exact money from one of his enlisted men for information as to the man's position on the rotation list thereby demonstrates his moral unfitness to continue as an officer of the United States Army (see MCM, 1928, par. 151).

c. Specifications 1, 2 and 3, Charge II:

It is established by the evidence that the accused wrongfully sold beer in the area of the company of which he was the commanding officer (Spec. 1); wrongfully caused certain articles to be sold at Post Exchange Branch Number 65 in excess of the authorized sale price (Spec. 2); and wrongfully sold miscellaneous "gratuitous issue" articles (Spec. 3), all of which was done for personal gain. Such conduct naturally tends to adversely affect good order and military discipline. The acts of which the accused was found guilty as alleged in the specifications under consideration constitute separate wrongs, all punishable under Article of War 96.

6. The first part of Exhibit D, which indicates that the accused transmitted one thousand dollars to his wife on 5 July 1944, does not appear to be relevant to any issue in the case. The accused was not post exchange officer at that time, although he may then have been the acting company commander for a brief period (R. 135). The evidence fails to show any wrongdoing on his part prior to the month of August 1944. Due objection was taken to the introduction of the "PTT" receipt showing that certain money was sent to the wife of the accused in June 1944, and the law member sustained the objection (R. 14-15). When the "PTT" receipts (Ex. D) for the months of July and October were offered, defense counsel, for reasons best known to himself, specifically stated that he had no objection. Despite counsel's failure to object, which does not preclude the Board of Review from considering the matter (Bull. JAG, January 1943, p. 60), the receipt for the month of July showing that accused sent one thousand dollars to his wife was just as incompetent as the receipt for the month of June and should not have been received in evidence. Considering the record as a whole, however, the error may be disregarded as not substantially prejudicial since the remaining evidence properly in the record is compellingly convincing as to the guilt of the accused (CM 231727, Walton, 18 B.R. 289, 294; CM 255083, Hargrove, 36 B.R. 29, 31).

Admission of evidence that accused sent his wife two thousand dollars in October 1944 was proper. It tends to show that money in excess of what he was making as an army officer and what he received from all other known sources, came into his possession. Along with the other facts in the case, the legitimate inference may be drawn therefrom that the money was obtained wrongfully, as charged (Wigmore's Code of Evid., 3d Ed., secs. 154, 155; Wharton's Crim. Evid., 11th Ed., Vol. 1, p. 204 and Vol. 2, p. 1258). Of course the defense may introduce evidence showing that the money came from other sources, legitimate or otherwise, such as a gift or from gambling. In this case, the explanation that some of the money came from the sale of pictures and bracelets did not adequately explain away the possession of such large sums, nor was the court duty bound to regard the explanation as true.

It may be argued that the court used the incompetent evidence in determining the amount of the fine of three thousand dollars, since it was exactly the total sum accused sent to his wife in July and in October 1944, and that it did, therefore, prejudice the rights of the accused. In CM POA 313, Greenlee, the Board of Review (one member dissenting) held that the admission of improper evidence which may have been prejudicial to the accused in the adjudication of the sentence upon him does not vitiate the findings of guilty and that clemency in a proper case may be extended to correct any wrong done.

7. A fine is an authorized form of punishment and there is no limit upon the amount which the court may impose upon an officer (MCM, 1928, par. 103g; App. 9, par. 24). It is stated in Winthrop's Military Law and Precedents, Reprint 1920, page 419 that a fine "is especially appropriate to those offences which consist in a misappropriation or misapplication of public funds or property, being in general adjudged with a view mainly to the reimbursement of the United States for some amount illegally diverted to private purposes." A fine appears to be an appropriate form of punishment in the present case also.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

(Absent) _____, Judge Advocate.
Major, J.A.G.D.

James V. Robinson, Judge Advocate.
Major, J.A.G.D.

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1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General,
A.P.O. 75, 6 August 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, A.P.O. 500.

1. In the case of Captain Charles F. Schwarz (O-1576622),
Ord., 245th Ordnance Service 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 the execution of the sentence.

2. When copies of the published order in this case are forwarded
to this office they should be accompanied by 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 brackets at the end of
the published order, as follows:

(CM P-46).



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 13, USAFP, 13 Aug 1945.)

and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence reveals that on 11 March 1945 Celestino Castillo, 20 years of age, his wife, Consolacion, 19 years of age, and his mother, Romana Serbantes, were living at Rosales, Pangasinan, P. I. Across the street and about 40 meters away lived Consolacion's sister-in-law, Leonida Mangis'el (R 27, 51). About 11:00 o'clock that night Leonida observed two colored soldiers, one of whom she recognized as accused Heath (R 60), standing near her house (R 53). Both were dressed in fatigues and were armed with carbines. Heath also carried a knife (R 54). One was carrying a lighted flashlight (R 53, 65). She saw one of the soldiers (from the testimony he would appear to be accused Heath (R 53, 59, 63)) "sliding the carbine, and then get it ready with one clip" (R 63), and they walked in a direction away from Consolacion's house (R 56). Shortly thereafter (R 57) a colored soldier entered the room where Consolacion, her husband, and her mother-in-law were sleeping. His footsteps awakened Consolacion, and by the light of a kerosene lamp burning in the room (R 21) she recognized the intruder as the accused Heath (R 25). He was dressed in fatigues (R 27, 37), was armed with a carbine slung over his shoulder (R 22, 46), and held a knife in his right hand (R 23). She noticed another soldier standing outside the house (R 22, 47). Consolacion testified that Heath seized her by the left wrist and awakened her husband who was asleep on the floor about eighteen inches away from her (R 33) and that he "came between the colored man and myself" (R 24, 34). Her husband and Heath struggled and wrestled around the room and she saw Heath stab him twice (R 24). In a pretrial statement she said, "The other negro did not come up. He stayed on the ground during the fight and did not do anything to aid his companion in the fight" (Def Ex 2). She went to the window and twice called for help (R 25, 48) and then jumped out and ran to the home of her sister-in-law. When she reached there, a shot was heard (R 28, 57) coming from the direction of her (Consolacion's) house (R 29, 57). Leonida lit a bundle of rice husks and using it as a torch she and Consolacion started towards the latter's house. On the way they saw two negro soldiers coming toward them, one of whom was accused Heath (R 30, 59), who then had blood on his shirt and trousers (R 60). After the two soldiers passed, the two women proceeded to Consolacion's house where they found deceased in the middle of the room with blood coming from his back. A subsequent examination revealed that he had been stabbed five times and that he had been shot, the bullet having entered about one-half inch below the middle of the left clavicle. The gunshot wound had caused his death (R 11). An exploded .30 caliber cartridge was found lying inside his shirt (R 11, 13, 19; Pros Ex B).

The two accused were seen during the night of 11 March 1945 at two stores, one called "Terry's Place" (R 87) and the other a small restaurant called "Manuel's Place" (R 93). Manuel's Place was almost opposite accused's camp and slightly more than a half mile from Terry's. Consolacion's house was a like distance down a road which intersected almost midway the road between the two stores. The accused, both wearing fatigues (R 221, 223), were at Terry's Place from about 2000 that night (R 88) until about 2200, playing Chinese checkers and drinking nipa wine (R 88, 221). They arrived at Manuel's about midnight (R 94) and remained there until about 0200 the next morning. The proprietor of Manuel's Place noticed that Chatman was dressed in fatigues and Heath in khaki. When they arrived their clothes were "very clean and the marks of the pressing [were] very very clear." It looked as though they had been worn only about "five or ten minutes" (R 97, 98, 101).

Subsequent to the killing Consolacion and Leonida were caused to confront the accused at several "line-ups" (R 115, 117, 121, 168, 169, 174). At certain of them they were unable to identify either of the accused and at others they definitely identified Heath (R 136, 155, 158, 166). At the trial Consolacion identified Heath as the man who had entered the house and had stabbed her husband, and Leonida testified that he was the soldier she had seen before and after the offense in the vicinity of Consolacion's house (R 39, 44, 55, 59). Neither identified Chatman. Both Leonida and Consolacion testified that they had seen Heath previous to the night in question and that he had stopped at Leonida's store to make a purchase the day before (R 26, 35, 54).

4. Both accused, Chatman and Heath, chose to be sworn, their testimony being substantially the same. They stated that they were together the entire evening of 11 March (R 192). Upon leaving their company area about 1800 (R 184) they first went to Terry's Place and remained there until 2315 (R 185). Upon leaving Terry's Place they went directly to Manuel's restaurant (R 196, 199) where they remained until about 0200 and then returned to their camp. Each testified that he carried a carbine (R 187, 204, 214) but had no other weapons, nor did either of them have a flashlight (R 187). Chatman claimed to have been wearing an HBT jacket and camouflage jungle trousers (R 187). Heath claimed to have been wearing khaki all evening. They admitted having drunk about three bottles of nipa wine at Terry's Place and that they had about two drinks at Manuel's (R 193) but claimed that neither of them was drunk.

At the conclusion of the prosecution's testimony defense made a motion for findings of not guilty with reference to the two accused which was denied. At the conclusion of the trial it was renewed as to Chatman and again denied.

5. The evidence establishes that accused Heath, with a carbine slung over his shoulder and carrying a knife in his hand, entered Consolacion's house and seized her by the wrist as she lay upon the floor. When her husband, Celestino, who was sleeping next to her was awakened and interceded, Heath stabbed him. Consolacion ran from the house, and a few moments later a shot was heard. Immediately thereafter Celestino was found to have been stabbed five times and to have been shot by a carbine fired at close range, the latter wound having caused his death. From such circumstances the court could properly conclude to the exclusion of any other reasonable hypothesis that Heath fired the fatal shot. The killing was unjustified and the surrounding circumstances indicate a wicked, depraved, and malignant spirit, from which malice may be inferred (Evans v. U. S., 122 F.2d 461, 466). There is substantial evidence in the record to sustain the court's findings of guilt with reference to accused Heath.

As both accused testified that they were together from about 1800 on 11 March 1945 until about 0200 the next morning, and as Heath and another colored soldier were seen near Celestino's house about 2200 that evening when the homicide was committed, the court could properly reject accused Chatman's alibi (Delvalley v. U. S., 88 F.2d 579) and conclude that he was the colored soldier who was seen waiting outside Celestino's house while Heath was within it.

For accused Chatman to also legally be found guilty of the homicide it must be determined that he was either an accessory to, or aided and abetted, Heath in the commission of the latter's criminal act.

" . . . A person is not an accessory before the fact, unless there is some sort of active proceeding on his part; he must incite, or procure, or encourage the criminal act, or assist or enable it to be done, or engage or counsel, or command the principal to do it. . . . The concept of an accessory before the fact presupposes a prearrangement to do the act . . . and to constitute one an aider and abettor, he must not only be on the ground, and by his presence aid, encourage, or incite the principal to commit the crime, but he must share the criminal intent or purpose of the principal. . . . " (Morei v. U. S., 127 F. 2d 827, 830).

There being no direct evidence that Chatman so acted, the proof is limited to circumstantial evidence.

In the light most favorable to the prosecution the evidence shows that Chatman was with Heath all evening; both were carrying carbines, one of whom loaded his carbine (R 54, 60, 63)

and shortly thereafter Heath entered Celestino's house; Chatman remained outside the house (R 47) while Heath and the Filipino were struggling, "stayed on the ground during the fight and did not do anything to aid his companion in the fight" (Def Ex 2), and when Heath emerged from the house a few moments later, they departed together. It might be inferred that he saw that Heath's clothing was then bloodstained; that they went to their camp where they changed their clothes and then together went to Manuel's Place. In addition to such circumstances accused Chatman in his defense endeavored to establish an alibi which was rejected by the court.

It has become the settled law in our system of military justice that the Board of Review, when it has for consideration the legal sufficiency of a record of trial wherein the findings of guilt are based solely on circumstantial evidence, is required to determine as a question of law not alone whether that evidence raised a reasonable inference of accused's guilt, but also whether the circumstances are inconsistent with any reasonable hypothesis of accused's innocence, or, as has been stated, are sufficiently conclusive to exclude all other reasonable inferences except the one of accused's guilt (CM 197408 McCrimon, 3 BR 111, 114; CM 207591 Nash et al, 8 BR 359, 363; CM 212505 Tipton, 10 BR 237; CM 228831 Wiggins, 16 BR 333, 337).

Pertinent is the statement in Van Gorder v. United States, C.C.A., 21 F. 2d 939, 942 --

"In order to sustain a conviction of a crime on circumstantial evidence, it must be such as to exclude every reasonable hypothesis, but that of the guilt of the accused; the facts proved must all be consistent with and point to his guilt only and inconsistent with his innocence. Vernon v. U. S. (C.C.A.) 146 F. 121, 123, 124. The Circuit Court of Appeals of the Second Circuit in Nosowitz v. U. S., 282 F. 575, 578, declared that: 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the plaintiffs in error.' . . . "

The circumstances in the instant case do not justify as a logical inference, sufficiently conclusive to exclude a reasonable inference to the contrary, the conclusion that accused

Chatman aided and abetted Heath. That Chatman and Heath were armed with carbines that evening does not indicate that they were bent on mischief. Although the record does not state that accused were at that time privileged to carry carbines, likewise the contrary does not appear. The court (and the Board of Review) of its own knowledge knew that 11 March 1945 (the date of the alleged offense) was not long after the landing of the American forces on Luzon and that Pangasinan, the place of the offense, was not far from the enemy. The mere fact that Chatman and Heath went together from Terry's Place to Celestino's home does not raise the inference that Chatman knew that Heath intended to commit a crime. Although from the evidence it may be inferred that Heath loaded his rifle and entered the house to have sexual intercourse, there are no facts in evidence from which it may be inferred that Chatman had the same desire. Indeed the contrary inference is present as he did not go into the house with Heath in order to aid the accomplishment of, and share in, such mission. The conclusion that accused Chatman's contribution to the unlawful enterprise was that of a watchman or lookout is equally tenuous. There is no evidence that he so acted; he did not go to his companion's aid during his struggle with the Filipino and did nothing to quell the woman's cries for help or to prevent her from escaping from the house and running for assistance. The principal incriminating circumstance present in the record was Chatman's mere presence with Heath prior to, his remaining outside the house during, and his leaving the scene with him after the crime. It is well settled that:

"In the absence of a conspiracy or some preceding connection with the transaction, one does not aid and abet if he merely sees a crime being committed. . . . Mere approval or acquiescence, without expressed concurrence or the doing of something to contribute to an unlawful act, is not an aiding or abetting of the act" (Smith v. State, (Ohio), 179 N.E. 696). People v. Powers, (Ill.), 127 N.E. 681; CM 186947 Bopp and Aldrich; CM 192882 Milburn et al, 2 BR 43; CM 202976 Baker et al, 6 BR 389; CM 205564 Rose et al, 8 BR 197; CM 218876 Wyrick et al, 12 BR 157, 161; CM 234118 Reis, 20 BR 243; CM 237075 Auvil et al, 23 BR 255.

"Evidence that codefendants were present during encounter between defendant and deceased, and that codefendants were present near point where defendant again encountered deceased, was not enough to establish beyond reasonable doubt that codefendants aided, abetted or participated in the killing of deceased so as to sustain conviction of murder" (People v. Jackson et al, 52 N.E. 2d, 945).

Prior holdings by the Board of Review and pertinent decisions of civil criminal courts demonstrate the application of that rule.

The Rose case, supra, involved two accused, Rose and Gilbert, who were tried jointly for the larceny of a raincoat from a clothes line on a Fort. The Board of Review said, in part:

"The evidence does not sufficiently show accused Gilbert's participation in the offense. There is proof that he and Rose were seen standing together some distance from the clothes line, that they approached it together, and that after accused Rose had taken the raincoat from the clothes line, they continued together towards their own barracks, where apparently they separated, accused Rose going to the squadroom and Gilbert to the day room. The raincoat was never seen in the possession of accused Gilbert, but to the contrary, Rose is positively identified as the person who took it from the clothes line and who had it on his arm when it was last seen at the time the two accused entered their barracks. There is no evidence of any conversation between the two accused at or about the time of the offense and nothing else in the testimony to form the basis of a reasonable inference that Gilbert intended to or did aid, abet, encourage, or otherwise assist Rose. Neither is there any proof that Gilbert's acts were conceived in any plan agreed upon by the two accused or that there was any other prearrangement between them.

"

"It is true that accused Gilbert's statement denying that he knew anything about the disappearance of the raincoat was obviously untrue. This statement is, however, consistent with his innocence of the theft itself and may be reasonably explained by a desire to protect his friend and companion."

In CM 206280 Taylor et al, 8 BR 261, Taylor, Lee, and Morgan were tried jointly for attempted robbery. The evidence showed that all three accused, dressed in civilian clothing, went to a rooming house and there Taylor proposed to the proprietress that "they" would give her "protection" for a sum of money. Taylor or Morgan told her that if she did not give them the money, she could no longer operate her place of business. Accused Lee sat on a davenport and said nothing. One of the other accused stood in front of the woman, and the third stood by the door. The woman said she had no money, and "they" said

that one of them would return later for it. The next night Morgan returned and was apprehended. Taylor was arrested less than a block from the house. The Board held that the evidence was legally sufficient as to Morgan and Taylor, but insufficient as to accused Lee, saying:

" . . . the only proof of participation by him in the attempted robbery lies in his arrival with the other accused and his presence at the scene. He took no part in the conversation or threats and was seated in the room in a position apparently free from any suggestion of threatened force or violence. In so far as appears from the evidence, Lee may have gone to the scene of the offense in ignorance of the purpose of his companions. He remained in the room during the commission of the attempt but it is well established that the mere presence of a person at the time and place of the commission of an offense, without other proof of aiding or abetting the same, is not sufficient basis for an inference of participation therein. CM 205564 Rose and Gilbert, and cases cited; Bopp and Aldrich, sec 1310, Dig Op JAG 1912-30 . . . "

In Volume I, Bulletin of the Judge Advocate General, page 23, the following digest of a Board of Review opinion (CM 221019) is set out:

"Two accused were jointly tried for an attempt to rob. The evidence showed that both went at night in a stolen automobile to a gasoline filling station. There one of the accused, identity not proved, entered the building and attempted by a display of force to require the proprietor to deliver to him some gasoline for the car. The other accused remained outside the building but there was no proof that he acted as a lookout or participated in the transaction in any other way. There was no proof that the venture with respect to the gasoline was joint or the result of a pre-conceived plan. Mere presence of a person at the scene of a crime, in the absence of preconcert or attempt to participate, is not sufficient basis of an inference of participation. Evidence legally insufficient to establish guilt of either accused. CM 221019 (1942)."

In Carey v. State (Ind.), 144 N.E. 22, Carey and Ford were tried in one count for robbery and in a second count for larceny from one Ferguson. They were convicted of the latter offense. The evidence showed that Ferguson had known the defendants for a number of years. On the morning in question, he was walking toward his home when he saw them approaching him and spoke to them. Near a blind alley Ford pointed a gun at him, demanded his possessions and was given \$1.05. Carey,

meanwhile, walked out "toward the car track." Carey and Ford then left, "on either side of the alley." The court, in finding the evidence insufficient to sustain a conviction as to Carey, said:

" . . . the sole question presented for our consideration is whether or not there was evidence to support an inference that appellant stole or participated in stealing the money from Ferguson, as alleged in the second count of the indictment. Clearly there was not. The mere fact that appellant was with Ford when Ferguson met and spoke to them, and that he walked out to the curb and then out toward the car track, and 'never opened his mouth' nor said anything when Ford took the money, and that he and Ford then 'went on either side of the alley,' as Ferguson boarded a street car, taken in connection with the undisputed fact that the parties had been acquainted for many years, and had been together at different times, fails to prove that he acted with a felonious intent to assist Ford in stealing Ferguson's money, or that he had any part in taking it away from Ferguson. Merely being present when another commits a crime is not enough to make a person guilty of the offense so committed if he is not shown to have conspired with his companion to commit it, nor to have assisted in its commission, nor to have counseled, encouraged, hired, commanded, or otherwise procured it to be committed."

In People v. Ligouri et al, 284 N.Y. 309, 31 N.E. 2d, 37, it appears that one Panaro was with Ligouri while the latter engaged in a conversation with the deceased. Ligouri and Panaro then went to the former's house. Shortly thereafter deceased had someone telephone to Ligouri and said, "If you don't come down here, I'm coming down to get you." Ligouri armed himself. He testified he "figured on getting Panaro to help him out because he figured that they were coming down in a mob because he (deceased) told him he would be down there." He and Panaro then drove to a corner. Ligouri put a gun in his pocket as he got out of the car and they met deceased. The evidence with reference to what then occurred is conflicting. Ligouri and Panaro testified that deceased said to Panaro to get away and Panaro walked away "at least a few steps." An acrimonious discussion arose which resulted in Ligouri shooting and killing deceased. Another witness testified "he saw two men pursuing and shooting at another man" who stumbled and fell; another, that he saw a man on the ground and two others standing, one on each side of him, one shooting at the prostrate man, and yet another, that "the defendants told him before the shooting to get off the corner as there might be some trouble." Ligouri

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General,
APO 75, 9 October 1945.

To: Commanding General, Sixth Army, APO 442.

1. In the foregoing cases of Private Frank M. Chatman (34429007) and Private Robert B. Heath (34413040), both of 4072d Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and sentence with reference to the accused Heath but legally insufficient to support the findings and sentence with reference to the accused Chatman. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence in the case of Heath. In the case of accused Chatman the findings and sentence should be disapproved.

2. When copies of the published orders in these cases are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in these cases, please place the file number of the record in brackets at the end of the published order, as follows;

(CM P 47.)

ERNEST H. BURT.
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

ARMY SERVICE FORCES
 In the Branch Office of The Judge Advocate General
 with the United States Army Forces
 in the Pacific

Board of Review
 CM P-43

22 July 1945.

UNITED STATES)

v.)

Corporal JOHN WASHINGTON)
 (16001618), Privates MONROE)
 DAVIS (16039964), WILLIAM)
 M. BRUNSON (33103891) and)
 SAM MOSELY (34072701), all)
 of 3521st Quartermaster Truck)
 Company.)

Trial by G.C.M., convened at)
 APO 310, 28 March 1945. As)
 to Washington, Davis and Brunson:)
 Death. As to Mosely: Dis-)
 honorable discharge, total)
 forfeitures, confinement for life.)
 The United States Penitentiary,)
 McNeil Island, Washington.)

HOLDING by the BOARD OF REVIEW
 ROBERTS, MURPHY and CLARKINS,
 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 in a joint trial upon the following charge and specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Sam Mosely, Private Monroe Davis, Private William M. Brunson and Corporal John Washington, all of the 3521 Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, in conjunction with Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Caggan, both of the 3521 Quartermaster Truck Company, at APO 72, on or about 25 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fourth Grade Leodore Ruditys, Company "B", 99th Signal Battalion, a human being by shooting him with a gun.

Specification 2: In that Private Jan Mosely, Private Monroe Davis, Private William M. Brunson and Corporal John Washington, all of the 3521 Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, in conjunction with Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Cagan, both of the 3521 Quartermaster Truck Company, at APO 72, on or about 25 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Calextro Dingoang, a human being by shooting him with a gun.

Specification 3: In that Private Jan Mosely, Private Monroe Davis, Private William M. Brunson and Corporal John Washington, all of the 3521 Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, in conjunction with Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Cagan, both of the 3521 Quartermaster Truck Company, at APO 72, on or about 25 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation mortally wound one Private Robert B. Duke, Headquarters Company, 1st Corps, a human being by shooting him with a gun in consequence of which shooting and wounding, the said Private Robert B. Duke died on or about 26 February 1945.

Each accused pleaded not guilty to, but, all members of the court concurring, was found guilty of, the specifications and the charge with the exception of the words "in conjunction with Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Cagan, both of the 3521 Quartermaster Truck Company" of which words each was found not guilty. Accused Washington, Davis and Brunson were sentenced to be hanged by the neck until dead and accused Mosely to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentences and designated the United States Penitentiary, McNeil Island, Washington, as Mosely's place of confinement. The confirming authority confirmed the sentences of accused Washington, Davis and Brunson and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence reveals that on the evening of 24 February 1945 a public dance (R. 19, 26), attended by about two hundred Filipino civilians and white American soldiers (R. 10), was held in a tent at a place called the "cockpit" (R. 23) northwest of and near the 216th Military Police area (R. 9, 10). That organization was located on the south side of a road that paralleled the beach and led to the town of Carigara, P.I.. On the other side of the road, that nearest the beach, and about five hundred or six hundred feet east of the "cockpit" was the western boundary of Headquarters Battery, I Corps Artillery. The 3521st Quartermaster Truck Company of which organization the four accused were members (R. 60) was located about a mile east of the Headquarters Battery area.

About 11:00 or 11:30 that evening five colored soldiers (R. 11, 17), one of whom at least had purchased a ticket of admission (R. 28), entered the dance tent. Accused Washington, Davis and Mosely were identified as three of the colored soldiers (R. 11, 23, 185, 214, 224). About thirty minutes after their arrival there was an intermission to permit the members of the orchestra to eat (R. 12, 225) and everyone went outside (R. 23, 205). There was the sound of a "short scuffle" (R. 12) and accused Davis, who was walking behind his companions and arguing with a Filipino, drew a pistol from his pocket, cocked it, pointed it at the Filipino and also aimed it in the general direction of the dance tent (R. 17, 27, 186, 214). The people standing about scattered (R. 24) and the colored soldiers ran away (R. 25).

Between 11:00 and 12:00 o'clock that night Corporal Roy L. Smith of accused's unit saw accused Washington and Davis, each carrying a Thompson submachine gun, walk past the orderly room of their company going in the direction of the Headquarters Battery area (R. 105). About 11:45 Technician Fourth Grade Leslie W. Hines, a guard who was walking a post along the eastern boundary of Headquarters Battery and who a short time earlier that evening had seen five colored soldiers walking in the other direction (R. 117) saw six colored soldiers walking three abreast down the road towards the Military Police area (R. 115). The three in front and the one in the second line nearest Hines were carrying Thompson submachine guns slung over their shoulders. The soldier in the center of the front line was wearing a white T-shirt and the others were dressed in khaki (R. 115, 116). The witness was not able to identify any of the men nor was he able to state whether the other two in the second line were armed (R. 116).

About fifteen, twenty, or twenty-five minutes after the colored soldiers had left the dance five were seen by witnesses in the dance area to return along the road (R. 20, 25, 187). One of them, accused Brunson, wearing a white T-shirt (R. 199) and carrying a gun in an "on guard" position, went toward the dance tent and the others remained grouped on the road (R. 189). A fight started between about five

Filipinos, two white soldiers and Branson (R. 186, 200). Branson's gun was taken from him and he shouted "something" (R. 189, 192). A bolt was heard to click; someone shouted "The colored troops were back" (R. 12, 19, 25); everyone started to "scatter" and there was firing from the vicinity of the road and the beach (R. 12, 19, 28, 206, 216). The firing was variously described as submachine rapid fire (R. 28); two short bursts like Tommy-gun fire (R. 12); like half of a small 20-round clip (R. 20); two or three bursts of fire (R. 29); two bursts and a carbine shot (R. 47); a string of shots, a single shot, and then a long string of shots (R. 145); several bursts with a long burst at the end (R. 136); thirty or forty shots, single shots, then bursts (R. 110, 131) and three or four bursts (R. 142). The firing lasted between twelve (R. 131) and thirty seconds (R. 47).

After the firing had ceased the body of an American soldier, Private Isadore Ruditys, 99th Signal Battalion, was lying about 8 feet from the entrance to the dance tent (R. 13, 59) and the body of a Filipino was lying about five or six paces away (R. 13, 145). Both had been killed by the gun fire (R. 14, 34, 35). No firearms were seen near either of them (R. 15, 20).

The body of the Filipino was taken to the Municipal Building in Carigara where it was identified as Calastro Dingcong (R. 39, 40, 93). A .45 calibre bullet (R. 41; Ex. 14, R. 181) was removed from his body by a civilian doctor and given to the Military Police (R. 41, 82, 84, 161, 169, 209).

Accused Branson had suffered a gunshot wound in the leg (R. 33) from which a .45 calibre bullet (Ex. 3, R. 33, 180) was extracted, and a Technician Fifth Grade Wilbert F. Ruff was wounded in the leg (R. 145, 197, 202).

A Private Hobert B. Duke, Headquarters Company, I Corps, received several gunshot wounds in the body (R. 31). A Filipino took the carbine that Duke was carrying and, assisted by Corporal Byron J. Eckard (R. 25, 43, 54, 97), helped him to walk to the orderly room in the Military Police area (R. 25, 221). There Private Duke was laid on the floor and his clothing removed. A .45 calibre bullet (Ex. 13; R. 181) which was protruding from his hip was extracted (R. 54, 165, 169). He was taken to the 58th Evacuation Hospital (R. 32, 51) and died the following day from the wounds that he had received (R. 57). The carbine which Private Duke had been carrying was examined and did not appear to have been recently fired (R. 50).

About midnight Technician Fifth Grade William E. Wilson, the guard patrolling the ocean approaches to the beach and the western boundary of Headquarters Battery, that is, the boundary nearest the Military Police area (R. 121) saw through the field glasses that he was using on his tour of duty (R. 134) two or three colored soldiers walking along the road

toward the Military Police area. He noticed that they left the road and dropped behind an embankment and "squatted there a moment" (R. 122). The guard looked away for two or three minutes (R. 133), looked back, and then saw four or five colored soldiers (R. 130, 132) behind the embankment about 25 yards from the first hut of the Military Police area (R. 124). While he was watching them he saw "very small flashes" coming from their position and heard approximately thirty or forty shots from automatic weapons in ten or fifteen short bursts and at least one single shot (R. 125, 131). The colored soldiers then turned and ran in his direction (R. 125). Three of them "broke away towards the road" and the other two continued towards the guard (R. 125). Captain Morton H. Robinson of Headquarters I Corps Artillery had heard the shooting and joined Technician Fifth Grade Wilson. He saw two colored soldiers "walking and running intermittently" along the beach towards him (R. 136). Within forty-five seconds to a minute after the firing had ceased (R. 139) he and Wilson stopped the two men, accused Washington and Davis (R. 125), and asked them if they had fired their weapons. They answered in the negative. The Captain felt the submachine gun that each was carrying and, finding that one was worn to the touch, disarmed the men and placed them in custody (R. 126, 137). Captain Robinson asked the soldier who had been carrying the hot gun what he had shot at and the latter replied, "I fired my gun in the air . . . they were shooting at us". Asked what his name was the soldier answered "John Washington" (R. 137, 140, 143). One of the two colored soldiers said, "White boys stuck guns in our belly * * * we wasn't shooting to kill anybody" (R. 123, 135). The accused were taken to the supply room at Artillery Headquarters. First Lieutenant Michael Deakowski of the 216th Military Police Company asked Washington if the hot gun was his and the latter answered in the affirmative (R. 150). He asked Davis if the cold gun was his and he said it was (R. 150). The guns were kept separate, taken to the MP supply room and tagged (R. 140, 146, 148, 151, 155, 171). The butt plate (magazine release) of Davis' gun, number 177894, (Ex. 10; R. 175) was hanging out but the gun could have been made to fire in two or three seconds (R. 141, 144, 211). A full clip was found in Davis' pocket (R. 164). Washington's gun, number 159694 (Ex. 11; R. 175) contained ten or twelve live rounds in a 20-round clip.

About eight minutes after the shooting Technician Fourth Grade Hines saw three colored soldiers, at least two of whom were carrying submachine guns, going in an easterly direction along the road towards the Quartermaster area. In some manner not disclosed by the record, they "identified themselves" to him and were not detained (R. 117). The guard could not recognize any of the accused as among those whom he had previously seen nor did he hear any conversation at the time (R. 120).

A short time after the shooting first Washington and then Davis retreated with First Lieutenant Walter G. Troy, 216th Military Police Company

and Captain Del Guccio, the Provost Marshal, 4 Corps, their route to the place where they had been apprehended (R. 156). Washington told the officers that he had walked down the road and that when he jumped into a ditch his gun was discharged. He told them that he then went further up the road where he met Davis. They then crossed a barbed wire fence, walked along the beach and were taken into custody (R. 157, 159). In daylight the Lieutenant went over the same ground again and found nothing to indicate that that had been the path which the accused had taken. No expended cartridges were found in the vicinity of the ditch into which Washington claimed he had jumped (R. 157) but, fifteen or twenty feet away and four or five feet from the road the Lieutenant found ten expended .45 cartridges (R. 158, 163). The expended shells (Exs. 16-A-1 - 16-A-10; R. 235) were placed in an envelope and marked (R. 159).

Lieutenant Troy also examined the dance area and found five .45 bullets (Exs. 15-A-1 - 15-A-5; R. 235) in trees and a tree shrub about eighteen or twenty feet from the dance "cockpit" (R. 159). By noting where the trees and bushes had been marked the Lieutenant determined that the bullets he found had been fired from the place where he had discovered the empty cartridges (R. 160).

Within twenty minutes after the shooting, a little after 12:00 o'clock (R. 101), a Thompson submachine gun Number AD 23837 (Ex. 7; R. 111, 171), without a stock or sling, was found about twenty feet from the northeast corner of the dance area (R. 100). It contained a full clip and one round in the chamber (R. 101, 110) and did not appear to have been recently fired.

About an hour later Sergeant Alfred C. Culver inspected the area where the dance had been held. About fifteen feet south of the road and about sixty feet northwest of the "cockpit" (R. 88) he found twenty expended .45 cartridges which smelled of freshly burned powder (R. 91) (Exs. 17-B-1 - 17-B-20; R. 85, 172, 236) lying on the ground "in a sort of a column" as though they had been discharged from a weapon (R. 88, 89). Between the place where he had found the shells and the dance tent there was one tree and no shrubbery. The place was "out in the open" (R. 92).

About 0400 hours that day Sergeant of the Guard Clarence Sutton found a Thompson submachine gun and clip between a kitchen and an incinerator about forty yards from the gun tent in accused's area (R. 73). The gun had not been fired (R. 80). By stipulation it was agreed that the gun bore Number 193849 and was introduced as Exhibit Number 6 (R. 73).

On 12 March 1945 two Filipino boys, Marcos Cantiveros and Eladio Insigne, found a Thompson submachine gun near the Sebang River about two or three hundred yards from the Quartermaster area. The next day they found a loaded magazine at the same place (R. 94-97). The gun and magazine were turned over to the Military Police. The gun bore serial number 174140 and was introduced in evidence as prosecution's Exhibit Number 8 (R. 174, 184).

The record further reveals that the 3521st Quartermaster Truck Company of which accused were members possessed nine Thompson submachine guns (R. 60). They were kept in a box in the supply room but in the morning of 24 February, the day of the fatal shooting, the guns were moved to the gun tent, next to the supply tent and three or four feet from it (R. 61, 66, 72) and laid out for inspection (R. 62). Accused Davis was the assistant supply sergeant of the company and occupied the tent opposite the supply tent (R. 64). Early on the morning after the shooting the company was lined up and a search was made for the machine guns (R. 66). Six Thompson submachine guns bearing serial numbers 196428, 174140, 177894, 193849, 023837, and 159694 and two or three clips of ammunition for that type of gun were found to be missing (R. 59, 67). It would have been possible for someone to go into the tent and get the guns without anyone knowing it (R. 72, 75). The four accused were not authorized to carry submachine guns (R. 69) and none had been issued in the company (R. 71).

The several guns, the bullets which had been taken from Dingoong's and Duke's bodies and Branson's leg, and the empty cartridges and the bullets which had been found by Lieutenant Troy and Sergeant Culver were, all as marked, turned over to Second Lieutenant Robert R. Kent, acting Assistant Inspector General, Americal Division (R. 34, 152, 159, 161, 165, 169-175, 177-182, 235). Gun number 196428, Exhibit Number 9 (R. 174, 237) was also turned over to him. The record does not reveal, however, where or when that gun was found.

Lieutenant Kent took the several guns, cartridges and bullets to Brisbane, Australia, and turned them over to Detective Constable Thomas M. Baty, a qualified ballistics expert for examination (R. 238). Mr. Baty testified that from tests made by him and the comparison of photomicrographs (R. 240; Exs. 18, 19) in his opinion the bullet (Ex. 14) taken from Dingoong's body and that (Ex. 13) taken from Private Duke's body were fired from gun number 159694 (Ex. 11; accused Washington's gun) (R. 239, 241). Of the five bullets found by Lieutenant Troy (Ex. 15) two had been fired from that gun; one bore no rifling; one was fired from a colt .45 revolver; and the other was fired from a submachine gun not tested by the witness (R. 239, 241). Of the ten empty cartridges

(Ex. 16), four had been fired from gun number 196428 (Ex. 9) (otherwise unidentified); four had perhaps been fired from a pistol; one from gun number 159694 (accused Washington's; Ex. 11) and the last by a weapon not tested by him (R. 242, 244, 248). The twenty empty cartridges found by Sergeant Colver (Ex. 17) had all been fired from gun number 159694 (accused Washington's; Ex. 11) (R. 242, 244). The bullet which had struck accused Brunson in the leg (Ex. 3) had been fired from a submachine gun, but not from any of those tested by him (R. 241). Because of its condition Mr. Buty made no attempt to secure a sample bullet fired from gun number 174140 (that found by the Philippine boys) (Ex. 8; R. 243).

Lieutenant Kent, on or about 1 March 1945 (R. 227, 230) saw accused Mosely in the M.P. office at the stockade (R. 228). After warning him of his rights he interrogated Mosely with reference to his activities on 24 February (R. 227). Mosely then said that he, Davis, and Caggan bought tickets and entered the dance tent on the night of the shooting (R. 232). Washington and Talley later joined them (R. 233). Washington asked a white soldier for a light and the latter refused to give it to him. Washington said to the soldier "No hard feelings, shake my hand" but he declined. The dance stopped and they left the tent. Mosely was the last to leave and as he went outside he noticed that there was "some sort of argument" and "the crowd was scattering". Someone said to him "Get, nigger, before you get a hole in your back" (R. 233). He went toward his company area and on his way back met Washington, Caggan, Talley, Brunson and Davis who were armed (R. 233, 234). He asked where they were going and they answered "Back to the dance" (R. 233). He also stated to the Lieutenant "We was talking when we left about the guys snapping rifles. We was going back up prepared. If anything did start, we would have something to protect ourselves" (R. 232) and that when they reached a place about one hundred yards from the dance "people gets to running. Some say or another, we gets on by the dance. We heard a scuffle at the dance. They was whipping Brunson. After a while we heard a Tommy-gun" (R. 234).

The only witnesses called by the defense were First Lieutenant Melvin G. Koch, Field Artillery, Headquarters X Corps, and Technician Fifth Grade Felix Janison of accused's organization. The Lieutenant testified that on either 4 or 11 February he passed through the area of the 3521st Quartermaster Truck Company (R. 249) and saw a typewritten paper posted prominently upon the bulletin board which, in effect, stated:

"If some day you see a black bastard lying out in the middle of a field well policed for an area of about 75 yards square, you will know the poor son-of-a-bitch was a member of the 3521st." (R. 250).

Janison, who had also seen the notice, said that it had appeared to him "as a threat" (R. 252). Prosecution's witness Sutton had also seen the notice on the bulletin board about twelve or thirteen days before the shooting (R. 30).

Each of the accused elected to remain silent.

4. The four accused were found guilty of the murder of the several deceased. Murder is the unlawful killing of a human being with malice aforethought (MCA, 1928, par. 147a).

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. 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. (Clark.)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one 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 a 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 or by a wish that it may not be caused; * * * (MCA, supra).

Every person is presumed to intend the natural and probable consequences of his act. The evidence clearly establishes that accused Washington discharged a submachine gun at short range into a group of soldiers and civilians and killed Dingoong, a Filipino, and Private Duke. A fatal injury to someone was the natural and probable consequence of his act. Such action "clearly tends to establish that, whether or not he had any special malevolence toward any particular individual, he was possessed of 'a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief,' which has been held to be embraced by the term 'malice aforethought'" (Living v. U.S., 297 F. 841; Allen v. U.S., 164 U.S. 492, 17 S. Ct. 154). It follows that there is substantial evidence in the record in support of the court's findings that accused Washington was guilty of murder. There then remains for consideration the question whether the findings with reference to the remaining three accused may be sustained.

"The mere presence of a person at the scene of the commission of an offense by another, in the absence of evidence of preconcert or evidence of intent to participate, if need be, is not sufficient basis for an inference of his participation as an accessory or principal therein" (CM 186947, Bran & Alrich; CM 206280, Taylor, et al., VII S.R. 261; CM 218876, Syrick, et al., XII S.R. 157, 162).

Such inference usually rests on circumstantial evidence (sec. 244, Wharton, Crim. Evid.) and may be drawn from conduct which discloses a common design on the part of accused to act together in pursuance of the common criminal purpose (sec. 1667, Wharton, Crim. Law); from all the attendant circumstances and from the conduct of accused subsequent to the criminal act (22 C.J.S. 155-156; CM 234118, Acia, XI S.R. 243, 244; Blaustein v. U.S., 44 F. 2d 163).

From the conduct of accused Davis, Brunson and Mosely and the attendant circumstances, their preconcert and association with accused Washington in his felonious acts may be inferred. They were all members of the same organization. Accused Davis, Mosely and Washington were identified as being present at the dance. Davis there drew, cocked, and pointed a revolver at a Filipino and others, and the several colored soldiers left and were soon walking toward their company area. Mosely admitted (which was not evidence against the other accused) "he was talking when we left about the guys snapping rifles. We was going back up prepared. If anything did start, we would have something to protect ourselves". A short time later Washington, Davis, Brunson, Mosely (the latter by his own admission) and two other colored soldiers were soon walking three abreast from the direction of their organization to the vicinity of the dance (those in the front line and one in the second line at least carrying submachine guns). The evidence establishes that Washington, Davis, and Brunson were carrying such weapons and, as six Thompson submachine guns were unlawfully taken from the gun tent in accuseis' area that evening, the court properly could infer that Mosely also was carrying one. Upon hearing the place where the dance was held, Brunson, carrying his gun in an "on guard" position, left the others standing on the road nearby and went toward the dance tent. He was disarmed and shouted something. Immediately thereafter Washington and others commenced the fatal firing. The shooting stopped and Washington and Davis, each carrying a submachine gun, ran towards a guard and were apprehended. Their two companions ran in another direction and were not then taken into custody. When apprehended the magazine release on Davis' gun was hanging down and it could not be fired but could have been repaired in two or three seconds. A full clip of ammunition for his gun was found in his pocket. Either Davis or Washington stated about a minute after the shooting, "White boys stuck guns in our belly * * * We wasn't shooting to kill anybody".

Tests made by a ballistics expert revealed that bullets from Washington's gun had killed Duke and Dingsong. Other bullets and expended cartridges were found which had been fired from other of the missing submachine guns and a revolver.

From all of such facts the court properly could infer that the several accused, pursuant to a joint plan and agreed course of action, unlawfully took submachine guns from their company's gun tent and returned to the dance area. Accused Hanson went to the vicinity of the tent. He shouted "shoot ing" and immediately thereafter at least one of the conspirators, Washington, fired into the crowd killing Sergeant and Private Dike. The evidence is susceptible to the further inference that the shooting was in accordance with accuseds' joint plan. One of their number, pursuant to such purpose, having committed murder, it follows that all are equally guilty with him as principals for such unlawful action (III Bull. JAG 284, July 1944). Although there was no evidence as to who fired the gun which caused Private Rulity's death, it might properly be concluded that that homicide was also a result of the firing by one of the accused.

A sentence of death or of life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. With reference to accused Mosely it is noted that 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 punishable by penitentiary confinement by Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 455).

5. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings and the sentences.

Richard J. Robert, Judge Advocate.
Colonel, J...G.O.

James M. Murrey, Judge Advocate.
Lieutenant Colonel, C...G.O.

Judson S. Clement, Judge Advocate.
Major, J...G.O.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
with the United States Army Forces
in the Pacific

Board of Review
CM P-98

27 August 1945.

UNITED STATES

v.

Private PAUL L. ANDERSON
(33745159), 315th Port
Company.

) Trial by G.C.M., convened at
) Base K, APO 72, 28 May 1945.
) Dishonorable discharge, total
) forfeitures and confinement
) for fifteen years. The United
) States Penitentiary, McNeil
) Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, MURPHY and CLEMENTS,
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. Paul L. Anderson, 315th Port Co., APO 72, did, at APO 72, on or about 23 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Froilan Bayona Jr., a human being, by shooting him with a 45 cal pistol.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to fifteen years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that on the afternoon of 23 March 1945 the accused entered the "Zombie Club", APO 72. The proprietor, Froilan Bayona, Jr., told him to leave as colored soldiers were not served there (R. 7) and an argument ensued during which accused said that he should "tear up the joint". Bayona went to an adjoining room; returned with a .45 calibre pistol, the butt of which was protruding from a pocket of his trousers (R. 7), and, "egging him on" (R. 19, 21), said to accused, "tear the place up and see what happens" (R. 9). Both appeared to be angry and continued arguing (R. 15, 21). Bayona went to the porch, leaned on a window sill facing into the room and said to some soldiers who were sitting at a table in a voice loud enough to be heard six feet away, "Should I shoot the nigger bastard" (R. 8, 10, 17, 19). Accused, who had followed the Filipino, suddenly snatched the pistol from his (Bayona's) pocket, took two steps backward (R. 34) and shot him four times (R. 8). One bullet entered the back of Bayona's head and three others entered the back of his body (R. 38) and he died shortly thereafter. The accused ran from the building and with the automatic still in his possession was taken into custody by the Military Police.

On cross-examination the evidence was elicited that deceased had said that about two months prior to the incident he had shot a negro soldier (R. 12, 20).

The accused elected to take the stand as a witness. He testified to the same effect as did the witnesses for the prosecution as to the events prior to Bayona's leaving the room to secure the gun. Accused further stated that upon the Filipino's return he (accused) said to him "Do you think I'm afraid because you've got a gun?" and deceased answered, "you should be, because I'm going to use it". Bayona then went out to the porch and said he was going to kill "the nigger bastard". Accused further testified that the Filipino then turned around and, believing that he was going to shoot him, he (accused) grabbed the pistol from the Filipino's pocket (R. 46, 47) and as he did so the gun, which was already cocked (R. 49) went off. Bayona then grabbed him and during the subsequent struggle the pistol was discharged several times (R. 45, 50). He also testified that he did not intend to kill the Filipino (R. 47, 49) and that he did not leave the "club" because he "wouldn't turn" his "back on the gun" (R. 48).

4. The evidence is clear that at the time and place alleged accused shot and killed deceased with a .45 calibre pistol. Accused claimed that the homicide was accidental, testifying that he grabbed the pistol which was already cocked from deceased's pocket fearing that the latter was going to shoot him; that the first shot was accidentally discharged and that the subsequent shots were fired during the ensuing struggle between them. He further stated that at no time did he intend to kill deceased.

Whether the homicide was accidental, as claimed by accused, or was intentionally committed was a question of fact for the determination of the court-martial as triers of fact (People v. Kane, (NY) 107 NE 655; Lloyd

v. State, (Ind) 189 NE 406). By its findings the court determined that the homicide was intentional and committed with malice aforethought.

"* * * Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. 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. (Clark.).

Malice aforethought may exist when the act is unpremeditated. It may mean any one 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 a 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 or by a wish that it may not be caused;* * * (MCM, 1928, par. 148a).

The court had before it evidence that both accused and deceased were angry, that accused had said that he should "tear up the joint" and that after seizing deceased's pistol accused stepped back two or three paces and then fired at the Filipino. It follows that there is substantial evidence in the record to sustain the findings that the homicide was unlawful and was occasioned willfully, deliberately, and with premeditation.

Although a sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92, it may be mitigated by the reviewing authority to confinement for a term of years. 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 punishable by penitentiary confinement by Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 455).

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

Madison R. Roberts, Judge Advocate.
Colonel, J.A.G.D.

James M. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
With the United States Army Forces
In the Pacific

27 July 1945

Board of Review
CM P-99

UNITED STATES)
 v.)
Corporal JOSEPH L. LEPINAY)
(36020093), Company C, 97th)
Engineer General Service)
Regiment.)

Trial by G.C.M., convened at APO
322, 6 June 1945. Dishonorable
discharge; total forfeitures and
confinement at hard labor for ten
years. United States Penitentiary,
McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
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: In that Corporal Joseph L Lepinay, Company "C", 97th Engineer General Service Regiment did, at APO 322, on or about 11 May 1945, lift up a weapon to wit a pistol against First Lieutenant Lester R. Fox, Company "C", 97th Engineer General Service Regiment, his superior officer, who was then in the execution of his office.

CHARGE II: Violation of the 93d Article of War

Specification 1: In that Corporal Joseph L Lepinay, Company "C", 97th Engineer General Service Regiment did, at APO 322, on or about 11 May 1945 with intent to do bodily harm, commit an assault upon Staff Sergeant David Romes, Company "C", 97th Engineer General Service Regiment, by threatening him with a dangerous weapon to wit, a pistol.

Specification 2: In that Corporal Joseph L Lepinay, Company "C", 97th Engineer General Service Regiment, did, at APO 322, on or about 11 May 1945 with intent to do bodily harm, commit an assault upon Staff Sergeant George Calloway Jr, Company "C", 97th Engineer General Service Regiment, by threatening him with a dangerous weapon to wit, a pistol.

The accused pleaded not guilty to, but was found guilty of, all specifications and charges, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. The reviewing authority approved the sentence, remitted five years of the confinement imposed, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution:

The accused, Corporal Joseph L. Lepinay, a member of the 97th Engineer General Service Regiment, was working in a sawmill at APO 322 with other men of the regiment during the month of May 1945. Lieutenant Fox was in charge of the detail (R. 14). Under him were Staff Sergeants David Romes and George Calloway, Jr. (R. 19). The men worked at night beginning at about 2230 hours.

On the night of 10 May 1945 the accused arrived at work feeling rather "high" (R. 7-8). He obtained permission from one of the sergeants to "take a nap" (R. 7), which he did on a pile of lumber (R. 8). Sometime between 0100 and 0200 hours Sergeant Romes went around to awaken him and get him to go back to work (R. 8). Accused did not return to work and the matter was reported to Lieutenant Fox (R. 8). Lieutenant Fox said "let him go, we will handle that tomorrow" (R. 8).

The next morning, 11 May 1945, the accused reported to Lieutenant Fox "that someone had cut a hole in the bottom of his pocket and stole ~~44~~ [44 pounds] out of his wallet" (R. 14). He claimed that it was done while he was asleep on the stack of lumber (R. 14). Lieutenant Fox saw the hole in the pocket and found the empty wallet nearby (R. 14). He decided to search the three men who had been near the accused while he was sleeping. One of those men was Staff Sergeant Romes (R. 8, 14). The search was made but the money was not found (R. 8). After the search accused told Lieutenant Fox that he was "sure Sergeant Romes got his money" and stated the reason why he was sure was because Sergeant Romes was the only one who had a knife (R. 14-15).

At about 2230 hours (11 May 1945) the accused approached Sergeant Romes near the sawmill, pointed a .45 caliber pistol at him and said, "Go and get my money. I give you three seconds to get it or I will blow your brains out" (R. 8). Sergeant Romes said he didn't have his money and started walking toward the woods figuring he could "duck" (R. 8). Accused kept close watch and said to Romes when he got to the woods, "Stop right there" and "Give me my money" (R. 9). Being fearful lest the

accused shoot, Romes said, "I have 31¹/₂ [31 pounds]. I will give you this and I will give you the rest pay day" (R. 9).

Upon being told about what was going on, Lieutenant Fox immediately went to the scene with Sergeant Calloway. He saw accused pointing a pistol at Romes. He (Fox) directed the accused to put the pistol down and said that if accused was sure that Romes had his money to go to the company and file charges against him. Accused told Lieutenant Fox to "get the hell out of there" or he would shoot him too (R. 15, 9).

Accused was finally persuaded to return to the company. At the point of a gun he ordered the three men (Lieutenant Fox, Sergeant Romes and Sergeant Calloway) to move off towards the jeep. When Sergeant Calloway lagged behind accused told him to close up and with that he fired a shot (R. 9, 15). It is not known whether the shot was fired at Sergeant Calloway or into the air. Sergeant Calloway fell out but it did not seem to bother the accused as he continued to march Lieutenant Fox and Romes to the jeep at the point of a gun (R. 20, 15). Lieutenant Fox got into the driver's seat. Romes was seated alongside of him. Accused climbed on from the rear and held the gun pointed at the middle of Sergeant Romes' back (R. 9-15).

En route the accused ordered Lieutenant Fox to drive "up a lonely road" (R. 15). He said he was going to kill Romes; that he was tired "messing with him"; and further that he was going to "bump him off right there" (R. 9, 15). Lieutenant Fox persuaded the accused that the best thing to do was to return to the company. Several other incidents happened along the road. First, accused ordered Lieutenant Fox to drive slowly and threatened that if an "M.P." should stop them he would have to kill the "M.P." too (R. 15-16); second, he told Sergeant Romes to sing or he would blow his brains out, whereupon Sergeant Romes started to sing; third, he told Lieutenant Fox that if he (Fox) turned on him that he (accused) would kill him; fourth, he asked Romes if he had his money, to which Romes, at the point of the gun, said yes "I hid it in the sawmill" (R. 16). Accused ordered Lieutenant Fox to turn around and go to the sawmill. Romes then said that the money was in the company area, that he had given it to First Sergeant Graham (R. 9, 15). Accused then decided to go to Sergeant Graham's quarters (R. 16).

When they arrived at Sergeant Graham's quarters, which were in the company area, accused ordered Lieutenant Fox to call Sergeant Graham out. Lieutenant Fox obeyed. Accused said that if Sergeant Graham came out with a weapon he would kill Sergeant Romes. Lieutenant Fox called to Sergeant Graham to come out without any weapons (R. 9-16).

Sergeant Graham testified that he recognized Lieutenant Fox's voice and looking out saw accused with a pistol. He started for the back door but the accused must have heard or seen him, for he called out, "stand right there, don't move" (R. 27). Accused then went around

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to the back door to head off Graham. Whereupon Sergeant Romes ran away (R. 9, 27). Romes called to another soldier to phone the military police (R. 9).

Being unable to get in through the back door of Sergeant Graham's tent, accused came around to the front. He then found that Sergeant Romes had gone. He stuck the pistol in Lieutenant Fox's side and said that they were going to look for Sergeant Romes (R. 16-17). They argued back and forth. Accused was finally persuaded to go to Captain Farrell, the company commander, and file charges of stealing against Sergeants Romes and Graham. Walking towards Captain Farrell's quarters he continued to point the pistol at Lieutenant Fox (R. 17).

Captain Farrell was awakened and after accused told his story about the loss of his money he was persuaded to turn the pistol over. At this point the military police came in. Not knowing what had happened, other than what the accused told him respecting the stealing of the money, he (Farrell) told Lieutenant Fox and the accused to go back to the sawmill (R. 17, 21). Lieutenant Fox thought that that was Captain Farrell's preconceived plan of having the military police pick up the accused. He accordingly followed instructions (R. 17). When they went out Sergeants Romes and Graham "came out of hiding from someplace" and told the captain what had transpired. The military police were ordered to arrest the accused, which they did soon thereafter (R. 22).

Throughout the entire evening accused looked serious (R. 20). Accused "had been drinking a little but he wasn't drunk" (R. 13). The pistol had been loaded (R. 23), and those whom he had threatened were actually placed in fear of bodily harm (R. 9, 19).

4. The accused elected to remain silent (R. 31).

5. The evidence amply sustains the finding that the accused lifted up a weapon, to wit: a pistol, against First Lieutenant Lester R. Fox, his superior officer who was then in the execution of his office, in violation of Article of War 64 (see MCM, 1928, par. 134a). The proof also establishes that the accused did with intent to do bodily harm commit an assault upon Staff Sergeant David Romes and Staff Sergeant George Calloway, Jr., by threatening each of them with a dangerous weapon, namely, a pistol, in violation of Article of War 93 (see MCM, 1928, par. 149m).

The intent to do bodily harm may be inferred from the conduct of accused and all the surrounding facts and circumstances (4 Am. Jur. 142. See also CM POA 054, Vaughn). It may even be inferred solely from the use and character of the weapon employed (6 C.J.S. 937). Here the accused, pointing a loaded pistol at close range stated on more than one occasion that he intended to do bodily harm, and there is nothing in the record which negatives that intent (CM 209862, Yaple, 9 B.R. 146).

It was said in CM POA 350, Natusko:

"Such an intent [to do bodily harm] is to be inferred from the surrounding facts and circumstances and from the nature of the weapon used (CM POA 191, Roberts). It has been held that it is a jury matter to determine the intent from the character of the instrument, the distance apart of the parties and other circumstances (State v. Schumann (Iowa), 175 NW 75). It is the 'act and the intention with which the act is done, rather than the result, which fixes the crime or degree of crime' (State v. Shaver, 198 NW 329; 6 CJS 837)."

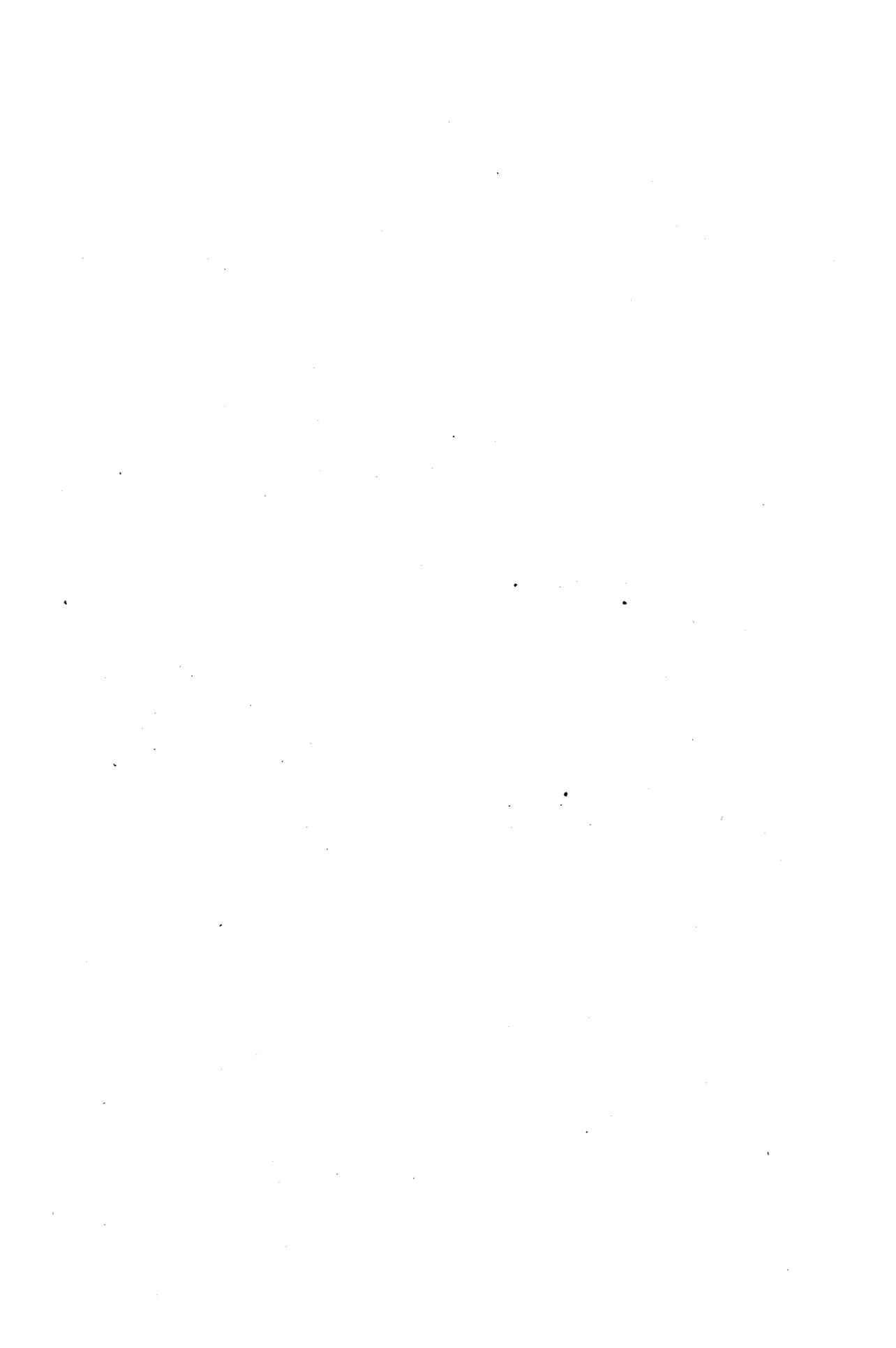
6. Confinement in a penitentiary is authorized by Article of War 42 for the offense of assault with intent to do bodily harm with a dangerous weapon, recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-502 of the Code of the District of Columbia.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

(Absent) _____, Judge Advocate.
Major, J.A.G.D.

Joseph S. Robinson, Judge Advocate.
Major, J.A.G.D.



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On 24 February 1945 about 1000 hours, the accused, who was a member of the 810th Engineer Aviation Battalion, had been working at Rabon Bridge, APO 70. He had an argument with Pfc. Chayter who reported the incident to Second Lieutenant William S. Hogan (R. 5). Lieutenant Hogan called the accused and questioned him about the argument and his failure to obey the orders of a "non-commissioned officer" (R. 5). After a heated conversation between them, Lieutenant Hogan told accused that if he were not going to obey he would take him back to camp (R. 5). Accused replied that Lieutenant Hogan was not going to take him anywhere. With that, he put a shell in the chamber of his carbine, stepped back, took aim, and pulled the trigger. The safety was on and the carbine failed to respond, whereupon the accused lowered the weapon, threw the safety off and put it back to his shoulder. Lieutenant Hogan "started diving to the ground" and accused fired (R. 5). The bullet entered Lieutenant Hogan's left shoulder and made its exit through the right shoulder at about the same level as the point of entry. He was taken to the 144th Station Hospital where he remained for 23 days (R. 6).

Upon hearing the shot fired, First Lieutenant Tracy E. Blakeley, who had heard part of the discussion between the accused and Lieutenant Hogan, and who was then with "Lt. Lucas" in a jeep at an ammunition dump, returned to the scene. As he approached he saw Lieutenant Hogan on the ground and accused with the carbine in his hands "walking in a semi-circle around Lt. Hogan" about eight to ten feet from him. He testified that the accused walked up to his (Blakeley's) jeep and said, "Do you blame me for killing him?" (R. 8-9).

4. The evidence for the defense:

The accused, testifying on his own behalf, stated that the first and second platoons of which he was a member had completed their work at Rabon Bridge about 1030 hours and that they were told to return to camp because they had "run out of work." (R. 10). He and Sergeant Jones entered a GMC truck, which was made available for the trip back to camp. Pfc. Chayter with whom he had an argument earlier that morning then came up and ordered him out of the truck and into a weapons carrier. Words passed between them. Accused nevertheless got out of the truck (presumably when told that Lieutenant Hogan wanted to see him) and walked over towards Lieutenant Hogan, mumbling to himself, "It seems to me as though the people keep fucking with me." When he approached, Lieutenant Hogan said, "God damn it, jump to attention" (R. 10). The accused came to attention and asked Lieutenant Hogan "what did he want to say?" He told accused to shut up and let him talk. Accused replied, "All right, go ahead and talk." Lieutenant Hogan said that his orders were for accused to get off the truck and accused told him that he would obey the orders. Accused had his rifle, as all the men kept their rifles "on the job." He was excited and nervous. After Lieutenant Hogan had finished talking he (Hogan) turned around to go to the weapons carrier. Accused was holding his rifle in his right hand near the safety with the

muzzle elevated at an angle. He did not know that it was loaded. He turned around and started walking toward the jeep, which was in the same direction as the weapons carrier, when he stumbled "and the rifle went off." He did not attempt to kill Lieutenant Hogan (R. 10, 11).

Upon examination by the court accused testified further that he did not say to Lieutenant Blakeley, "Do you blame me for killing him?" (R. 13).

Second Lieutenant Lawrence M. Lucas, 810th Engineer Aviation Battalion, testified that on 24 February 1945 he saw Lieutenant Hogan and accused engaged in conversation. He was then in a jeep with Lieutenant Blakeley. The jeep was driven away and when it had gone 50 or 75 yards Lieutenant Lucas heard a shot. He looked around and saw Lieutenant Hogan lying on the ground and accused standing with a carbine in his hands. He was present and heard a conversation between accused and Blakeley but did not hear the accused make the remark which Blakeley attributed to him (R. 10, 11).

5. The evidence for the prosecution shows that at the time and place alleged in the specification, accused, without excuse or justification, deliberately shot Second Lieutenant Hogan in the back with a carbine. Accused's testimony to the effect that the shooting was accidental, raised an issue of fact which the court resolved adversely to the accused.

In a similiar case (CM POA 054, Vaughn) the Board of Review said:

"The offense charged, assault with intent to commit murder, is, in effect, an attempt to murder. One of its essential elements is a specific intent to murder which must concur with the assault (MCM, 1928, par. 1491, p. 178). Such an intent is to be inferred from the circumstances of the assault, including the situation of the parties, their acts and declarations, the character of the weapon used, the manner of its use and the nature of the wound inflicted (4 Am. Jur. 142)."

In another case (CM POA 346, Hill) the Board of Review said:

"The fact that accused aimed at Captain Stella and deliberately shot him, even without apparent motive, sustains an inference that he was activated by malice aforethought and intended to murder (See CM POA 228, Booher). Malice may be inferred from a deliberate, unlawful act of violence, likely to cause death (see Wharton, Criminal Law, 12th Ed., secs. 146-147)."

The deliberate acts of placing a shell in the chamber, stepping back, releasing the safety, taking aim, and firing are facts which, if believed, are sufficient to spell out intent to murder (MCM, 1928, par. 1491). In the present case, upon the prosecution's version of the occurrence, which the court chose to believe, the inference that the accused intended to murder Lieutenant Hogan may properly be drawn from the established facts. Had the victim in the instant case died, the accused may properly have been convicted of murder in violation of Article of War 92 (MCM, 1928, par. 148a).

6. According to the charge sheet the accused is 27½ years of age. He was inducted on 4 September 1941. Confinement at hard labor for twenty years is authorized for the offense charged (MCM, 1928, par. 104c).

7. The court was legally constituted. No errors 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 of guilty and the sentence. Confinement in a penitentiary is authorized by the 42nd Article of War under Section 22-501, District of Columbia Code.

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Arthur P. Drummond, Judge Advocate.
Major, J.A.G.D.

James A. Robinson, Judge Advocate.
Major, J.A.G.D.

ARMY SERVICE FORCES
 IN THE BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE UNITED STATES ARMY FORCES IN THE PACIFIC

Board of Review

19 July 1945

CM P-101

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

v.)

Second Lieutenant ARTHUR O.)
 HENDERSON (O-2049809), MAC,)
 Medical Detachment, 25th)
 Infantry Regiment.)

Trial by G.C.M., convened at APO
 926, 26 April 1945. Dismissal
 and total forfeitures.

HOLDING by the BOARD OF REVIEW
 DRIVER, DRUMMOND and ROBINSON
 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 holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific.
2. The accused was tried upon the following charge and specification:
 CHARGE: Violation of the 64th Article of War.

Specification: In that 2nd Lieutenant Arthur O. Henderson, MAC, Medical Detachment, 25th Infantry, having received a lawful command from Major Arthur O. Diggs, MC, 25th Infantry, his superior officer, to make inspections of the 2nd Battalion Medical section, 25th Infantry and Headquarters Medical section 25th Infantry and to turn in results to said Major Arthur O. Diggs, MC, 25th Infantry by noon Saturday 10 March 1945, did at APO 322, on or about 10 March 1945, willfully disobey the same.

The accused pleaded not guilty to and was found guilty of the charge and specification and was sentenced to dismissal, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved only so much of the sentence as provides for dismissal and total for-

feitures and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General of the United States Army Forces, Pacific, confirmed the sentence as approved by the reviewing authority and pursuant to Article of War 50½ directed that the execution of the sentence be withheld.

3. On 8 March 1945 the accused, who was a member of the Medical Detachment, 25th Infantry, and had been assigned to the 3rd Battalion Medical Section, called upon Major Arthur O. Diggs, the commanding officer of the detachment, in his quarters at APO 322, and said that he could not make certain inspections which Major Diggs had told him to make (R. 5, 7, 8, 11, 12). Major Diggs had directed accused to inspect the Ordnance and area appearance, 2nd Battalion Medical Section, the orderly room, motors and area appearance of Headquarters Section of the Medical Detachment, and also to make inspections of two other organizations not mentioned in the specification (R. 5, 6, 7). Accused said that he could not make the inspections for the reason that he was not supposed to work anywhere other than in the 3rd Battalion Medical Section. Major Diggs told accused that he (Diggs) was "commanding officer" and if he so desired could give accused orders "to work or do any job anywhere." Accused replied that he would not make the inspections (R. 6).

Major Diggs then gave accused a direct order to make the inspections and submit a report thereon by the afternoon of 10 March 1945. Major Diggs asked accused if he knew the meaning of a direct order. Accused answered that he did and that "it meant about five years in the penitentiary." (R. 6, 8, 11). When Major Diggs did not get the report on the afternoon of 10 March, he asked accused about it and the latter said that it had not as yet "been done." On 11 March Major Diggs went to see accused and asked him whether he had made the inspections and accused said that he had not. When Major Diggs asked him if he intended to make them accused answered "No." (R. 6).

4. Accused testified that on 8 March 1945 he was attached to the 3rd Battalion Medical Section which was located about eight miles from the rest of the regiment. On that day he went to see Major Diggs about some inspections which the latter had ordered him to make. Accused understood that while serving as assistant to the battalion surgeon away from the rest of the regiment he was under the "direct control" of such surgeon. Accused had been so informed at the Medical School, Camp Barkley, Texas, where he received his commission, and had told Major Diggs that such were his instructions. In the course of their conversation, Major Diggs said that he was the commanding officer of the detachment and could order accused to do anything he saw fit. Then accused told Major Diggs that he would be unable to make the inspections because he had other duties to perform which would prevent him from making "all of them." His battalion surgeon, Captain Ernest Williams, had directed him to check as to malaria control and "pick up the diagnosis" of patients in the hospital. The duties which Major Diggs had given him would have had to be performed approximately three miles and eight miles respectively from the battalion of accused (R. 12-13).

On cross examination accused admitted that Major Diggs had given him a direct order to make "those inspections and to turn in a report on Saturday 10 March;" that Major Diggs had told accused what the consequences of disobedience would be; that accused had said he knew "what would happen" in the case of disobedience; and that accused had not made the inspections or turned in any report (R. 13-14).

5. According to the undisputed evidence the commanding officer of accused gave him a direct order to make certain inspections and submit a report thereon within two days. Accused announced that he would not obey it. He did not make the inspections or report, and after the time for performance had expired again told his commanding officer that he did not intend to obey.

Unless it is palpably illegal, a command of a military superior to a subordinate is presumed to be legal and the burden of proving otherwise devolves upon the defense (Winthrop's *Military Law and Precedents*, 1920 Reprint, pp. 575-576). The expression of an intention to disobey a superior officer's order to do a particular thing at some future time, when such intention is carried into execution, may constitute willful disobedience in violation of the 64th Article of War. The basic criterion is whether the disobedience is such as to show an intentional defiance of authority (MCM, 1928, par. 134b).

In the instant case the order related to military duty and on its face was one which Major Diggs was authorized to give the accused. The legality of the order was not questioned by the defense. The conduct of accused, his brazen and repeated declarations that he would not obey the order, and his persistent refusal to do the things which he had been ordered to do, clearly indicate that his attitude was one of intentional defiance of military authority. His disobedience was willful within the meaning of the 64th Article of War.

The excuses presented by accused to the effect that he had been directed by the battalion surgeon to do other work are not supported by any evidence other than his own testimony. The defense made no attempt to show that the accused could not perform all of the duties assigned to him. The discharge of such duties by the accused may have presented some difficulty and inconvenience but that would not justify his disobedience. He knew or should have known that Major Diggs was his commanding officer and that the latter's order would take precedence over any assignment of other duties by the battalion surgeon. Accused disobeyed the order at his peril.

6. The charge sheet shows that the accused was 27 years of age at the time of the commission of the offense and that he was commissioned a second lieutenant in the Medical Administrative Corps, Army of the United States, on 12 January 1944.

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7. The court was legally constituted. No errors 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 of guilty and the sentence as confirmed.

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

William P. Drummond, Judge Advocate.
Major, J.A.G.D.

James V. Robinson, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific, A.P.O. 75, 20 July 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, A.P.O. 500.

1. In the case of Second Lieutenant Arthur O. Henderson, 02049809, Medical Detachment, 25th Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM P-101).

Ernest H. Burt
ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMC 6, USAFP, 26 July 1945.)

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3. The evidence for the prosecution:

On 22 February 1945 the accused and the deceased, Private Judge Hill, both members of the 2021st Quartermaster Truck Company, APO 72, were to go on guard duty during the evening. Sometime between 1800 and 1900 hours, Acting First Sergeant Arthur A. Hardy tried to locate them (R. 11). He drove a weapons carrier to Angeles and found the accused in a "little tavern" (R. 12). When Sergeant Hardy informed him that he was supposed to go on guard, accused responded, "I am too tired. I am not going on guard" (R. 11). Nevertheless he came out of the tavern and jumped onto the rear of the weapons carrier as it was moving away (R. 13). Sergeant Hardy asked him if he knew "where Judge Hill was" (R. 13). The accused directed him to a place and as they drove up "Weeks jumps out and said 'I will go get him'" (R. 14). When neither the accused nor Private Judge Hill came out, Sergeant Hardy went into the building and told Hill that he was on guard duty (R. 14). Hill said he was just getting ready to leave. The three of them came out and boarded the weapons carrier (R. 14). Sergeant Hardy entered the driver's seat, accused and Private Hill entered the rear part, "one on the right and one on the left side" (R. 14). Within a short time both of them got into an argument (R. 15). Private Hill had charged the accused with having disclosed his whereabouts (R. 23).

En route to camp, the vehicle made two stops prior to the time of the shooting--the first to pick up some soldiers who were going in the same direction and the second to let one white soldier off (R. 14-15). As the truck proceeded from the point where the white soldier was let off to the area of the 870th Engineer Aviation Battalion, which is opposite the area of the 2021st Quartermaster Truck Company, the argument between the accused and the deceased became more vehement (R. 18, 30). When the vehicle came to a stop at the 870th Engineer Aviation Battalion area, Sergeant Hardy turned part way around, at which time he noticed that both the accused and Private Judge Hill were pointing their carbines at each other (R. 16). They were standing on opposite sides of the weapons carrier and each of them "had one knee on the bench, one on the right side and one on the left." (R.17-18). In addition to pointing their carbines directly at one another, each continued to make remarks such as, "You are too scared to shoot" (R. 30), and to call each other vile names (R. 16). Sergeant Hardy told them to stop the argument and to take the clips out of their respective carbines (R. 16). Before he had turned completely forward again, a shot was heard from the accused's carbine (R. 17). The bullet went "right off the edge of the cab of the truck and down to the running board" (R. 17).

Sergeant Hardy immediately slipped out of the truck on his left side and stooped down (R. 19). As he raised his head to see what was happening he heard and saw rapid fire coming from the accused's

carbine which was aimed at Hill (R. 19). He estimated that between six and seven shots were fired (R. 19). At the same time Private Judge Hill "fell right over the side of the weapons carrier" (R. 19). None of the shots came from any direction other than "the direction of Weeks" (R. 19). After the body fell, Sergeant Hardy tried to get around the vehicle in order to summon an officer or a doctor. A crowd was gathering from the 870th Engineers. He happened to look over his shoulder and noticed that the accused was following him, "with his gun waist high, pointed in the direction" Hardy was walking (R. 20). The accused "got lost in the crowd" and apparently returned to his tent (R. 22).

A medical officer of the 870th Engineers, who heard the shots at 2135 hours, arrived on the scene approximately six or seven minutes later (R. 7). At that time Private Judge Hill was " * * * moaning at intermittent intervals * * * and was in an unconscious state, a state of shock" (R. 7). Morphine tartrate was administered followed by blood plasma. Hill expired at 2155 hours. The cause of death was the filling up of the chest cavity with blood resulting from internal bleeding due to gunshot wounds in the chest (R. 9).

An examination of the carbines revealed that the one that was assigned to the deceased and which was alongside of him when he fell out of the truck, had not been fired. It was rusty and dirty. There were no shells in the clip (R. 21). Examination of the carbine possessed by the accused, which was found in his tent alongside his bed, revealed that it had been fired recently (R. 39, 41, 42).

About a half hour after the occurrence the accused was found in his tent asleep or pretending to be asleep (R. 26). When aroused he professed that he knew nothing of the occurrence (R. 22-23). The military police requested him to get his clothes, whereupon he asked "What for?" (R. 22). Sergeant Hardy, who was present, remarked, "Weeks, don't you know you shot Judge Hill?" The accused responded, "No, I haven't shot Judge Hill. I haven't seen him" (R. 22-23).

Sergeant Hardy was recalled as a witness for the court. A member asked him, "Did you, yourself, see Private Weeks shoot the carbine at Private Hill?" to which Hardy answered, "Yes, sir" (R. 47).

4. The defense offered no evidence. The accused elected to remain silent.

5. Upon all the evidence the court was warranted in finding that the accused committed the offense charged. The evidence shows that accused, unlawfully, that is to say, without legal justification or excuse, intentionally shot and killed Private Hill. "Manslaughter is

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unlawful homicide without malice aforethought and is either voluntary or involuntary. Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation" (MCM, 1928, par. 149a).

Assuming that the accused was provoked to sudden passion by taunts and insulting remarks, and by having a gun pointed at him by Judge Hill, nevertheless he was not warranted in taking Hill's life (2 Bull. JAG, p. 340).

The defense did not contend that the accused acted in self-defense or that he had reasonable ground to believe that he was in imminent danger. Had such an issue been raised it would have been for the court to say whether the homicide was unlawful (2 Bull. JAG, p. 428; MCM, 1928, par. 148a).

6. According to the charge sheet, the accused was 26 years of age and was inducted at Philadelphia, Pennsylvania on 14 May 1942.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized for the offense of voluntary manslaughter under the 42nd Article of War by Section 22-2405 of the District of Columbia Code.

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Adrian P. Drummond, Judge Advocate.
Major, J.A.G.D.

Joseph H. Robinson, Judge Advocate.
Major, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
With the United States Army Forces
In the Pacific

21 July 1945

Board of Review
CM P-103

UNITED STATES)

v.)

Second Lieutenant HAROLD R.
CHRISTMAN (O-1177735), Battery)
A, 163rd Field Artillery Bat-)
talion.)

Trial by G.C.M., convened at
APO 38, 10 May 1945. Dismissal.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
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 75th Article of War.

Specification: In that Second Lieutenant Harold R. Christman, 163d Field Artillery Battalion, being present with his artillery forward observation party while it was engaged with the enemy, did at APO #38, on or about 2 May 1945, shamefully abandon the said forward observation party and seek safety in the rear.

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

Specification: In that Second Lieutenant Harold R. Christman, 163d Field Artillery Battalion, having received a lawful order from Lieutenant Colonel Doyle C. Skelton, his superior officer, to remain with Company C, 152nd Infantry, as artillery forward observer, an organization then in combat or expecting combat, did at APO 38, on or about 2 May 1945, willfully disobey the same.

The accused pleaded guilty to, and was found guilty of, the specifications and the charges and was sentenced to dismissal. The reviewing authority approved the sentence and the confirming authority confirmed it and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution:

On 2 May 1945 about 1330 hours the organization of accused, the 163rd Field Artillery Battalion, was in direct support of the 152nd Infantry Regiment which was engaged with the enemy in a battle then in progress. "C" Company of the regiment had been "pretty badly cut up." Lieutenant Colonel Doyle C. Skelton, commanding officer of the field artillery battalion, was at an observation post directing the fire called for by the infantry (R. 6). At his direction accused reported to the observation post. Colonel Skelton told him to go up as forward observer for "C" Company to relieve another officer who had been wounded, and to report to "C" Company's commander. The accused joined the forward observation party, consisting of four enlisted men, and reported to the commander of "C" Company. The infantry company commander told accused to "stay right there until he came back" (R. 12). Accused, instead of doing as he was told, called Colonel Skelton and stated to him that he was leaving the forward party and returning. Colonel Skelton replied, "Listen Christman, I am giving you a direct order, you are forward observer with 'C' Company, and you are to remain there." Accused called back and said "I was forward observer for 'C' Company, out." (R. 7, 9, 10, 12, 13). The accused stayed on the hill with the forward party for about an hour and left without being relieved by anyone. At that time enemy shells were falling within the area. For about two hours after the accused departed the forward observation party continued to remain at their post (R. 14).

4. The evidence for the defense:

The accused testified that the first time he "saw combat" was April 25th, 1945. After a three-day rest he was sent back to the same position where enemy mortar shells were falling in his immediate area. The next day he was at an observation post where the only cover available was a shallow trench, and Kunai grass fifteen to twenty inches high, and that he had difficulty adjusting fire on a machine gun nest. He was pretty well shaken up by the time he was relieved and thought he would get at least a three-day rest before going forward again. He slept very little that night because there was a gun about fifty yards from his bed. When his battalion commander called him on 2 May to report to the post which he later abandoned, he "had a notion to ask for a relief and not to be sent up," but decided to try it again.

Accused further testified, "I got my orders from Colonel Skelton, and his last words were to keep down." On the way forward accused saw several casualties. He concluded his testimony with the following remark: "If you have never actually experienced it, you can't imagine just what it is like to be under Japanese mortar fire. Some men have nerve enough to take it, but the only thing I can say is that I don't have nerve enough to stand it." (R. 16).

5. The plea of guilty, the evidence for the prosecution and the testimony of accused establish beyond any question of a doubt that the accused, while under fire by the enemy, shamefully abandoned his post at a time when a battle with the enemy was in progress. Such conduct is a violation of Article of War 75 (MCM, 1928, par. 141a; Winthrop's Military Law and Precedents, 2nd Ed., 1920 Reprint, pp. 622-628; Dig. Op. JAG, 1912-40, p. 303).

It likewise appears that the accused willfully disobeyed the simple, direct and lawful order of his superior officer to remain with "C" Company as artillery forward observer, in violation of Article of War 64.

6. Although the court did not explain to the accused the meaning and effect of his plea of guilty, by certificate, dated 30 May 1945, it appears that his defense counsel fully informed him of its meaning and effect, and that the accused informed defense counsel that he nevertheless wished to plead guilty. The error, if it may be considered as such, may be disregarded as harmless under Article of War 37.

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

Samuel M. Driven, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

William P. Drummond, Judge Advocate.
Major, J.A.G.D.

Joseph S. Robinson, Judge Advocate.
Major, J.A.G.D.

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1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific, A.P.O. 75, 21 July 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, A.P.O. 500.

1. In the case of Second Lieutenant Harold R. Christman (O-1177735), Battery A, 163rd 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 50¹, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM P-103).


ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered/ executed. GCMO 7, USAFP, 31 July 1945.)

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE UNITED STATES ARMY FORCES IN THE PACIFIC

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Board of Review

17 July 1945

CM P-104

UNITED STATES

v.

Technician Fifth Grade OSWALD
L. SINCLAIR (33752388), 3716th
Quartermaster Truck Company
(Heavy), APO 75.

} Trial by G.C.M., convened at APO
75, 12 May 1945. Dishonorable
discharge, total forfeitures and
confinement at hard labor for
life. United States Penitentiary,
McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
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 Oswald L. Sinclair, 3716th Quartermaster Truck Company (Heavy) did, at APO 70, on or about 18 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fifth Grade Leroy Wilson, a human being, by shooting him with a carbine, M1.

He pleaded not guilty to and was found guilty of the specification and charge. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution is as follows:

On 18 March 1945 between 2230 and 2300 hours, accused, a member of the 3716th Quartermaster Truck Company, entered the mess hall of that organization and, after asking whether another soldier had his flashlight, approached Technician Fifth Grade Leroy Wilson, the company mail orderly (R. 7, 8, 11). Accused asked Wilson why he was not getting his mail. He repeated the question once or twice, but Wilson did not answer. Accused pulled back the operating slide of the carbine which he was carrying and said, "You aren't going to tell anything, huh." Wilson made no reply, accused put his carbine "back on his shoulder at sling arms" and Wilson left the mess hall by the north door. A short time later accused went out by the south door (R. 12, 18).

Wilson returned to the mess hall and stood in front of the "counter" where mess was served. Two men were standing behind it and there was one and possibly two other soldiers in the room, which was lighted by a Coleman lantern (R. 7, 12, 14). Five or ten minutes later a shot, which appeared to come from the vicinity of the south door, was fired and a voice at the same location said, "I mean it." About thirteen additional shots were fired. One witness thought the voice sounded like the voice of accused and another witness testified that it was the voice of accused (R. 12, 13, 18, 20). After the firing had ceased Wilson was lying on the floor on his back bleeding profusely. "The blood was running out of his neck." He was picked up and taken to the hospital (R. 8, 13, 21).

When First Lieutenant Gene W. Buchanan heard the shots he went to the mess hall to investigate. He assembled all of the men of the company there and asked them "who shot the man." After the question had been asked, accused entered the room through the south door and said, "I shot him." Lieutenant Buchanan "asked him why" and accused replied, "I just shot him." He then mentioned that he had won some money and was going to get some "pom-pom," and mumbled something which Buchanan could not understand (R. 25, 26, 28). Buchanan asked accused where his rifle was and accused said he thought it was in his tent and offered to get it. Buchanan "sent Corporal Frank Curry after the rifle and took the rifle" (a carbine, M1). The barrel of the gun was warm and when Buchanan subsequently opened the chamber he found that it contained a "live round" and that the weapon appeared to have been fired recently (R. 26). Accused had been drinking and his breath smelled of alcohol on the night of the shooting (R. 9, 15, 31).

On cross examination Lieutenant Buchanan testified that accused had always been an efficient and obedient soldier (R. 26, 27). He also testified that in March 1944 accused had "passed out" for no apparent reason and upon awakening seemed dazed and had a "funny look" in his eyes; that on a subsequent occasion while on a hike accused had "a sort of veiled look" and "spoke sort of thick" and was directed to fall out; and that at still another time when Lieutenant Buchanan had asked accused something about his truck the latter gave an answer which was in no way responsive to the question (R. 27-29).

On re-direct examination Lieutenant Buchanan testified that there were holes in the mess hall "indicating that rounds were fired from outside into it" (R. 33).

It was stipulated between the prosecution and the defense, with the consent of the accused, that if Major Ralph C. Peterson, Medical Corps, were present he would testify that on the night of 18 March 1945 he examined the deceased, Leroy Wilson, and found that a bullet had passed through the 6th and 7th cervical vertabrae, "practically severing completely the spinal cord at the level of the 6th cervical, and that this man died as a result of this wound" (R. 34).

4. The accused testified that he was born in Kingston, Jamaica, was 35 years old and married. He was inducted into the service in February 1944. He and Tec 5 Wilson had not had any quarrel or argument prior to 18 March 1945. Accused left the company area about noon that day and began drinking "Napa." He started back for "chow" but met an officer, and at the latter's request drove him to a place where he could "pick up a jeep." Accused and a companion then drank wine "in the evening." Accused drank about two bottles, took a drink offered by "some white boys" and did not know how many drinks he subsequently bought. The last thing he remembered was sitting on the porch of a Filipino house, just when it became dark enough to use automobile lights. He remembered nothing more until he awoke in a cell the next morning (R. 39-40, 43). In the fall of 1941 accused fell from a tree, broke four ribs, injured his head, and was unconscious until after he had been taken to a hospital (R. 41).

5. The evidence shows that on the night of 18 March 1945 accused had an altercation in the company mess hall with Tec 5 Leroy Wilson, the mail orderly, in the course of which accused pulled back the operating slide of the M1 carbine which he was carrying. Accused left the hall and a short time later a number of shots were fired into the room from the outside and at a point near the door through which accused had departed. After the first shot a voice, identified by a witness as that of accused, said, "I mean it." One of the bullets struck Wilson who was standing in the mess hall and passed through his neck virtually severing the spinal cord. He subsequently died as a result of the wound. After First Lieutenant Gene W. Buchanan, who had heard the firing, assembled the men of the company in the mess hall, accused entered and unsolicited and without prior questioning, spontaneously said, "I shot him."

In his testimony accused claimed that he had been drinking heavily during the day and evening of 18 March and that he remembered nothing from some time prior to the shooting until he awoke in a cell the next morning. However, since the conduct of the accused prior to the fatal wounding of

Wilson and the character of his conversation with Wilson and others clearly indicated that he was not intoxicated to the degree claimed, the question whether he was so drunk as to be incapable of entertaining malice, an essential element of murder, was one of fact for the court.

Murder has been defined as the unlawful killing of a human being with malice aforethought (MCM, 1928, par. 148a).

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor actual intent to take his life, or even to take anyone's life. 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. (Clark)."

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, * * * knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person * * * ." (MCM, 1928, par. 148a).

In the present case malice reasonably may be inferred from the fact that accused, after an altercation with Wilson, intentionally and without justification, fired several shots from an M1 carbine, an instrument likely to cause death or serious bodily harm, into the mess hall where the latter was standing (MCM, 1928, par. 112a; 1 Wharton's Crim. Law, 12th Ed., par. 519). Under the well known standards outlined above the action of accused in shooting and thereby causing the death of Wilson was murder.

6. Lieutenant Buchanan testified that when he examined the carbine of accused, after the shooting, the barrel was still warm, there was a round of live ammunition in the chamber and the piece appeared to have been fired recently. The carbine was not identified as that of the accused by any competent evidence. Buchanan testified that he "took the rifle [carbine]" after he had sent Corporal Frank Curry to bring it to him from the tent of accused. Curry was not called as a witness and it does not otherwise appear where he procured the carbine or that it was one which had been issued to accused. The testimony of Lieutenant Buchanan as to the condition of the weapon at the time he examined it must therefore be regarded as inadmissible. However, inasmuch as the accused unequivocally admitted that he shot Wilson and there is no evidence in the record to the contrary, the admission of the testimony as to the condition of the carbine did not prejudice any substantial rights of the accused.

7. The charge sheet shows that the accused was 33½ years of age at the time of the commission of the offense and that he was inducted on 11 January 1944.

8. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized for the offense of murder under the 42nd Article of War by Section 22-2404 of the District of Columbia Code.

Samuel M. Drury Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Addison P. Drummond Judge Advocate.
Major, J.A.G.D.

Frederic S. Robinson Judge Advocate.
Major, J.A.G.D.

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3. The evidence for the prosecution:

On 9 February 1945, accused and Private Daniel Roberson whom he had met ten or fifteen minutes earlier, went to the home of a Filipino family by the name of Cervantes at the suggestion of accused (R. 15). Both the accused and Roberson were armed with carbines (R. 16). When they entered the house they found Private Jackie L. Smith, a visitor; Martina Cervantes, a twelve year old girl; Eladia Sanchez and several other members of the household present. Accused said that he was an "MP" and that he was looking for another soldier by the name of Key (R. 5). He started using profane language such as "God damn it" (R. 5, 11) whereupon Smith asked him not to use profanity as the Cervantes were "very nice people." Accused became angry, "wanted" to fight Smith (R. 5), and said to him, "Don't get out of your seat" (R. 16). Accused told Smith, "you won't leave the house alive" (Roberson testified that he did not hear that remark.) (R. 6, 21). Roberson told the accused, "Don't come in here and start no trouble. You see, you got the girl crying there." Accused replied, "She's crying, is she?" (R. 16).

The accused and Roberson left the house and started walking away. When they had gone about thirty feet, accused suddenly "whirled around" and aimed his carbine at the house. Roberson "grabbed" the weapon whereupon the accused said, "Look out, there is a bullet in the chamber. You will get shot." Roberson released his hold on the gun, turned around with his back to the accused and started to go away when he heard a shot fired (R. 16, 17). At that time he was about fifteen feet from the accused. It was dark but Roberson was "Sure" the house was visible from the spot where the accused was standing (R. 20). Immediately after the shot was fired accused told Roberson to get in the truck "and let's go." They got into the truck and Roberson drove it away. After they had proceeded about a mile and a half accused took the wheel and drove the truck "almost to the beach" (R. 17).

At the time of the incidents related above, accused had been drinking but was not drunk (R. 6, 16).

According to the testimony of Private Smith, after the accused had walked away from the Cervantes house and gone about five yards, Smith, who was sitting at an open window with Martina Cervantes, Eladia Sanchez and a third Filipino girl, heard a "rifle click." He turned around and a "shot went off." He had his "arms" on Martina's shoulder. A bullet grazed his finger, went through Martina's body, entering her "left chest" and emerging "in the right chest." The bullet then struck Eladia Sanchez and passed through her neck. Both girls fell. Martina was bleeding (R. 6). Martina was taken to a hospital but died "on arrival" as a result of the gunshot wound in her chest (R. 6, 21, Ex. A).

4. The defense offered no evidence. The accused made an unsworn statement substantially as follows: On "that night" in February Roberson gave accused a ride into town. As they were "riding along" Roberson told accused that he (Roberson) was going to a Filipino home. Accused had never been there before. They entered the house but accused did not remember that he then inquired about a soldier by the name of "Keys." Someone told him that he did not know whether "Keys" was there. Accused and his companion then left. As he was leaving accused had his rifle on his left shoulder. He concluded his statement with the following remark: "I remembered he grabbed me and the rifle and he tussled with me and as he turned me loose the rifle went off" (R. 22).

5. Although no one saw the fatal shot fired, the facts and circumstances compel the conclusion that it was fired by the accused. In his unsworn statement accused virtually admitted as much although he said that after a struggle with Roberson over the gun, it was discharged "as he turned me loose."

Murder is the killing of a human being with malice aforethought and without legal justification or excuse. Malice does not necessarily mean hatred or personal ill will toward the person killed nor an actual intent to take his life, but may mean that preceding or co-existing with the act or omission by which death is caused, the accused entertained an intention to cause the death of, or grievous bodily harm to, any person, whether or not such person is the one actually killed (MCM, 1928, par. 148a).

In the present case it is a reasonable inference from the evidence that accused is guilty of murder under the foregoing definition. Manifestly he inadvertently shot and killed Martina Cervantes when he aimed and fired in Smith's direction with the intention of killing him. Such an intention is evidenced by the fact that immediately preceding the shooting he had had a quarrel with Smith, by his telling Smith that the latter would not leave the house alive, and by his aiming and firing in Smith's direction a carbine, a weapon likely to inflict death or serious bodily harm.

The unsupported unsworn statement of accused to the effect that the gun was accidentally discharged was not evidence and was entitled only to such consideration as the court deemed warranted (MCM, 1928, par. 76).

Although there is evidence that the accused had been drinking, the court was justified under all of the circumstances in finding that he had the mental capacity to entertain the requisite specific intent (MCM, 1928, par. 126). He resented Smith's remarks, cautioned his companion that the carbine was loaded and drove an automobile, all of which tended to show that he was not so intoxicated that he did not know what he was doing.

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A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92.

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

Samuel M. Diver Judge Advocate.
Lieutenant Colonel, J.A.G.D.,

Charles P. Hammond Judge Advocate.
Major, J.A.G.D.

James F. Roberts Judge Advocate,
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General,
A.P.O. 75, 29 July 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, A.P.O. 500.

1. In the case of Private First Class Harvey W. Nichols (33372642), 3448th Quartermaster Truck Company, 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 the execution of the sentence.

2. It is recommended that the death sentence in this case be commuted to life imprisonment. "The evidence reveals that at the time the murder was committed the accused was under the influence of intoxicating liquor. The circumstances appertaining to the homicide indicate that the principle applicable in determining the appropriate sentence in this case is as formulated by the late President in his commutation actions on death sentences for murder committed under the influence of intoxicants. Inclosed is statistical data revealing the Presidential policy referred to. Equality of justice should not be different in this theater in this type of case, in the absence of extraordinary circumstances demanding extraordinary corrective measures, than in the United States." The following quotation of War Department policy is pertinent:

"3. a. Marked disparity in general court-martial sentences similar in nature, unless justified by factors individually peculiar, is highly undesirable. Such disparity within a single judicial system tends to discredit it and is not to be permitted, unless its justification is wholly clear. Unduly severe sentences not only fail to accomplish the desired deterrent effect and accordingly serve no useful purpose, but subject those charged with the administration of military justice to severe public criticism." (AG 250.4(16 May 45) OB-S-USW-M, 18 May 1945).

The instant murder arose out of a sudden quarrel between the accused and another soldier. The record contains no evidence of any prior bad feeling on the part of the accused towards the intended victim, the other soldier; there is no evidence of any prior relationship between the two or of a prior motive for desiring to kill the intended victim. The inclosed statistical data reveals a large number of cases of this character wherein the determination was made that the appropriate sentence is life imprisonment rather than death.

"In further justice to the accused the record of trial and its accompanying papers reveal that his defense constituted one of the poorest defense services rendered an accused for murder that has come to the attention of this office. It did not introduce a single witness and, other than insufficient cross examination of the prosecution's witnesses and acquiescing in the making of an unsworn statement by the accused, very little effort was made to save his life by establishing in evidence the extent of his insobriety, a most important aspect of the case."

3. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM P-105).



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

Inclosure:

Statistical data.

(Sentence ordered executed. GCMO 9, USAFP, 4 Aug 1945.)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
with the United States Army Forces
in the Pacific

(343)

Board of Review
CM P-106

8 August 1945.

UNITED STATES)

v.)

Private BRADLEY WALTERS, JR.
(36791367), 4th Air Cargo
Resupply Squadron, 21st Air
Service Group (Air Freight
Forwarding).)

Trial by G.C.M., convened
at Headquarters Fifth Air
Force, APO 710, 20 April
1945. Death.

HOLDING by the BOARD OF REVIEW
ROBERTS, MURPHY, and CLEMENTS,
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 Bradley Walters Jr., 4th Air Cargo Resupply Squadron, 21st Air Service Group (Air Freight Forwarding) did, at APO 75, on or about 26 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with pre-meditation kill one Private Leroy Maynard, 1129th Engineers Combat Group, Headquarters Company, a human being by shooting him with a rifle, United States carbine 30 calibre, serial number 2910614.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and the confirming authority confirmed it and forwarded the record of trial for action under Article of War 50½.

(344)

3. The evidence reveals that on the evening of 25 February 1945, Privates Bradley Walters, Jr. (accused), J. B. Camp, Knight and Jackson and several Filipinos, among whom was one Demetrio Maypayo, drove in a six by six truck from the 4th Air Cargo Resupply Squadron to Maypayo's home in the city of Manila where they unloaded some rice. The truck had a canvas top over the cab and an open body. The soldiers asked Maypayo where there were "pom-pom" girls, and, under his direction, drove to another house (R. 18). Upon arriving the Filipino went into the house and two white soldiers, Private Leroy Maynard and Private First Class Bert P. Sherrill, Jr., and a girl came out. Maynard told them that "the girls wasn't for business" and the "best thing" they could do was to leave (R. 20, 60, 90). Camp testified "The other one /Sherrill/ said 'Wait until I come back' so I pulled off then and go back to the Filipino's house" (R. 20). Sherrill, however, testified "So the driver he had a rifle. He had the barrel aimed like he had it pointed towards Maynard. Maynard reaches over and grabs the rifle and shoves it back and said 'Don't try to pull anything like that!'" (R. 90). He further testified that he then ran back to the house to secure his rifle but when he again came out the truck had gone. Camp who was driving the truck denied that the incident related by Sherrill had occurred.

Maypayo testified that after leaving the girls' house Walters leaned from the back of the truck into the cab and said "Let us go back. I am going to shoot that white American!" (R. 61). Camp denied that such event had transpired (R. 153).

After they returned to Maypayo's house Walters asked Camp if he was going back and if he was afraid and Camp answered in the negative. A Filipino guerrilla then said that he would "get some girls" for them and Camp then drove the truck to the house they had previously left with Maypayo sitting in the cab beside him and Walters and about four Filipinos in the back. Both Camp and Walters had their carbines with them, the former's being beside him in the cab. The truck was again parked near the house. Maynard came out and said to Camp, "I thought I told you not to come back here! * * * These girls were not for you guys. You better leave now." (R. 23). Maynard, standing alongside the truck, grabbed the barrel of Camp's carbine and he and Camp, who remained seated, endeavored to secure its possession. Within a "couple of seconds" a shot was fired from behind the cab (R. 46, 63) and Maynard fell backwards to the ground (R. 25) dead from a bullet that had penetrated the back of his head (occipital region) and had come out at a place below his right eye (maxillary region) (R. 11). Camp testified that his gun had not been discharged. Immediately after Maynard fell Camp looked to the rear and saw Walters, carrying his gun, and some Filipinos running up the road. Camp got out of the truck, heard two or three bullets pass by him, and ran away.

Maypayo testified that immediately after he heard the first shot he ran about four meters from the truck and "hid in the stall of a house" from which place he saw Walters, standing in the truck, shoot twice at Maynard's prostrate body and then run away. The Filipino then ran to the corner and called an MP whom he saw standing there.

Sherrill testified that about 30 minutes after the truck had left the house where he and Maynard were it returned and Maynard went outside. Maynard called "Come on, Sherrill!". Sherrill grabbed his rifle, ran to the corner and saw a flash from a gun being fired from "the left hand side of the truck near the cab * * *.in the truck somewhere near the cab" (R. 92) and then his companion fell over backwards into the ditch. He saw about four or five men run from the truck and he fired three or four shots into the cab of the truck. Sherrill testified that he heard no shots other than the one from the truck and those which he fired (R. 93).

Camp and accused after running away from the scene of the shooting met at Maypayo's house. There a Filipino asked accused "why did he kill the American soldier" and accused answered that "he killed him because he was trying to kill * * * Camp" (R. 27, 157).

Harry J. Painter, Special Agent, Criminal Investigation Section 35, Manila, saw the accused in Bilibid Prison two days later, advised him of his rights and questioned him about the shooting. Accused denied that he shot deceased (R. 107) but stated that he saw a gun flash "in the right of the truck". He did not know who had done the firing (R. 113). After about two hours accused said that he would make a statement and was taken to the office of Captain Merle R. Miller, CMP. The Captain again explained Article of War 24 to him and accused dictated a statement which he signed. The defense objected to the admission of the statement in evidence on the ground that it had been obtained under duress. In proof thereof accused testified that Mr. Painter slapped him in the face several times and said that he (accused) "would be dead in less than a week if * * * he didn't talk" (R. 144, 146). Accused further testified that he "merely took him Mr. Painter at his word" (R. 147) and, because of the threat, made the statement (R. 146). Camp testified that he was present during a portion of the time that Mr. Painter was interrogating accused and saw him twice slap accused in the face (R. 133). Mr. Painter and Captain Miller were recalled and each denied that accused had been slapped or in any manner threatened (R. 108, 124, 125).

The court overruled the objection and admitted accused's statement in evidence. In substance, he said that when they returned to the house where they had first stopped a Filipino said that he would get the girls for them, adding "if we want to shoot it out with carbines or pistols we will". He told the Filipino that he did not want to get killed but that he would go. Returning to the girls' house he heard Maynard say "didn't I tell you to stay away from down here. * * * you niggers know this is not for you". He then saw Camp and Maynard tusselling over the

gun and someone hollered "'Don't shoot'", and Camp said "'Someone shoot him.' 'He is trying to kill me.'" He (Walters) then went to the left side of the truck, fired his gun once, and hearing another shot jumped from the truck and eventually returned to Mr. Maypayo's house. Upon being there asked "what was the trouble" he stated that Camp and a white fellow got in an argument and that he thought the white fellow "possibly" intended to kill Camp so fired at him and thought he had hit him (Pros. Ex. 2).

Camp, upon being recalled, testified that during his tussle with Maynard over the gun he did not call out that the white soldier was trying to kill him nor did he say "'Someone shoot him.' 'He is trying to kill me.'" (R. 156).

The accused elected to remain silent.

4. Accused was charged with, and found guilty of, the murder of Private Leroy Maynard.

The evidence establishes that accused and Private Camp asked a Filipino to direct them to a house where they could secure "pom-pom" girls. They drove there and Maynard came out and told them that they should leave as the girls were not "for business". They left, but shortly returned. Camp, who was driving, had a carbine beside him and accused who was in the back of the truck was armed with a similar weapon. Maynard again went to the truck and told Camp to leave. He and Camp, who was then sitting in the cab of the truck, each endeavored to gain possession of Camp's carbine. A single shot was fired from the body of the truck immediately behind the cab and Maynard fell to the ground dead, a bullet having entered the back of his head. The carbine over which Maynard and Camp were tusselling had not been fired. Both Camp and accused ran away. Later, when asked "why did he kill the American soldier" accused answered "because he was trying to kill" Camp.

An admission that he shot at deceased and thought that he had hit him was contained in a statement given by accused two days after the shooting, the introduction in evidence of which was objected to by the defense. The statement, not being an acknowledgment in express terms by accused of guilt of the crime charged, was an admission against interest (2 Wharton, Crim. Evid., 11th Ed., sec. 580). By admitting it into evidence the court concluded that accused was not acting under such duress when making the statement that it was likely to be false. From the evidence in the record it cannot be said that the court erred in so doing (CM 210693, Alexander, 9 B.R. 331, 341; CM 239731, Buck et al, 25 B.R. 257; CM POA 206, Clark; MCM, 1928, par. 114b). It is further noted that the matters admitted by accused in his statement were largely cumulative of evidence otherwise before the court.

From all of the testimony the court properly could conclude that

the accused fired the shot which caused Maynard's death. Although accused did not take the stand and explain his actions, immediately after the shooting he stated that he had shot Maynard in order to prevent the latter from taking Camp's life.

To justify a homicide on the ground that it was in prevention of a felony attempted by force or surprise the circumstances must be such as to excite the fears of a reasonable man that a felony was in fact about to be committed and that it was necessary to kill to prevent the crime threatened. A mere assault or beating, not of a character to imperil life, cannot excuse or justify a homicide (1 Wharton, Crim. Law, sec. 613). It has further been held -

"[The] Burden of proof is on accused to show that he acted in good faith, and after the use of all other reasonable means within his power to otherwise prevent the crime, and was without fault" (Mitchell v. State, 22 Ga. 211; sec. 627, Wharton, supra).

Whether, in the instant case, Maynard was attempting by force or surprise to commit a felony, namely to kill Camp, and whether accused had reasonable ground to believe that all reasonable means within his power other than shooting Maynard were ineffective to prevent Camp's death were questions for the determination of the court-martial as the triers of fact.

There was evidence that Camp did not "call out" that Maynard was shooting or trying to kill him; when shot Maynard did not have possession of Camp's carbine and from nothing that appears in the record can the inference be drawn that if he had secured its possession he would have used it in shooting Camp. It further appears from the evidence that upon leaving the scene of the first encounter the accused may have said "I am going to shoot that white American" and that when a Filipino subsequently said "if we want to shoot it out with carbines and pistols we will" the accused agreed to return. He also asked Camp if he (Camp) was afraid to go back. Accused's actions were indicative of his ill-will toward deceased and furnish substantial evidence from which the court could determine that the homicide was unlawful and not justifiable, and it could further conclude that the act was committed with malice aforethought. Malice aforethought -

"* * * is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done mallo animo, where the fact has been attended with such circumstances as carry in them the

plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden." (CM 224951, Thompson, 14 B.R. 219, 225).

It follows that there is substantial evidence in the record to sustain the findings of the court that the accused was guilty of murder which is the unlawful killing of a human being with malice aforethought (MCM, 1928, par. 148a).

A sentence of death or of life imprisonment is mandatory under Article of War 92 upon conviction of murder.

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

Leahy, Judge Advocate.
Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson S. Clements, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

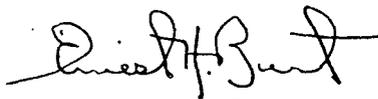
Army Service Forces, Branch Office of The Judge Advocate General,
A.P.O. 75, 9 August 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, A.P.O. 500

1. In the case of Private Bradley Walters, Jr., (36791367), 4th Air Cargo Resupply Squadron, 21st Air Service Group (Air Freight Forwarding), 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 the execution of the sentence.

2. When copies of the published order in this case are forwarded, to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

P-106).



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 14, USAFP, 14 Aug 1945.)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
With the United States Army Forces
In the Pacific

25 July 1945

Board of Review
CM P-112

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

v.)

Second Lieutenant WILLIAM J.)
COLEPAUGH (O-2050203), MAC,)
Shipment Number OM-442 II(a).)

Trial by G.C.M., convened at
APO 75, 21 May 1945. Dismissal.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
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 2d. Lieutenant William J. Colepaugh, Medical Administrative Corps, Shipment Number OM-442-II(a), did, on board the USS General John Pope, at sea, from about 30 March 1945 to about 16 April 1945, wrongfully wear as part of his uniform the insignia of a 1st. Lieutenant.

Specification 2: In that 2d. Lieutenant William J. Colepaugh, Medical Administrative Corps, Shipment Number OM-442-II(a), did, on board the USS General John Pope, at sea, from about 30 March 1945 to about 16 April 1945, wrongfully, and with intent to deceive his superior officers, assume and use the fictitious name of Lieutenant Burke.

Specification 3: In that 2d. Lieutenant William J. Colepaugh, Medical Administrative Corps, Shipment Number OM-442-II(a), did, on board the USS General John Pope, at sea, from about 30 March 1945 to about 16 April 1945, wrongfully, falsely, and with intent to deceive his superior officers, represent himself to be an officer of the Medical Corps and as such did assume and perform the functions and duties of an officer of the Medical Corps in the sick bay and forward battle dressing station aboard said ship.

The accused pleaded not guilty to, but was found guilty of all specifications and the charge, and was sentenced to dismissal and total forfeitures. The reviewing authority approved only so much of the sentence as provides for dismissal. The confirming authority confirmed the sentence as approved and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

On 26 March 1945 the accused, an officer in the Medical Administrative Corps, left the United States aboard the USS General John Pope. A few days later, on or about 30 March 1945, the accused was seen standing near the medical station aboard the vessel, wearing a first lieutenant's bar and a Medical Corps insignia (Ex. A). Because certain Medical Corps officers who were thought to be aboard the ship had not reported, Lieutenant Anderson, a naval medical officer, approached the accused and said, "Are you the other medico we have been looking for?" to which the accused replied, "I guess I am the one" (Ex. A). When asked his name accused replied, "Burke" (Ex. A). Accused and Lieutenant Anderson went to the office of Commander Howard Dennee (Ex. A). Lieutenant Anderson introduced accused as "Doctor Burke, our missing Medico" (Ex. B). Commander Dennee, addressing the accused, said, "Where have you been, we have been looking for you," to which the accused replied, "I have been hiding^{out} because I knew you would put me to work" (Ex. B). Commander Dennee then told accused that he was detailing him to take over the Forward Battle Station and also to perform other duties of a medical officer aboard the ship (Ex. B).

Under his pseudo name, rank and branch of service, accused entered upon his new duties. He held sick call every morning, performing the duties of a medical officer (Ex. G); signed his name upon the clinical record as "Burke" (Ex. H); was called "Burke" by everyone with whom he came in contact (Exs. A-I); reported to Commander Dennee almost every day; and at no time did he assert that his name was not Burke (Ex. C).

This situation continued until approximately April 15th, on which day First Lieutenant Lloyd E. Johnson, Medical Administrative Corps, who knew the accused from Camp Beale, and had the same shipment number as accused, overheard a conversation between accused and Captain J. H. Hill (R. 7, Ex. D). Captain Hill, a Dental Corps officer aboard the Steamship General John Pope, stated to the accused in substance that it was strange that there were twenty-five Dental Corps officers and only two Medical Corps officers aboard the vessel, to which accused made the vague reply, "Yes, isn't it" (Ex. D). Captain Hill referred to the accused as "Burke" (R. 7). At that time "Burke" was wearing a first lieutenant's bar and no insignia of service (R. 7, 8). Suspicions were aroused and Captain John Watson, the other Medical Corps officer aboard the vessel, called the accused and said, "Burke, someone is circulating the story that you are misrepresenting yourself. I think you should scotch the story at once, * * * " (Ex. B). Accused, soon thereafter, admitted his identity (Ex. E).

4. The accused testified in substance as follows:

He had studied medicine for two years prior to the time he entered the service on 5 September 1942 and had done some pre-intern work as assistant to his uncle, a Los Angeles physician (R. 13-14). At Scott Field where accused was assigned, he acted as laboratory technician, held sick call for enlisted men (R. 14), "handled" approximately sixty men a day and took care of about thirty percent of that number without the assistance of a medical officer (R. 15). He went to Medical Administration School at Camp Barkley and was familiar enough with medicine to take over the duties of a battalion surgeon's assistant if necessary (R. 15). When Lieutenant Anderson first saw him standing at the door of the operations room aboard the ship accused introduced himself by his correct name. Anderson "must have misunderstood" him or heard someone else's name. The two of them went down to Commander Dennee's office, and Anderson introduced accused as Burke (R. 15). Accused did nothing to correct the erroneous introduction because he thought it might prove to be an embarrassing situation for Lieutenant Anderson, "so I just let it ride at that" (R. 16). He admitted that other officers aboard the vessel called him "Burke" (R. 19); that he signed a clinical record using the same name (R. 19); and that he performed the duties of a medical officer (R. 19). He did not know whether he was wearing an "M.A.C." or "M.C." insignia when Lieutenant Anderson first met him. The "A" might have been off (R. 16-18). He insisted that he was wearing a second lieutenant's bar which looked like a first lieutenant's because "it had been blitzed" (R. 16). When asked by the prosecution "what color is it now?" he answered, "It is a silver bar, sir" (R. 21).

5. The evidence clearly and amply establishes that the accused at the time and place in question intentionally misrepresented his name, rank and branch of service as alleged respectively in Specifications 1,

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2 and 3. Such conduct constitutes a violation of Article of War 96. (CM 233900, Baker, Jr., 20 B.R. 189). In the Baker case at page 202 the Board of Review said, "the unauthorized use of military insignia, the false representation as to his duty assignment with Military Intelligence, and the preparation and his use of the letter purportedly from The Adjutant General, each in itself constituted a military offense, a violation of Article of War 96." See also CM 233393, Colburn, 19 B.R. 377; CM 233491, Slaughter, Jr., 20 B.R. 9; Winthrop's Military Law and Precedents, 2nd Ed., 1920 Reprint, p. 727.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Adrian P. Brummond, Judge Advocate.
Major, J.A.G.D.

James S. Robinson, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General with
the United Army Forces in the Pacific, A.P.O. 75, 26 July 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, A.P.O. 500.

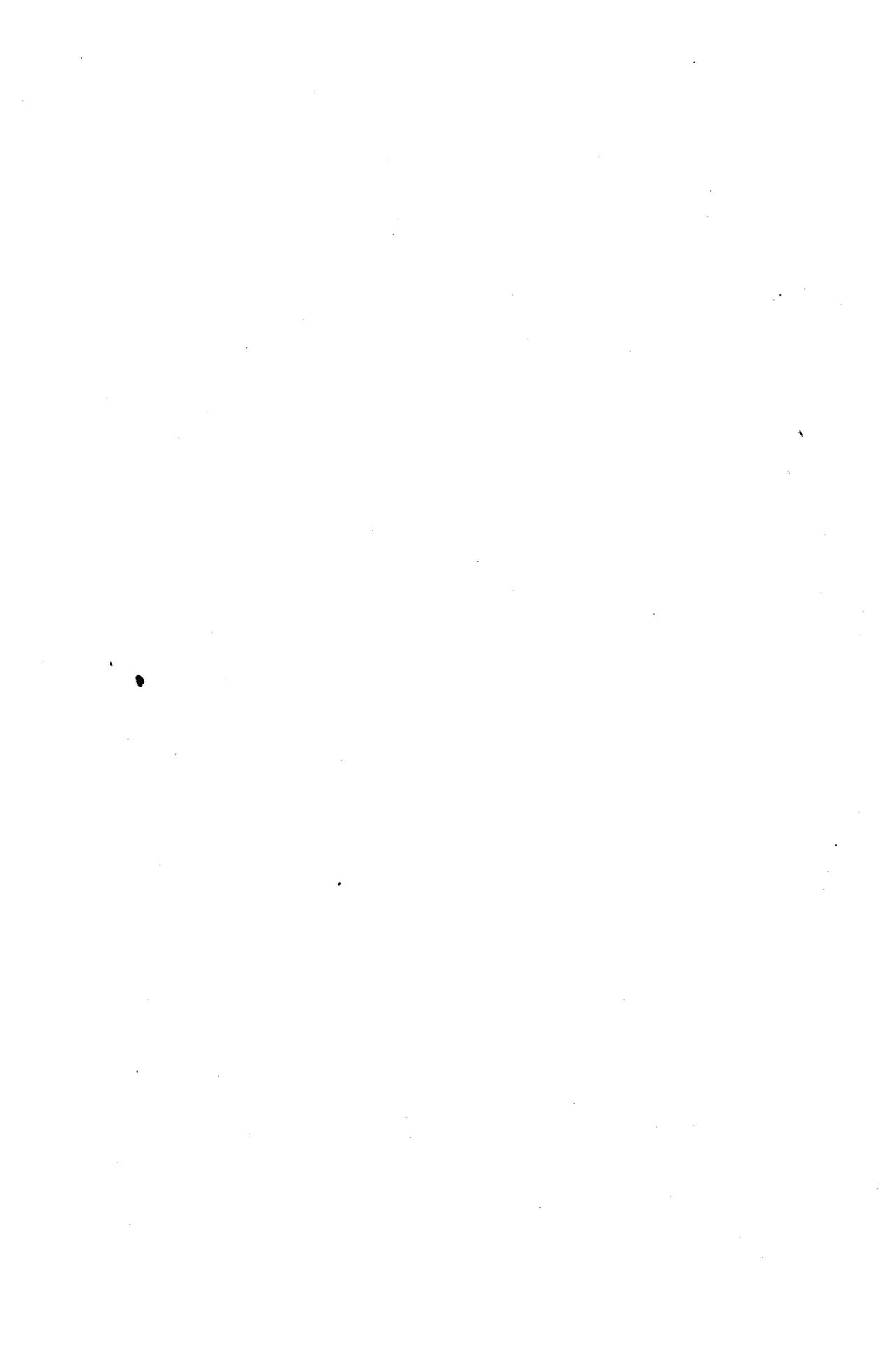
1. In the case of Second Lieutenant William J. Colepaugh (O-2050203),
MAC, Shipment Number OM-442 II (a), attention is invited to the foregoing
holding by the Board of Review that the record of trial is legally
sufficient to support the sentence, which holding is hereby approved.
Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to
order the execution of the sentence.

2. When copies of the published order in this case are forwarded
to this office they should be accompanied by 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 brackets at the end of
the published order, as follows:

(CM P-112).

ERNEST H. BUNT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 8, USAFP, 1 Aug 1945.)



ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
with the United States Army Forces
in the Pacific

Board of Review
CM P-117

29 July 1945.

UNITED STATES)

v.)

Technician Fifth Grade ELLIS
McCLOUD, JR. (34052264),
Battery "A", Seventy-sixth
Antiaircraft Artillery Gun
Battalion (Semi-Mobile).)

Trial by G.C.M., convened
at Headquarters, 77th AAA
Group, APO 324, 23 June
1945. Death.

HOLDING by the BOARD OF REVIEW
ROBERTS, MURPHY and CLEMENTS,
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 Ellis McCloud, Jr., Battery "A" Seventy-sixth Antiaircraft Artillery Gun Battalion (Semi-Mobile), did, at APO 324, on or about 19 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Captain Jack C. McLain, Battery "A", 76th Antiaircraft Artillery Gun Battalion (Semi-Mobile), a human being by shooting him with a rifle.

The accused pleaded not guilty to, but, all members of the court concurring, was found guilty of, the specification and the charge, and was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and the confirming authority confirmed it and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that about 8:30 or 9:00 o'clock on the evening of 19 April 1945 the Corporal of the Guard of Battery A, 76th Antiaircraft Artillery Gun Battalion, APO 324, heard several shots coming from the direction of the officers' quarters about 100 yards away. He immediately proceeded in that direction and when about 50 yards from the officers' quarters met the accused carrying a .30 caliber M1 rifle. The guard asked him "what he was doing" and, after stuttering a little while, accused replied "'Nothing'". The guard took the rifle and an extra clip of ammunition from accused and they walked up the battery street together. Accused stated that he wanted to write a letter and then changed his mind and said that he wanted to listen to the radio (R. 34-35) and was permitted to leave. The accused went to the tent of Technician Fifth Grade Paul L. Pitts, of the same unit, and not finding Pitts there sent someone to get him. When Pitts arrived the accused said to him "'I want you to write my girl friend and tell her that I suppose she is satisfied now because the letters and pictures she has sent me has driven me to do what I have done'" (R. 39). Upon repeated questioning by Pitts as to what he was talking about accused told him that he (Pitts) would find out that they would have a new battery commander, that he (accused) had killed Captain McLain (R. 39).

About an hour later First Lieutenants Frederick R. Schindler and Arthur H. Cletzer, of accused's organization, returned to their quarters from a moving picture show (R. 8). About three and one half hours earlier (6:30 P.M.) they had left Captain Jack C. McLain, the battery commander, seated at a table in the quarters preparing to write letters. As they entered the doorway they observed the body of Captain McLain lying on the floor before a desk upon which were three letters, two finished and one partially written. There was a large pool of blood underneath the bed and broken glass was scattered over the quarters. While Lieutenant Cletzer telephoned the battery surgeon, Lieutenant Schindler examined the body, found it cold and determined that Captain McLain was dead (R. 8). The death was subsequently confirmed by Captain William J. Robinson, MC, who examined the body and found several bullet wounds thereon, one bullet having gone through the right lung, and another possibly through the upper portion of the heart (R. 17-18). Lieutenant Schindler ran to the tent of the first sergeant but not finding him went to the first tent on the right of the area where he found the accused, Corporal Ellis McCloud, Jr., and Corporal Paul L. Pitts. He asked them if anyone had heard a "commotion" in the officers' quarters, stating that Captain McLain had been killed (R. 14). Corporal McCloud replied "You mean down there? I killed him". Upon being asked why he did it the accused replied "If you people would have sent me on home when I wanted to go this wouldn't have happened" (R. 11). When asked why it had to be Captain McLain accused replied "It could have been any of you" (R. 14) or "I shot him, and I hate it wasn't you" (R. 40).

As Lieutenant Schindler was leaving the tent Lieutenant Cletzer

approached. The former told him that Corporal McCloud "did it". Lieutenant Cletzer remarked "Ellis McCloud" and accused stated "Yes, I did it" (R. 11). Shortly thereafter the Corporal of the Guard handed Lieutenant Schindler the rifle and the extra ammunition clip which he had taken from the accused. The rifle was subsequently proved to be the one issued to accused (R. 24). An examination of the clip in the rifle revealed four .30 caliber armor-piercing cartridges, none of which type had ever been issued in the battery (R.13).

About an hour after he had found Captain McLain's body, Lieutenant Schindler went to the shower room which adjoined deceased's quarters for a drink of water and found four .30 caliber expended cartridges on the floor (R. 13). He also observed four bullet holes in the screen door between the shower room and the room where the Captain's body was found (Pros: Ex. A).

The first sergeant testified that on the afternoon in question he gave accused permission to go to "C" Battery and that at about 6:30 he received a telephone call from him requesting permission to stay away from his battery (R. 30), accused stating that his mind "wasn't right". Permission was refused and accused returned to his unit (R. 31).

Technician Fifth Grade Pitts testified that some time before the homicide accused had received some pictures from his girl friend, one of which revealed a portrait of another soldier. After that incident he seemed to be depressed, was quiet, and had nothing to do with anybody (R. 41).

Captain William J. Robinson, MC, the battalion surgeon, who examined the body of deceased shortly after he had been killed and immediately questioned and observed the accused, testified:

"He seemed very quiet and calm. I asked him why he did this and he said he didn't know. He had an odor of alcohol on his breath but he had no slurring of speech. His movements seemed well coordinated and he did not appear intoxicated."
(R. 19).

Other witnesses testified that accused understood and answered questions coherently; did not stutter or stagger as he moved about and gave the impression "as if he had gotten just through finishing a particular job" (R. 14). His eyes appeared "glassy, wide" and he looked "more like he was hurt than excited" (R.40). Captain Robinson stated further that he

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had been in the battalion four years, had known the accused well for two years, had occasion to examine him several times during that period, and had never found anything unusual about the accused but considered him to be a normal soldier. In his opinion, on the night of 19 April 1945 there was no change in accused's appearance or actions; he was sane, knew the difference between right and wrong and could adhere to the right (R. 19-21).

Lieutenant Floyd O. Due, MC, Naval Reserve, a psychiatrist at Base Hospital Number 15, testified that he had the accused under observation from 20 April to 24 April 1945 and saw him daily during that time and interviewed him at length on one occasion (R. 52). He gave him the routine clinical examinations, applying the Roschet Test and the Shipley-Hartford Retreat Test (R. 52). The doctor's conclusions were that although accused was emotionally upset and depressed he did not have a mental disease, was normal, knew right from wrong and could adhere to the right (R. 53).

The defense called Sergeant Charles H. Ray, of accused's organization, who testified that he had known accused for over four years. He stated that when accused saw boys going home on rotation it seemed to hurt him and he would lie on his bed and cry like a child. At one time accused showed him a letter from his girl friend and some pictures and accused did not "take it so good" (R. 62-63). Other witnesses testified that about six months preceding the killing accused began to act "strange"; he refused to play ball with them, hardly ever said anything to anybody and wanted to be alone.

The accused elected to remain silent.

4. Accused was charged with, and convicted of, the murder of Captain Jack C. McLain. Murder is defined as " * * * the unlawful killing of a human being with malice aforethought".

"Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden." (CM 224951, Thompson, XIV B.R. 219, 225).

"Malice is presumed from the use of a deadly weapon." (MCM, 1928, par. 112a).

The evidence is clear that accused, while hiding behind a screen, intentionally and without provocation, shot and killed Captain McLain, his battery commander, as the latter was sitting at a desk in a tent, writing letters. The accused committed the homicide apparently after brooding over his "girl friend's" supposed inconstancy and the fact that he had not been sent home on rotation. Immediately after the act accused admitted that he had killed the Captain, expressed no remorse therefor, and stated in substance that any of the officers might have been his victim. Accused's malice was demonstrated by his willful and deliberate use of a deadly weapon which resulted in the Captain's death and his utterances shortly thereafter that he was glad he did it. The battalion surgeon and a psychiatrist, both of whom examined accused, testified that he could distinguish right from wrong and adhere to the right. The court, in whose province it is to make such determination, by its findings concluded that accused was mentally responsible for his unlawful act. The facts furnish substantial evidence from which the court could determine that accused killed & deceased willfully, deliberately, with malice aforethought and premeditation, and sustain the court's findings of guilt of murder as charged (MCM, 1928, par. 148a).

A sentence of death or of life imprisonment is mandatory under Article of War 92 upon conviction of murder.

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

Charles S. Roberts, Judge Advocate.
Colonel, J.A.G.D.

James D. Murphy Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson J. Clements Judge Advocate.
Major, J.A.G.D.

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1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General,
A.P.O. 75, 31 July 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of Technician Fifth Grade Ellis McCloud, Jr., 34052264, Battery "A", Seventy-sixth Antiaircraft Artillery Gun Battalion (Semi-Mobile), 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 the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by 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 brackets at the end of the published order, as follows:

(CM P-117).



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 12. USAFP, 7 Aug 1945)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
With the United States Army Forces
In the Pacific

24 July 1945

Board of Review
CM P-118

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

v.)

Lieutenant Colonel MARTIN T. OLSEN (O-389016), CWS, and Captain FRANK E. BOBO (O-372186), CWS, Headquarters 38th Infantry Division.)

Trial by G.C.M., convened at APO 38, 3 July 1945. Sentence (as to each): Dismissal and total forfeitures.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
Judge Advocates.

1. The record of trial in the case of the officers named above has been examined by the Board of Review.
2. The accused were tried upon the following charge and specification:

CHARGE: Violation of the 80th Article of War.

Specification: In that Lieutenant Colonel Martin T. Olsen and Captain Frank E. Bobo, both Headquarters 38th Infantry Division, acting jointly, and in pursuance of a common intent, did at APO 38 from on or about 15 May 1945 to on or about 10 June 1945, unlawfully dispose of the following captured property of the United States, namely: Nineteen automobile tires of the value of about \$503.00 and one automobile storage battery of the value of about \$8.00, thereby receiving as profit, benefit, and advantage to themselves the sum of 3,116 pesos Philippine currency.

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Each accused pleaded not guilty to, but was found guilty of the specification and the charge, and was sentenced to dismissal, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence as to each accused but remitted that portion thereof relating to confinement. The confirming authority confirmed the sentences as modified and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution:

On three occasions between approximately 15 May 1945 and 10 June 1945 the accused removed from the Wawa Dam motor pool, a Japanese installation, certain captured property which they sold through a civilian, Mr. Cicero M. Castro, with the resultant profit to themselves (R. 3-19). Accused, Lieutenant Colonel Martin T. Olsen and Captain Frank E. Bobo, were both assigned to the Chemical Warfare Section, 38th Infantry Division (R. 9). On 13 May 1945, a few days prior to their first act of trading in captured property, the accused, Lieutenant Colonel Olsen, was also appointed 38th Division salvage officer (Ex. 1).

On the morning of 18 May 1945 the two accused proceeded by jeep, which was driven by Pfc. Justin B. Finn, to the "Jap motor pool" at Wawa Dam (R. 9). At the motor pool were Japanese and American trucks, civilian automobiles, seven or eight hundred tires "scattered all around" and other articles (R. 9). After "looking around in general" the two accused and their driver, Pfc. Finn, loaded seven or eight tires in a trailer which they had attached to the jeep (R. 9-10), and returned with their loot to the 236th Chemical Platoon area, about three and one-half miles away (R. 10). At that time there was fighting going on around the Wawa Dam area but not in the immediate vicinity of the motor pool (R. 11, 16). After dark the tires were delivered to Mr. Castro in Manila, with whom earlier arrangements had been made for their disposition (R. 25-26).

On or about 23 May 1945 the two accused, driven by Pfc. Finn, and this time accompanied by Sergeant King, again went to the "Jap motor pool" at Wawa Dam and "took a load of tires" (R. 10, 11). Some storage batteries and "four or five automobile wrenches" were also removed (R. 27). All the property was likewise delivered to Mr. Castro (R. 26).

A third trip was made on or about 5 June 1945 and again a load of tires was removed (R. 12). This time the two accused, driven by Pfc. Finn, were accompanied by Corporal Vittucci. They returned with the tires to their company area, which was the Balara Filtration Plant, and after dinner, "between the hours of 7:30 or 8:00, or something like that," made delivery of their loot to Mr. Castro (R. 21). On several occasions in addition to the three occasions on which the tires had been delivered, the two accused, singly or together, had been at the home of Mr. Castro and discussed in general the matter of disposing of the property.

Mr. Castro sold the tires and made two payments from the proceeds to the accused (R. 27). Eighteen hundred pesos was paid on the first occasion, of which two hundred pesos was paid back to Castro as his commission (R. 27). On the second occasion, 1,360 or 1,316 pesos was paid, of which everything in excess of 1,200 pesos was paid back to Castro as his commission (R. 27, 29). Accused thus received 2,800 pesos (R. 30), of which approximately one-third was paid to the enlisted men who aided in the plan, and the balance of 1,800 pesos was divided equally between the two accused (R. 33-34).

On one of the occasions when the money was paid by Castro, the accused, Bobo, was not present (R. 24, 26) although he admitted that he received his proportionate share (Ex. 3). It was stipulated "That the tires alleged to have been disposed of herein were nineteen in number and were of a total value of \$503.00" (R. 7, 8, Ex. 2).

A voluntary confession made by each accused, after he had been fully and correctly informed of his rights, was introduced in evidence without objection (R. 31). Both of the accused, with minor variations as to the details, admitted that the tires mentioned in the specification had been taken by them from the motor pool at Wawa Dam and delivered to Mr. Cicero M. Castro, and that they received a certain payment therefor (R. 32-34). Neither claimed that he did not know that the property belonged to the United States Government. Both expressed a desire to return the proceeds "to the proper authorities as partial restitution" (R. 33, 34).

4. Neither accused testified as to the events. Each made an unsworn statement asking for clemency (R. 35, 36). Accused, Olsen, said in substance that he was sorry for what he had done; that it caused him untold mental anguish; that while he was ready to accept punishment he realized it would cause considerable suffering to his wife and family, and concluded, "I pray that you won't judge me too harshly. This was the first act of this kind I have ever committed in my life and I ask your clemency" (R. 35). Accused, Bobo, said substantially the same thing. He said that he realized he had committed a grave offense and was deserving of punishment; that he too suffered the pains of mental anguish; that his military career was free of "any blot or stain" and concluded: "I am not a hardened criminal * * * so I am imploring the court, if it sees fit, to affix a sentence which will not blight my entire life and future lives of my wife and family as well" (R. 36).

5. Article of War 80 reads as follows:

"Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage

to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties."

That the accused obtained and sold "captured or abandoned property" as distinguished from private property (See Dig. Op. JAG, 1912-40, p. 305) with the resultant profit to themselves is clearly established by the evidence.

It is a well-recognized rule of warfare that "all public property taken from the enemy is the property of the United States" (Article of War 79; Lamar v. Browne, 92 U.S. 194; United States v. Klein, 13 Wallace 136) and it has long been recognized that any person subject to military law may be tried and punished "for selling or 'in any way dealing in' such property." (Winthrop's Military Law and Precedents, 2nd Ed., 1920 Reprint, p. 557, footnote).

By General Orders No. 27 of 1863 two officers were "summarily dismissed for appropriating property taken from the enemy" (Winthrop's Military Law and Precedents, 2nd Ed., 1920 Reprint, p. 557, footnote. See also p. 781).

The wording of the present statute (Article of War 80), insofar as it is applicable to this case, is free of doubt. The conduct of the accused constituted a violation thereof for which dismissal from the service is authorized punishment.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Adrian P. Drummond, Judge Advocate.
Major, J.A.G.D.

James S. Robinson, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific, A.P.O. 75, 25 July 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, A.P.O. 500.

1. In the case of Lieutenant Colonel Martin T. Olsen (O-389016), CWS, and the case of Captain Frank E. Bobo (O-372186), CWS, both of Headquarters 38th Infantry Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentences, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order the execution of the sentences.

2. When copies of the published orders in these cases are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in these cases, please place the file number of the record in brackets at the end of the published orders, as follows:

(CM P-118).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed, as to each accused. GCMO 11, USAFP, 6 Aug 1945.)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
With the United States Army Forces
In the Pacific

27 July 1945

Board of Review
CM P-119

UNITED STATES)

v.)

Private First Class CHARLES
L. EDWARDS (33782600), Private
First Class JOHN T. HOLMES
(33639139), Private ROBERT
PAYNE (33742642) and Private
WILLIAM H. McCauley (33741460),
all of 568th Medical Ambulance
Company, APO 72.)

Trial by G.C.M., convened at
APO 72,5,6 and 12 June 1945.
Sentence (as to each): Dis-
honorably discharge, total
forfeitures and confinement
at hard labor for life.
United States Penitentiary,
McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
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 upon the following charge and specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Pvt. William H. McCauley, 568th Med. Amb. Co., APO 72; Pfc. Charles Edwards, 568th Med. Amb. Co., APO 72; Pvt. Robert (NMI) Payne, 568th Med. Amb. Co., APO 72; and Pfc. John T. Holmes, 568th Med. Amb. Co., APO 72; did, jointly and in pursuance of a common intent at APO 72 on or about 16 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Florentina Robias.

Specification 2: In that Pvt. William H. McCauley, 568th Med. Amb. Co., APO 72; Pfc. Charles Edwards, 568th Med. Amb. Co., APO 72; Pvt. Robert (NMI) Payne, 568th Med. Amb. Co., APO 72; and Pfc. John T. Holmes, 568th Med. Amb. Co., APO 72, did, jointly and in pursuance of a common intent, at APO 72, on or about 16 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Celedonia Orbeta.

Each accused pleaded not guilty to the specifications and the charge. Accused, Edwards and Payne, were found guilty of Specification 1 and the Charge and not guilty of Specification 2. Accused, Holmes and McCauley, were found guilty of Specification 2 and the Charge and not guilty of Specification 1. Each was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

On the afternoon of 16 March 1945 two Filipino girls, Celedonia Orbeta and Florentina Robias, brought some clean laundry and mended clothes to Malirong (R. 7). It had been their practice to do washing and repair work for soldiers and others (R. 54). Celedonia Orbeta was paid ten pesos for her work (R. 14), while Florentina Robias received no money as the man to whom she was delivering the laundry was not in (R. 7). Both girls picked up some soiled laundry which they were taking home to wash (R. 24).

Celedonia Orbeta's brother, Ceferino, worked for Mr. Clarence J. Bloodworth, Jr., a Red Cross field director (R. 8). Ceferino usually finished his duties about five o'clock, and it being about that hour when the girls had completed their delivery, they decided to call on him so that all could go home together (R. 8). They met Ceferino and the three of them started walking along the road from Malirong to Tibak where they lived (R. 8). Ceferino signaled an ambulance which was observed going in the same direction (R. 8). When it stopped Ceferino asked the driver whether "we can ride the ambulance." The driver gave his consent (R. 20). Celedonia entered through the front while Florentina entered at the rear. "Ceferino was not allowed to get in the ambulance, and then the ambulance went" (R. 8, 16, 21).

Inside the back of the ambulance were two colored soldiers (R. 21), later identified as Holmes and Edwards. The accused, Payne, was driving and the accused, McCauley, was sitting alongside of him. When the girls reached their destination they asked the driver to stop, but he continued on (R. 9, 21). Some distance beyond Tibak one of the accused asked Celedonia Orbeta "whether we accept pom pom," to which she replied, "No sir, because we are not bad girls" (R. 9, 21). She was thereupon struck on the mouth and pushed to the floor. Accused,

Holmes, held her shoulders and McCauley held her feet. Her clothes were opened and Holmes proceeded to have intercourse with her (R. 9). She was crying and resisting but to no avail (R. 9, 11, 21). When Holmes finished, McCauley proceeded to have sexual intercourse with her (R. 9). While this was going on Florentina Robias was asked by Edwards, who was sitting near her, "to have pom pom." She replied, "I do not like, because I am married" (R. 11, 21). He tore her clothes and struck her ("he give the blows") and she lost consciousness for "About a half a minute" (R.22). Despite her resistance, first Edwards and then Payne had sexual relations with her (R. 23). During the entire time the ambulance continued in motion. Accused, McCauley, when he had finished with Celedonia, took over the job of driving while Payne had sexual relations with Florentina (R. 9).

When all four accused had gratified their sexual desires, the girls were let off about two kilometers from their home (R. 22). They were met on the road by Ceferino, the brother of Celedonia, and another man, the husband of Florentina (R. 12). They reported what had happened (R. 12). Both girls were crying at the time (R. 12). Upon arriving home they repeated to Celedonia's mother the complaint that they had been raped (R. 12, 30). Celedonia had a "redish" mark on her breast and was bleeding from the mouth (R. 13). Florentina, who was 19 years old and the mother of two children (R. 19), had no visible marks or bruises, although her clothing was torn and partly covered with blood (R. 23, Ex. 8).

Voluntary statements made by each accused after he had been fully informed of his rights under the 24th Article of War were introduced in evidence. There were three signed statements by the accused, McCauley, the first dated 18 March 1945, wherein he denies any knowledge of the affair (Ex. 1). The second, dated 19 March 1945, in which he reiterates the denial (Ex. 2); and the third, dated the same day, which is to the effect that he drove the ambulance for a while so that accused, Payne, could have sexual intercourse with one of the girls. Accused, McCauley, continuing said, "After Payne finished he took the wheel and I went in the back. She was already laying down and I crawled on but I didn't lay her because she was to small. I don't know about the other one for Edwards was laying her. After then she came up in the front seat, * * * and I asked her if she would be my girl friend she said yes. Then she asked me for two pesos told me to come back tomorrow, I gave her two pesos * * *. By that time we were near where they wanted to get off so we left them off. My penis was sore that was the reason I couldn't lay the girl" (Ex. 3).

Accused, Holmes, in two statements, both dated 19 March 1945, first denied all knowledge of the occurrence (Ex. 4) but in the later statement said in substance that he was in the ambulance at the time and place in question; that the girls got in the back where he and Edwards

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were; and that "Edwards laid one and I laid the other. * * * McCauley then came back and I think he laid one of the girls but I don't remember cause I was pretty drunk. When McCauley finished Payne came back and he got fucked. That's all I know. I remember the girls getting out. I didn't pay them any money. They didn't cry when all this was going on" (Ex. 5).

Accused, Edwards, in one statement dated 19 March 1945, said in effect that he and Holmes were riding in the back of the ambulance which Payne was driving with McCauley sitting alongside of him; that "The girl said she would give. Payne went first. He got some of it first. I don't know which of the girls, I don't know one from the other." He also said that Holmes was having "the other girl" and that both couples were on the floor of the ambulance at the same time. No one hit either of the girls. They took off their "pants" and laid down "themselves." Neither of them made any noise. They asked for money after accused "were through" and accused, Edwards, "gave them that." They also requested that the accused take them home which accused did. After Holmes and Payne "got through," Edwards and McCauley had intercourse "with them. * * * They consented to have intercourse. * * * " (Ex. 6).

Accused, Payne, made two statements, the first dated 19 March 1945 (Ex. 7), which reads in substance that he was driving an ambulance on the day in question and that they picked up two girls who asked for a lift. Continuing he said, "I refuse to answer any questions from then on. I have a good reason for refusing. I don't want to incriminate myself. I don't want to incriminate anybody else or myself." He also said that "maybe" Florentina Robias was one of the girls they picked up. He refused to answer whether he had sexual intercourse with her (Ex. 7). In a lengthy statement, dated 18 April 1945, he stated in effect that one of the girls in the vehicle was asked how much she charged for "Pom Pom" and when she answered, "I don't know for you," he "took it for granted that these girls were the same as many of the girls that live in the vicinity because six (6) out of ten (10) girls there will sell their body." When "the fellow sitting next" to him took the steering wheel Payne moved to the rear and sat beside one of the girls. He asked her "would she sell 'Pom Pom'" and again the answer was, "I don't know for you." He reached over and kissed her, whereupon she put her arms around his neck. At his request she then voluntarily took off her underwear and he proceeded to have sexual intercourse with her. He insisted that the girls were paid and that no force was applied to attain his purpose (Ex. 7a).

The trial judge advocate requested the president to instruct the court that although each statement would "be used against" the one who made it, no statement would be considered as evidence against any of the other accused. The president of the court said, "The court is so instructed" (R. 45).

The day after the occurrence, Mr. Clarence J. Bloodworth, Jr., American Red Cross Field Director, called at the home of Celedonia Orbeta. He testified that she was "in tears" and claimed that she had been attacked. He brought her back to the area and turned her over to a medical officer (R. 54). He noticed that her lip was swollen. He knew both girls because they frequently brought laundry to the organization to which he was attached (R. 54-56).

4. The evidence for the defense:

The accused, Payne, testified that on 16 March 1945 he was driving the ambulance; that they picked up two girls on the road; that he first and then McCauley had sexual relations with Florentina Robias; and that Edwards and Holmes had sexual intercourse with Celedonia Orbeta (R. 58-59).

Accused, Edwards, testified that he asked Payne to stop to pick up the girls and that they were "talking pretty nice to me, and Payne got interested and came back and let McCauley drive." He (Edwards) was the last one to have intercourse and he "had it with the shorter girl [Celedonia Orbeta]" whose name he did not know. She did not struggle or show any resentment. When Edwards was asked, "Did they show any affection?" he answered, "Sure, they loved us" (R. 61). He said that when he had finished he gave his girl two pesos. "The ones in the back paid the girls, but the others, I don't know, if they paid them or not" (R. 61).

Accused, Holmes and McCauley, elected to remain silent (R. 63).

Defense counsel gave testimony on behalf of the accused in the form of a stipulation between himself and the prosecution to the effect that while he was talking to the two girls outside their home on 2 June 1945 three Filipino boys walked by, waved to the girls and said, "Hello, pom pom girls." The two girls were not shocked or chagrined, but smiled and waved back to the boys (R. 57).

A medical report signed by Captain M. R. Lazar, Medical Corps, stated in substance that Celedonia Orbeta was examined on 17 March 1945 at which time no evidence of injury was observed (Def. Ex. C). Another medical report, signed by Captain Albert J. Carsen, Medical Corps, stated that Florentina Robias was examined on 19 March 1945 and that no evidence of recent injury was found on her other than a small bruise on the back of the right thigh and a small bruise back of the left buttock (Def. Ex. D).

A statement by the first sergeant of the accused, dated 4 June 1945, was accepted by stipulation in lieu of evidence. It was to the effect that he had known each of the accused for approximately twenty-five months; that during such period they had performed all work and details in an excellent manner; that none of the accused had ever been court-martialed; and that each of them had an excellent record with the company.

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5. Each of the girls testified that force was used to overcome her resistance. The accused testified that each of the girls gave her consent to sexual intercourse but their testimony in that regard is intrinsically improbable and not in accord with well known patterns of human behavior. No woman with any self-respect or decency would voluntarily have sexual relations with two strange men one after the other while her woman companion simultaneously and in her presence engaged in similar acts with two other strange men. There is no evidence in the record that either girl had the reputation of engaging in illicit intercourse with men promiscuously or for hire. (See 1 Wharton's Criminal Law, 12th Ed., Sec. 696). On the contrary it appears that both girls had been doing laundry work for soldiers and that Celedonia was a 19 year old married woman, the mother of two children. In any event, the contention of the accused that consent was given and the testimony of the girls that they were forced to yield presented an issue of fact which the court resolved adversely to the accused.

The accused are charged with having "jointly and in pursuance of a common intent" raped Florentina Robias (Specification 1) and Celedonia Orbeta (Specification 2). The evidence as to which of the accused had sex relations with which particular girl is indefinite and not entirely free from doubt (R. 7, 10, 17, 23). The several accused among themselves were not in complete accord as to which one performed the act first and upon which girl. That the four accused were in the ambulance and that all four had sexual intercourse there with one or the other of the girls on 16 March 1945 is established without dispute by the evidence adduced by both the prosecution and the defense. The court apparently attempted to determine which girl each of the accused had carnally known, and its findings are that Edwards and Payne had sexual relations with Florentina Robias and that Holmes and McCauley had sexual relations with Celedonia Orbeta. Upon the specifications and the evidence in this case the court could have found each accused guilty of raping both girls. The general rule is that "Two or more persons cannot jointly and directly commit a single rape because by the very nature of the act individual action is necessary (MCM, 1928, par. 27). One who aids and abets the commission of rape by another person is however chargeable as a principal." (Bull. JAG, Feb. 1944, p. 62).

In CM 240646, Hall, et al (10 March 1944) the Board of Review said:

"There is no direct proof that the accused found guilty of the assault fired any of the shots but the evidence shows that each of them was a party to the unlawful enterprise and was present in the area where the crime was committed, aiding and abetting in the furtherance thereof. Any person who assists in or aids, abets or induces the commission of an act constituting an offense under

any law of the United States is a principal and may be charged directly with the commission of such offense (18 U.S.C. 550; Meyer v. United States, 67 F (2d) 223; United States v. Hederowicz, 103 (2d) 218). Where, as in the instant case, two or more persons by common design jointly engage in the same unlawful act, each is chargeable with liability, and is guilty of the offense committed to the same extent as if he were the sole offender (16 C. J. 128; 1 Wharton's Criminal Law 1144; Hicks v. State (Ala.) 26 So. 337; Brown v. Commonwealth (Va.) 107 SE 809; and see Annotation 16 A.L.R. 1043, 1047)."

The following digest of a case (CA NATO 1121) which appears in the February 1944 issue of the Bulletin of The Judge Advocate General at page 62 is in point in the present case:

"Two accused were found guilty of rape in violation of A.M. 92. The Specification alleged that they committed the offense 'acting jointly and in pursuance of a common intent.' The evidence showed that each of the accused assaulted the victim while the other stood by with a rifle. Held: The record is legally sufficient to support the findings and sentence. Each of the accused was in effect the actual perpetrator of an independent rape. While their joinder may be an improper form of pleading, each was directly associated with the other in a common venture, and a joint charge is appropriate as being within the application of the recognized rule of law that one who aids and abets another in the commission of an offense is chargeable as a principal. Therefore, in view of these concomitant circumstances of concerted action, though there is present that aspect wherein each accused is factually an independent rapist, the joinder cannot be deemed to have injuriously affected the substantial individual rights of accused."

Applying to the instant case the principle enunciated by the foregoing authorities it is not necessary to show penetration by each individual accused into a particular girl inasmuch as all of the accused acting in pursuance of a common design aided and abetted one another. It is sufficient that the evidence shows a penetration by at least one accused into the girl named in each specification by force and without her consent, and that the others named in that specification participated in the commission of the offense.

(376)

6. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-2801 of the District of Columbia Code.

7. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings and sentences.

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

(Absent) _____, Judge Advocate.
Major, J.A.G.D.

James V. Robinson Judge Advocate.
Major, J.A.G.D.

ARMY SERVICE FORCES
 In the Branch Office of The Judge Advocate General
 With the United States Army Forces
 In the Pacific

25 July 1945

Board of Review
 CM P-120

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

v.)

Private ROBBIE L. BRABOY
 (34956505), Company E, 1312th
 Engineer General Service
 Regiment.)

Trial by G.C.M., convened at APO
 70, 16 May 1945. Dishonorable dis-
 charge, total forfeitures and con-
 finement at hard labor for ten
 years. United States Penitentiary,
 McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
 DRIVER, DRUMMOND and ROBINSON
 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 93d Article of War.

Specification 1: In that Private Robbie L. Braboy, 1312th Engineer General Service Regiment, did, at APO 70, on or about 5 April 1945, commit the crime of sodomy, by forcibly and feloniously and against the order of nature having carnal connection per anum with Private Clinton B. Salisbury, 1312th Engineer General Service Regiment, a male human being.

Specification 2: In that Private Robbie L. Braboy, 1312th Engineer General Service Regiment, did, at APO 70, on or about 5 April 1945, with intent to commit a felony, to wit, sodomy, commit an assault upon Private Clinton B. Salisbury by willfully and feloniously placing a knife on his chest and threatening to murder him if refused carnal connection.

(378)

The accused pleaded not guilty to, but was found guilty of, the specifications and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The court considered two previous convictions (one by summary court and one by special courts-martial). The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution:

On 5 April 1945 the accused, Braboy, Private Clinton B. Salisbury and others were in the Headquarters Company area, 1312th Engineer General Service Regiment, awaiting transportation. The men were to be assigned to companies in the regiment (R. 5). Throughout the morning some of the men walked around, some sat on the grass, while others played cards (R. 5, 18). It was a very hot day (R. 5). After "noon chow" accused announced that "he had found a good swimming spot" and that he was going swimming (R. 5). Salisbury decided to go with him. None of the other men wanted to go (R. 5). The two of them walked some distance, when Salisbury changed his mind about continuing on. They sat down on the shaded side of a caribou shed to get some relief from the heat (R. 5).

Accused opened his "coveralls" and looking down at his exposed penis (which was in a state of erection (R. 22)) said that he was "hot" (R. 5, 10). At the same time he asked Salisbury if there was anything he (Salisbury) could do about it (R. 5). Salisbury "got" the "impression" that the accused was talking about himself sexually. When asked why he reached that conclusion, he said, "he was looking down at his penis" and "normally no one does that" (R. 10). Salisbury got up to go back to the company area, whereupon accused said, "Where do you think you're going?" (R. 6, 8). At the same time accused threatened to kill Salisbury if he "didn't do something for him" (R. 6). Accused placed a knife, which had a blade about five inches long, against Salisbury's side and ordered him to unbuckle his belt, which Salisbury started to do slowly (R. 6, 7). Accused "yanked" Salisbury's trousers "completely down," forced him to the ground and inserted his penis into Salisbury's rectum (R. 6). Salisbury was lying face down. Accused was on top of him holding the knife in his right hand against Salisbury's right side. His left hand was "propped against the ground" (R. 21). Before the insertion, accused spit on his penis and also into Salisbury's rectum (R. 21).

When the act was over, accused demanded that Salisbury give him some money. He searched Salisbury's wallet and when he found that it contained no money said, "I want to gamble tonight - I want you to get me twenty pesos" (R. 6). Accused threatened Salisbury with the knife

and said, "I got a great mind to kill you now" * * * I believe I will" (R. 6). Upon Salisbury's promise to borrow money accused let him go (R. 7). Salisbury immediately returned to the company area and talked the matter over with a friend in whom he had confidence (R. 7). He then reported the incident to Second Lieutenant Clarence Reed (R. 7).

Lieutenant Reed testified that on the afternoon of 5 April 1945 Salisbury told him of "some incident that had occurred between himself and Private Braboy" (R. 12). Without relating the conversation, Lieutenant Reed said it referred to "the same matter being heard here today" (R. 12).

4. The accused, testifying on his own behalf, stated that he had no recollection of anything that transpired between Salisbury and himself; that he started drinking on the afternoon of April 4th and continued drinking throughout the morning of the 5th; that he remembers gambling during the morning and winning ten or fifteen pesos; and that he remembers eating breakfast but not the noontime meal (R. 13-15). He said that in civilian life he got so drunk that "I would just pass out and don't know nothing" (R. 13); that it "Seems somehow or other it [liquor] has had quite an effect on me"; that at one time he was out with a married woman and got so drunk he "folded up and the next morning I was in the house with her and her husband" (R. 14). He testified further that he had a bayonet with him on 5 April 1945 because "I didn't have my rifle with me" (R. 14, 15) (The victim said he did not know whether the weapon which accused used was a bayonet or a knife. (R. 6)); that he was drinking "nipa" from the time he first got up on the morning of the 5th, and although he loses his sense when he drinks, he nevertheless continued the practice (R. 16, 17). As he expressed it, "maybe I am, just aint good enough, man enough, to stop myself. Whenever I see the stuff I take a drink and drink some more" (R. 17).

In rebuttal both Private Salisbury and Lieutenant Reed testified that the accused was not drunk and that he gave every indication of being sober (R. 18, 23).

5. a. Specification 1:

"Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being. Penetration alone is sufficient and both parties may be liable as principals" (MCM, 1928, par. 149k).

That the accused had sexual connection by rectum with a human being (which is the only requirement of proof; MCM, 1928, p. 177) was established by undisputed evidence.

Wharton's Criminal Law, 12th Edition, Volume 1, Section 759 states that "The essential elements of the crime of sodomy in any of its branches are very similar in character to those of the kindred crime of rape." Specific intention is not a necessary element of proof in a

rape case (MCM, 1928, par. 149b), nor is it necessary to allege or prove specific intent in a sodomy case (MCM, 1928, pp. 250, 177). A general intent, which is all that is required, may be inferred from the act itself.

The only excuse offered by the accused was drunkenness. In cases where specific intent is not an essential element of the offense, voluntary drunkenness is not an excuse for a wrong committed while in that condition (MCM, 1928, par. 126a). It follows that even if the court believed the testimony of accused concerning drunkenness, which it apparently did not, guilt of the crime of sodomy was nevertheless established.

b. Specification 2:

As to the second specification, which alleges assault with intent to commit a felony, to wit: sodomy, proof of specific intent is necessary (MCM, 1928, pp. 177-180). Whether the accused, because of his claimed voluntary drunkenness was incapable of entertaining such specific intent presented a question of fact which the court determined adversely to him, and its findings are amply sustained by the evidence. It follows that upon the evidence adduced the accused was properly found guilty of Specification 2.

6. The testimony of Lieutenant Reed set out in paragraph 3 above, concerning a complaint or report made to him by Salisbury, was in the nature of evidence corroborative of the testimony of Salisbury and as such was properly admitted in evidence. (People v. Swist, 69 Pac. (Cal.) 223; 1 Wharton's Criminal Law, 12th Edition, par. 727).

Confinement in a penitentiary is authorized by Article of War 42 for the offense of sodomy, recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-107 of the Code of the District of Columbia.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

William P. Drummond, Judge Advocate.
Major, J.A.G.D.

James S. Robinson, Judge Advocate.
Major, J.A.G.D.

Each accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority disapproved the sentences as to the accused Robinson and Patterson, approved the sentences as to the accused Jones, Harper and Cooper, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution in pertinent part is as follows:

At "dusk" on 22 November 1944, the five accused, all members of the 1351st Engineer Dump Truck Company, left their camp at the thirteenth kilometer mark on the highway running out of Tacloban on the Island of Leyte to attend a dance. After they had walked past the camp of the 153rd Engineer Construction Battalion, which was opposite the eleventh kilometer mark, they came up to a group of white soldiers who were working on the highway (Exs. 1, 2, 3 and Def. Ex. 3). According to pre-trial statements of accused Harper and Cooper (hereinafter summarized), the white soldiers directed them to a house of prostitution (Exs. 1 and 2). They walked on a short distance, entered a path leading into the jungle and followed it until they came to a house where they found a 21 year old unmarried Filipino girl named Simplicia Magallanes and her fifteen year old sister Augustina. They thought Augustina was a boy as she was dressed like one but some time later discovered that she was a girl (R. 15, 16, 38; Exs. 1, 2 and 3).

Simplicia directed them to a house back of her own dwelling and told them to turn out their "lights" and be quiet. When the accused approached the house and "put the light on" they saw standing on the porch a small man who appeared to be a Jap. When he started to run away accused Cooper stopped him by firing a shot into the air and they took him to the house of Simplicia Magallanes, who told them that he was not a Jap but a Filipino. They did not believe her and asked her to go with them to "identify" him but she refused to do so because it was very dark and they might "make some bad things of" her, meaning, she explained, that they might "pom-pom" her. They then persuaded her to let "the boy" (Augustina) accompany them (R. 16-18, 34, 38; Exs. 1 and 2).

The accused took their captive (Amando Oquino) and Augustina to the camp of the 153rd Engineer Construction Battalion where Amando and Augustina were kept under guard the rest of the night (R. 35, 39, 43). On the way the accused opened Augustina's shirt front (she opened her own shirt front and showed them her breasts according to the statement of accused Harper) and they discovered that she was a girl (R. 41, Ex. 1). Captain Walter S. Stumpp saw the accused with Amando and Augustina in the orderly room of the engineer battalion on the night of 22 November. He could not say "exactly" when he first saw them but "roughly" estimated that it was about 2000 or 2100 hours. They stayed approximately 20 minutes and then left. "They" said there were more Japs where they picked up "these people" and that they were considering going back there (R. 43).

When the accused left her house, Simplicia Magallanes "spread the mat," put down the mosquito net, and went to sleep. At about twelve o'clock that night some American negro soldiers came to her house (on cross examination she said there were six of them R. 26). She had no timepiece but "just thought it was that time, it was very late in the evening." Three of them entered the house and one lifted the mosquito netting and "held" her left hand. She went outside with them and they took her about "nine fathoms" from the house. They threatened her with their guns to induce her to "give pom-pom to them." She tried to run away but they caught her in the "deep bushes," held her hands and laid her on the ground. They removed their belts and trousers and she saw their penises. They "laid on top" of her and she cried and said that it was very painful, that she could not "endure." The "first one" was unable to penetrate her person because she was "pure" and he stood up and was laughing. The others were holding her hands and feet and when she shouted covered her mouth with their hands. They hit her thighs with their guns. The second man forced his penis into her vagina and she bled. All of the others then had sexual intercourse with her (R. 18-19).

Simplicia recognized the faces of her assailants and noticed that one of them had a gold upper tooth. When she was asked whether any of the men who had intercourse with her that night were in the court room she said "Yes, sir" and indicated accused Harper, Cooper and Jones. She also said "Those are the three I know, I don't know any others." She pointed to accused Harper as the one with the gold tooth. Harper opened his mouth at the direction of the trial judge advocate and there was a gold tooth in his left upper jaw (R. 19, 20). She could not identify the man who failed to penetrate her "because it was very dark, there was no light." "They flashed their light" when she "laid on the ground" but another negro "stopped the one" who was flashing it. She had "recognized" three of the negro soldiers in the house by the light of a large flashlight or electric lantern shaped like a box about eight inches square which the one who lifted the mosquito netting carried by a handle. When she went to the "Leyte jail" she identified accused Harper, Cooper and Jones as three of the men who had assaulted her (R. 19-21, 23, 28).

After the men had finished with her they went away and, as soon as she could "ascertain the way" (before sunrise) Simplicia went to the house of her brother a short distance away, and told him that "the negroes had forced" her. She was crying and had cuts and bruises on her face, hands and thighs (R. 20, 30-31). Augustina did not speak English but Simplicia and her brother could speak it "a little" (R. 21, 30).

On cross examination Simplicia testified that when she picked out accused Harper, Jones and Cooper at the Leyte jail in Tacloban she had recognized Cooper "because he has gold teeth" (R. 24). She could not say definitely how long it was from the time she awakened on the night of 22 November until the colored soldiers had finished with her "but it was long." Simplicia also said that "all six" of the colored soldiers had intercourse with her (R. 27, 95).

In the further cross examination of Simplicia, the defense introduced in evidence two sworn statements made by her, one on 24 November 1944 and the other on 8 January 1945. In all of their material parts the statements are identical. They are substantially in accord with her testimony except in the following particulars:

In the statements Simplicia said that the first soldier who forced his attentions upon her "did not get his private part all the way in" her but that she felt him "discharge inside" her; that all of the men "only opened the front of their pants"; that she did not think she could identify all of the negro soldiers but could identify one of them because he had a gold tooth and a long face; and that she sustained no injuries except the injury to her "private part" and some scratches on her left cheek which she received when she tried to run away (Def. Exs. 1 and 2).

Captain Howard A. Draper, the commanding officer of the 1351st Engineer Dump Truck Company, testified that about 27 November when the "ME's" reported to him that a Filipino girl had been raped and asked him to have "a line up" of his men, he remembered that the accused had related to him a certain "adventure" which they had had, and he called only the accused into the "CP" (except accused Harper who was not present) (R. 49-50, 53). Captain Draper said that the accused reported to him on the night of 22 November at approximately 2240 hours (R. 50).

Captain Arthur D. Brody, Medical Corps, examined Simplicia on the afternoon of 24 November and found a small laceration of the hymen. There were also some bruises on the left side of her cheek (R. 53-54). On cross examination Captain Brody expressed the opinion that if she had been a virgin and had been forced to have sexual intercourse with six colored soldiers "there should have been more tearing." There was little hymen left but he was "not certain" whether or not Simplicia had been a virgin. He also was unable to say with any reasonable degree of certainty that she had had intercourse thirty six hours prior to the examination (R. 54, 55).

Voluntary statements made by accused Jones, Harper and Cooper after each of them had been informed of his rights under the 24th Article of War were introduced in evidence by the prosecution (R. 12, 13; Exs. 1, 2 and 3). These statements, with variations as to details, traced the movements of accused up to the time they arrived at the camp of the "153rd Engrs" with Simplicia's sister, Augustina, and Amando Aquino, whom they mistook for a Jap, substantially as recited above. Each of the accused stated that they went directly back to their own camp after leaving the camp of the engineer battalion. Accused Jones said that they arrived in camp at approximately 2320 hours and that it took them about twenty minutes to walk from the one camp to the other (Ex. 3).

4. For the defense, Private Joe W. Copeland testified that he had been confined in the "Tacloban jail" under sentence for the offense of assault with intent to rape from 9 November 1944 until after 22 November. He was in a "line up" of thirty five to forty white and colored American soldiers at the jail. Simplicia Magallanes went up and down the line, pointed out Copeland, and said, "This is the man." She also picked out accused Jones, Harper, Patterson and Robinson (R. 59-61). Copeland had a gold tooth in the "direct" center of his mouth but the record does not show whether it was an upper or a lower tooth (R. 60).

General Prisoner Hubert Lewis testified that he had been convicted of assault with intent to rape; that he was in the Tacloban jail in December 1944 when Simplicia looked over a line up of twenty five to thirty prisoners; and that she picked out in the order named, Joe Copeland, Lewis, accused Harper and accused Jones (R. 198-199).

Recalled as a witness for the defense, Captain Draper testified that on the night of 22 November 1944 he was in his "C.P." playing cards with First Lieutenant Billy D. Vickers and "Lieutenant" Lonnie P. Jenkins when the five accused came in and related a story about capturing a Jap soldier and his "girl friend." It was about 2240 hours (between 2230 and 2300 hours according to Vickers and Jenkins) when the accused entered the "C.P." and they left between 2315 and 2330 hours (R. 61-63, 67-68, 69).

Numerous enlisted men who were tentmates of one or more of the accused testified that Harper, Jones and Cooper returned to their quarters on the night of 22 November 1944 at times variously estimated as 2300 hours (R. 81-82, 84, 93), 2315 hours (R. 88), 2330 hours (R. 76-77, 83), 2300 to 2400 hours (R. 74, 78) and 2330 to 2400 hours (R. 70), and that each of the accused after talking for a while about capturing a Jap, undressed, went to bed and did not leave his quarters again that night (R. 70-75, 77-81, 83-84, 88-91, 93).

Sergeant David Blossom, another witness for the defense, said that all five of the accused came to the motor pool of the 1351st Engineer Dump Truck Company where he was working about 2300 hours on the night of 22 November 1944. He had just been called out to fix a dynamo and at that time had looked at his watch (R. 204-205). On examination by the court he said that he started to fix the dynamo at 2300 and that the accused came in about 2310 after he returned to the motor pool (R. 206-207).

Six enlisted men who were members of the same company as the accused each testified that he had an upper gold tooth (R. 73, 81, 92-93, 120, 123, 126).

Captain Draper was again recalled by the defense and testified that on the preceding night he had assembled a group of ten enlisted men of his company and two officers including himself for the purpose of conducting certain tests. They first went to the place where the 153rd

Engineer Construction Battalion had its camp on 22 November 1944, near the eleventh kilometer mark. They left there at 0150 hours and walking at a "normal pace" proceeded to Simplicia's house, then immediately turned around and walked back past the engineer battalion campsite to the spot near the thirteenth kilometer mark where the organization of accused was camped on 22 November. It took the group one hour and twenty-one minutes to make the journey (R. 103-104, 109, 112). It was two-tenths of a mile from the engineer battalion campsite to the place on the highway where the jungle path leading to Simplicia's house turned off and five-tenths of a mile along the path to the house. From the engineer battalion campsite to the old campsite of the organization of accused (in the opposite direction from Simplicia's house) it was one and two-tenths miles (R. 106-108, Def. Ex. 3). Therefore the total distance traversed by Captain Draper's party was two and six-tenths miles (R. 114). Captain Draper said that he was familiar with "general conditions" on 22 November and that the highway and the back roads were "very very muddy" and sticky and that even travel "by foot" was difficult (R. 104). In his opinion the condition of the "terrain" was better on the night his test was made than it was in November (R. 108).

Captain Draper, Lieutenant Vickers and Second Lieutenant Raymond M. Wright, all officers in the organization of accused, testified that each of the accused had a good reputation for being a peaceful and law abiding soldier (R. 61, 66, 68).

Accused Harper testified that on the night of the incident of picking up a Jap he had left his company area along with the other four accused "at first dark" to attend a dance. They walked toward Tacloban on the main highway, met two white soldiers who told them "about a pom-pom house" and accused "thought" they "would get some." Farther on they met another group of white soldiers who told them where to turn to go to the "pom-pom" house (R. 134-135). They turned off the road and followed a path through the jungle until they came to a house. All of the accused were armed with carbines. Harper was dressed in "Tight leg" pants, khaki shirt and jungle boots and was carrying a battery light with a handle and a big bulb (R. 135-137).

At the house the accused talked with a girl and her "brother." Harper asked where the "pom-pom" house was but the girl did not seem to understand him. Jones then asked her and she said it was back of her house and suggested that they turn out the light as otherwise "the girls" would run away (R. 136). As they approached the other house they turned on the light and saw a boy who looked like a Jap squatting on the porch. He started to run away but Cooper halted him by firing a shot, and they took him to the girl's house. She said that he was a Filipino. Harper talked with her and showed her his gold teeth and she showed him one in her mouth. They asked the girl to go with them to identify the man they had picked up but she refused. At her request her sister, who was dressed like a boy, went along to show them the way and they took their captive to "the 153rd." (R. 137-138). On the way they came up to the same group of white soldiers they had seen before. Their guide "opened her bosom" and showed all of them that she was a girl (R. 138, 142).

It was about 2100 hours when they arrived at the camp of the engineer battalion and they stayed in the orderly room about twenty or thirty minutes. When they learned that some white soldiers planned to "go back there" with them accused decided that they would not return and so informed Captain Stump. They asked him "to keep the Jap" for them and returned to their own company. After talking with Sergeant Blossom at the motor pool for about thirty to thirty-five minutes, they washed off their shoes in a little creek, returned to the company area, told Captain Draper their story in the orderly room and turned in (R. 138-140).

When the accused were taken by boat to the Tacloban jail "this girl" and the "little girl with the pants" were on the same boat for a part of the journey and they were "viewing" the accused all the time. In the Tacloban jail "the girl" walked up and down the line and picked out "A boy named Copeland" and accused Harper and Jones. When Harper was on a boat "bringing those prisoners to town" the little girl "with the pants" had told him that she would "pom-pom" with him if he would "turn them loose" but he refused the offer (R. 141-143). Harper specifically denied that he had carnal knowledge of Simplicia Magallanes forcibly and against her will on 22 November 1944 (R. 142).

Again recalled to the stand, Lieutenant Vickers testified that as he was taking the "so-called Jap and the girl" to Tacloban by boat the girl came up to him and accused Harper and said "You go to our house we give you pom-pom" (R. 150-151, 153).

Accused Jones also took the stand on his own behalf. He testified in substance the same as Harper with reference to the movements and experiences of the accused on the night of 22 November 1944 (R. 155-163). There were some differences. Jones said their conversation with the first group of white soldiers they met after leaving their camp was about a dance. As the accused approached the second group of white soldiers Jones had "some rocks" in his shoe and "pulled up" on the bank to take them out. He did not, therefore, hear the conversation with the group. As they approached Simplicia's house "Someone mentioned this must be the pom-pom house." That was the first time he had heard anything about "pom-pom" (R. 156-157). After Harper had spoken to Simplicia, Jones asked her "was there any dirogango around" ("dirogango" meant "Ladies"). The accused then went the way she directed them (R. 158).

Jones also said that Simplicia had identified him as one of her assailants when she saw him in the "CP" of his company three or four days after 22 November and again in the line up at the Tacloban jail. On the latter occasion she had also picked out Harper, Hubert Lewis and Joe Copeland. Every time he had been questioned about it Jones had denied that he raped Simplicia and he still denied it (R. 162-164).

Accused Cooper testified to the same general effect as Harper concerning the incidents of the night of 22 November (R. 168-177). However, Cooper testified that when the accused left their camp and started walking along the highway they passed three groups of white soldiers, talked with the first group about a dance and with each of the other two groups concerning a "pom-pom" house (R. 169-170). He also denied that he had forced Simplicia to have sexual intercourse with him against her will (R. 174). After the night of 22 November Cooper had next seen Simplicia on 27 November in the supply room of his company. At that time she had picked out Cooper, Jones and Robinson. Later in the line up at the Tacloban jail she "identified" Joseph W. Copeland, Hubert Lewis, Harper and Jones but had not pointed out accused Cooper (R. 174-177).

5. The evidence for the prosecution shows that at some time during the night of 22 November 1944, while Simplicia Magallanes, a young Filipino girl, was sleeping alone in her house, three colored soldiers entered and took her outside where they were joined by three other colored soldiers. The men threatened her with their guns, threw her to the ground, held her hands and feet, put their hands over her mouth when she cried out and despite her protests had sexual intercourse with her by force and without her consent. In short it is established that a group of colored soldiers committed the crime of rape upon her (MCM, 1928, par. 148b). There remains for consideration the question of the identity of the accused as members of that group.

Their identification must of necessity rest upon the testimony of Simplicia since she was the only person present other than her assailants. At the trial she testified that accused Jones, Harper and Cooper were three of the men who had assaulted her. She said she could see their faces by the light of a large electric lantern which they carried. It had been turned on in the house and outside also for a short time after she was thrown to the ground. There is much testimony in the record to the effect that she had considerable difficulty identifying the accused on two occasions prior to the trial and that on one such occasion she pointed out as among her assailants two men who had been in jail at the time of the commission of the offense. Such testimony, if true, bears upon the weight of her testimony but does not destroy its probative value. Simplicia's testimony is legally sufficient to support the findings of guilty of the three accused whom she identified in court.

The testimony of the accused to the effect that they did not return to Simplicia's house after their first visit but went directly back to their camp and the testimony of defense witnesses advanced to establish an alibi for the accused raised an issue of fact which it was the province of the court to determine. It is worthy of note, however, that if the court had taken the defense alibi testimony as true it could still have found that the accused had time to return to Simplicia's house and commit the offense as charged. Captain Stump testified that

the accused came to his camp at about 2000 or 2100 hours and stayed approximately twenty minutes. Sergeant Blossom said that they reached their own camp at 2310 hours. (Accused testified that Blossom was the first person they saw upon their return.) According to the testimony of these two witnesses, therefore, it took them between one hour and fifty minutes and two hours and fifty minutes to go from the one place to the other. The accused will be given the benefit of the doubt and it will be assumed that it took them only one hour and fifty minutes. Had they gone directly the distance was only 1.2 miles. If they had gone to Simplicia's house before returning to their company the total distance would have been 2.6 miles. In the test which he conducted with his party of twelve Captain Draper took one hour and twenty minutes to traverse the distance traveling at a "normal pace." Assuming that it took the accused that long they would still have had thirty minutes in which to commit rape. It is a reasonable assumption, however, that had the accused decided to return and ravish Simplicia, knowing that she was alone, they would have traveled to her house and from it back to their camp after the crime had been committed at a rate of speed much faster than a "normal pace."

Simplicia testified that one of her attackers failed to effect penetration and since she was unable to say which one it was, it might have been accused Jones, Harper or Cooper. That, however, does not affect the validity of the findings of guilty inasmuch as the individual who failed to accomplish his purpose was present aiding and abetting the others in the commission of their completed offenses. The applicable general rule has been stated as follows: "Two or more persons cannot jointly and directly commit a single rape because by the very nature of the act individual action is necessary (MCM, 1928, par. 27). One who aids and abets the commission of rape by another person is however chargeable as a principal." (Bull. JAG, Feb. 1944, p. 62). Any person who assists, aids, abets or induces the commission of an act constituting an offense under any law of the United States is a principal and may be charged directly with the commission of the offense (18 U.S.C. 550; CM 240646, Hall, et al (10 March 1944); CM P-119, Edwards, et al (27 July 1945)).

6. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-2801 of the District of Columbia Code.

7. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings and sentences as approved by the reviewing authority.

Samuel M. Dree, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

~~John Jackson D. Clements~~, Judge Advocate.
Major, J.A.G.D.

(Dissenting), Judge Advocate.
Major, J.A.G.D.

ARMY SERVICE FORCES
 In the Branch Office of The Judge Advocate General
 With the United States Army Forces
 In the Pacific

8 October 1945

Board of Review
 CM P-164

UNITED STATES)
)
 v.)
)
 Privates JOHNNIE ROBINSON)
 (38521343), JOHN PATTERSON)
 JR. (38267127), PUGA L. JONES)
 (38522517), FRANK HARPER)
 (38519845) and PRENTIS COOPER)
 (38521203), all of 1351st)
 Engineer Dump Truck Company.)

Trial by G.C.M., convened at
 APO 72, 20, 21 and 22 February
 1945. Sentence as to each:
 Dishonorable discharge, total
 forfeitures and confinement
 at hard labor for life. United
 States Penitentiary, McNeil
 Island, Washington.

DISSENTING OPINION
 ROBINSON, Judge Advocate.

1. I cannot agree that the mere pointing of an accusing finger by the prosecutrix is sufficient to sustain a conviction regardless of the weight and character of the evidence introduced by the defense. The majority opinion appears to be predicated upon the theory that if there is any evidence introduced by the prosecution to support a finding of guilty no matter how weak or incredible that a Board of Review is precluded from considering the sufficiency of the proof; that questions of the sufficiency of proof may be passed upon by the court and reviewing authority only. The rule, as I understand it, is otherwise. The rule is that there must be substantial evidence--substantial enough to warrant a court's finding of guilt beyond a reasonable doubt (CM 203511, Wedmore, 7 B.R. 221, 227; CM 223648, Nugent, 14 B.R. 39, 42), and that lacking such substantial evidence it is the duty of the Board of Review to hold the record of trial legally insufficient to support the conviction (CM 205811, Fagan, 8 B.R. 229, 233; CM 203511, Wedmore, supra). Proof of guilt beyond a reasonable doubt is the measure which the law exacts (Buntain v. State, 15 Tex. App. 490) and it is our function to determine whether that measure has been met (CM 205920, McCann, 8 B.R. 239, 246; CM 223648, Nugent, 14 B.R. 39, 42).

In CM 228831, Wiggins, 16 B.R. 333 at page 338 the Board of Review said:

" * * * We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions * * *. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens."

Were the rule other than hereinabove stated, courts-martial would have it in their power, subject only to such action as the reviewing authority may choose to take, to convict on any evidence or on a mere preponderance of evidence without regard to the reasonable doubt rule. They may even make a finding contrary to the overwhelming weight of the evidence which a Board of Review must of necessity hold legally sufficient since, as is asserted, it does not have the power to do anything about it. If any evidence or a scintilla of evidence, regardless of its weight or sufficiency, precludes us from inquiring whether the record contains substantial evidence sufficient to support a finding of guilt beyond a reasonable doubt then any consideration by a Board of Review of the merits of a case becomes a mere formality. We may consider technicalities only. Why then should a Board of Review ever read the defense testimony (except of course to search for technical errors) in a case where the first pages of the record contain some evidence of guilt? The majority's view is that it matters not whether ten, twenty or one hundred witnesses testified to the effect that the accused did not commit the offense. It is my view that unless on the whole record there is a substantial showing of guilt, the record of trial is legally insufficient (CM 203511, Wedmore, 7 B.R. 221, 227). "Substantial," a relative term is used to describe the quantum of the evidence necessary to sustain a conviction (CM 223648, Nugent, supra). Defined it means "Having substance, or body; strong; stout; solid; firm" (Webster's Collegiate Dictionary, 5th Ed., p. 993). The strength or substance of the evidence must of necessity be based upon the whole record and not the prosecution's case alone (CM 203511, Wedmore, supra; CM 223648, Nugent, supra).

2. In this case five men in the military service were charged with raping a Filipino girl. It appears that on the evening of 22 November 1944 the five accused, Privates Johnnie Robinson, John Patterson Jr., Puga L. Jones, Frank Harper and Prentis Cooper, left their organization, the 1351st Engineer Dump Truck Company, intending to go to a dance which they understood was being held in the vicinity of kilometer mark number nine out of Tacloban, Leyte, Philippine

Islands. They came upon a number of white soldiers working on the road in the vicinity of the 153d Engineer Construction Battalion area. In the course of a conversation with the white soldiers one or two of the accused were advised of the location of a pom pom house (house of prostitution). The accused Harper was told that it was at the nine kilometer mark and that it would cost ten pesos (Ex. 1).

Proceeding as directed, which required hacking their way through a jungle, they came upon a hut in which Simplicia Magallanes and her sister, Augustina, lived. They inquired of Simplicia where the pom pom house was and were told to go around to a building "around in the back." They were also told to put out their light when approaching as otherwise the girls would run away and hide (Ex. 1, R. 9, 16). Approaching the "other" house they saw a small man standing on the porch. He looked like a Jap. He started to run but stopped when the accused Cooper fired a shot in the air. They seized him and took him back to Simplicia's hut to have her identify him. In the hut at that time was Simplicia's sister Augustina, dressed in man's clothes and from all outward appearances looking like a man. They insisted that their neighbor Amando Oquino was a Filipino and not a Jap. The five accused were not satisfied. They were of the honest opinion that Amando was a Jap and decided to turn him over to the army officials. They asked Simplicia to go with them to prove her statement that Amando was a Filipino. She said she would not go because she was afraid, and finally consented to let her "brother" go along with them.

The seven of them (Amando, Augustina and the five accused) then began their journey out of the jungle. Getting out on the road in the vicinity of the 153d Engineer Battalion area they ran into the same group of white soldiers who had told them of the pom pom house. One of the white soldiers said he thought he recognized Augustina; that she was a girl instead of a boy. She admitted her identity and to establish that she was a girl, opened her shirt and exposed her breasts. The white soldiers were unable to say whether Amando was or was not a Jap and suggested to the five accused that they go to the orderly room of the 153d Engineer Battalion where there were some guerrilla soldiers who could question Amando in the Filipino tongue. They followed the suggestion.

At the orderly room, the guerrillas and the captain of the 153d Engineer Battalion apparently also entertained the opinion that Amando was a Jap for they bound him hand and foot. They also bound Augustina and detained both of them overnight. The five accused were told by Captain Stumpp to come back the next morning at which time the matter would be straightened out.

The above facts are undisputed. The dispute arises as to what happened immediately after the five accused left the orderly room

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of the 153d Engineers at approximately 2120 hours. The prosecution contends that they returned and raped Simplicia. The accused contend that they returned to their company area.

Between approximately 2230 and 2300 hours the five accused were in their company area. When they came in they stopped at the motor pool for a while. The accused Robinson reported what had happened to their commanding officer, Captain Draper, while the other four returned to their tents. Captain Draper sent for them and they all related to him what had happened. He told them to go to bed and that arrangements would be made to pick up the prisoner the following morning.

On the morning of 23 November 1944 Lieutenant Vickers of the 1351st Engineer Dump Truck Company, along with Jones and Harper, went to the 153d Engineers, picked up Amando and Augustina and took them to Captain Draper. Captain Draper suggested that they be taken to Tacloban, which was done. Amando established his identity as a Filipino and was released.

Simplicia claims that she was raped by six negro soldiers during the night of 22-23 November. It was the theory of the prosecution that the rape was committed by the five accused between the time they left the orderly room of the 153d Engineer Battalion and the time they returned to the area of their own company, the 1351st Engineers, and reported the capture of the "Jap" to Captain Draper (R. 212). The defendants contend that no such thing happened; that if Simplicia was raped it was not by them, and the overwhelming weight of the evidence supports their contention. Thus the major issue becomes one of identity. The evidence relating to identity of the accused as the perpetrators of the crime is therefore hereinafter detailed.

3. Simplicia Magallanes, the prosecutrix, was the sole witness for the prosecution on the question of identity. She testified that she was a 21-year-old unmarried native Filipina; that she went to bed soon after the negro soldiers, her sister and the "Jap" left; that "They [six colored soldiers] came back at 12:00 in the evening" at which time it was "Very very dark" (R. 18-19). She said she was not sure of it, but that it was "very late in the evening" (R. 18); that she was taken outside the house where the six colored soldiers had intercourse with her against her will; that the accused Harper, Cooper and Jones were three of the six (R. 19); that she could not see them outside but recognized them in the house by a light which they carried (R. 23). Although she pointed to three, she said "I only recognize two in the house * * * " indicating Harper and Cooper, and again, "Those are the only two I recognize" (R. 23). When further pressed about her identification of Cooper she said, "Yes, I recognize him because he has gold teeth" (R. 24). In another part of her testimony, apparently

referring to Harper who also had gold teeth in his mouth, she said, "I didn't recognize the others, I only recognized the one with the gold tooth because I don't know them" (R. 22). At another point in her testimony she said, "I recognize their faces" (R. 23). In her pretrial statement dated 14 November 1944 (Def. Ex. 1) she said, "I do not think I can identify all the negro soldiers but I am sure I can identify one. The one I can identify has a long face, a gold tooth in the upper front of his mouth and a ring on his left ring finger." She admitted that when she appeared at the lineup to pick out the one she was sure she could identify she picked out instead a negro soldier by the name of Copeland (Copeland admittedly had nothing to do with the offense.).

Amando Oquino (the alleged Jap) testified that he was maltreated; that he was quite angry about the fact that he was taken in custody (R. 36); that both he and Augustina were tied up by the Filipino guerrilla soldiers and that "They [the accused] went in the same way we passed" (R. 35), presumably meaning that they left the orderly room of the 153d Engineers in the direction from which they originally came.

Augustina, who said she was fifteen years old and Simplicia's sister, gave as her last name "Santiso." She said that when she was taken to the army camp the Filipino guerrillas tied her hands. She identified Harper, Cooper and Jones as the three who brought her to the camp (a fact which was never in dispute). She of course knew nothing about the identity of the men who raped her sister and her identification of the accused could serve no purpose but to confuse the issue. She admitted she went along voluntarily; that she dressed like a boy (R. 40); that she was angry at the accused; that she saw the accused leave the 153d Engineers area the way they came in and that she talked with her sister about the case (R. 41).

Captain Walter S. Stumpp of the 153d Engineer Battalion stated that the accused and "an individual who looked very much like a Jap to us, although we couldn't be sure, and a girl with him" came into the orderly room about 2100 hours (R. 43), and that the five colored soldiers stayed about twenty minutes. He said that they found about thirty pesos on the person of Augustina made up in part of guilders and three or four American dollar bills (R. 44). He testified that he asked Amando (the alleged Jap) "why he was with the girl," referring to Augustina, to which the "Jap" answered that "he was with her for pom-pom." He was asked the following questions to which he gave the following answers: "Q. Did you know what pom-pom was? A. Yes sir. Q. Did he say anything to you about her running a house and being a pom-pom girl? A. Yes, and she didn't deny it. Q. Did this so-called Jap say anything about pom-pom? A. Yes, and she didn't deny it" (R. 45). Captain Stumpp said in substance that it would be impossible to tell where persons leaving the orderly room were going on a dark night such as the one in question.

He said he could not recognize any of the five accused as being the persons who brought Amando and Augustina to his company that night, commenting, "I don't recognize anyone in the court room, negroes are hard to recognize" (R. 46).

Augustina was returned to the witness stand and testified that the money which she possessed was given to her in "payment for my washing clothes" (R. 47).

Captain Howard A. Draper, commanding officer of the accuseds' organization, the 1351st Engineer Dump Truck Company, testified that on or about 23 November 1944 the prosecutrix, her sister Augustina, Amando and several military police came to his command post; that all the accused except Harper were called to the command post and that Augustina identified Cooper and Jones. Augustina was not present at the time the rape is alleged to have been committed and, as heretofore stated, it is difficult to see the relevancy of her identification of the accused. There was no dispute of the fact that they took her and Amando to the military post on the night of 22 November. Its only purpose, apparently, was to give the court the impression that she was identifying certain of the accused as the persons guilty of raping her sister. In addition, even if it were relevant, testimony relating to identification at a lineup any time prior to trial constitutes, as a New York court said, "Nothing more or less than a bolstering of present testimony of the witnesses by showing that on a prior occasion they said or did the same thing." Such self-serving declarations are highly prejudicial (People v. Seppl, 221 N. Y. 62, 116 N. E. 793).

4. To establish that the accused did not commit the offense charged, the defense called as the first of a series of thirty witnesses one Private Joe E. Copeland. He testified that he was a military prisoner in the Tacloban jail when Simplicia came there to make an identification. There was a lineup of between thirty-five and forty colored and white American soldiers (R. 59-60). He testified that Simplicia went up and down the line and pointed to him saying, "This is the man" (R. 60). Copeland testified that he told her, "if she didn't get out of my face I would slap the hell out of her" (R. 60). The record shows that he had a gold tooth in his mouth which probably explains Simplicia's identification of him as her attacker. Copeland was actually confined in the jail on the night of the alleged attack.

Captain Howard A. Draper who was commanding officer of the accuseds' organization, the 1351st Engineer Dump Truck Company, testified that the five accused had been members of his organization for about one year (R. 61); that he at no time had any trouble with any of the accused and that they had a reputation of being "peaceful and law abiding soldiers"; he testified that he was at his command post playing cards with Lieutenants Vickers and Jenkins about twenty

minutes to eleven when all the accused came to the command post and related their story about capturing a "Jap" soldier and his girl friend (R. 62); that he talked to the men for about forty or forty-five minutes and that they left about 2330 hours. He said that about four or five days later Amando (the Jap), the prosecutrix, her sister and several military police came to his company. He thought it was for the purpose of identifying the men who captured the alleged Jap and his girl friend on the night of 22 November (R. 49-50). He accordingly sent for the accused only and did not have a formal lineup.

During the course of the trial, at the request of the defense counsel, Captain Draper got ten men from his company as volunteers "for security reasons" and along with Lieutenant Wright traversed the area that the accused would necessarily have had to cover in order to go from the 153d Engineers orderly room where they left the "Jap" prisoner, to Simplicia's house and back to the command post of the 1351st Engineers where he saw them on the night Simplicia says she was raped. The ground traveled was not passable for motor vehicles, nor is it claimed that the accused used a motor vehicle. He testified that climatic and ground conditions were worse on the night of 22 November 1944 than they were on the day he made the trip with Lieutenant Wright; that he made no stops and that the actual time consumed in covering the ground was one hour and twenty-one minutes (R. 109, 114). He said that in November 1944 the terrain was very muddy and sticky and that it was a hard proposition to go anywhere; that to get to Simplicia's house it was necessary to go through jungle trails leading off a muddy highway.

Assuming this testimony to be true, and the prosecution introduced no testimony to the contrary, it was impossible for the accused to have raped Simplicia between the time they left the orderly room of the 153d Engineer Battalion at 2120 hours, as Captain Stumpp of the 153d Engineers testified, and be back at their company area between 2240 and 2300 hours, a fact about which there does not seem to be much dispute.

There were variations in the estimates of time by the several witnesses, as there naturally would be, but giving the widest latitude to those variations, the very "long time" which Simplicia said it took for the six men to rape her is not accounted for unless, in fact, a group of six men other than the accused (of which there were only five) raped her (R. 27, 95). Simplicia was asked whether it took one or two hours to which she answered, "I cannot tell, it was long." From the time element it was impossible for the accused to have committed the crime between 2120 hours and about 2240 hours, subtracting one hour and twenty-one minutes for travel time in the interim.

First Lieutenant Billy D. Vickers, an officer of the accuseds' organization, testified to the good reputation as peaceful and law-abiding soldiers that the accused enjoyed. He testified substantially

as did Captain Draper that all the accused came to the command post where he, Captain Draper and Lieutenant Jenkins were playing cards sometime between 2230 and 2300 hours. The men, after relating their story about capturing the "Jap" and "debating" as to what to do with him, etc. (R. 67), left the command post between 2315 and 2330 hours (R. 68).

Second Lieutenant Raymond M. Wright, Jr., also an officer of the accuseds' organization, who was not available as a witness at the time of the trial, testified by stipulation that the five accused came into the command post where he, Captain Draper and Lieutenant Vickers were playing cards between 2230 and 2300 hours; that they related their story about the capture of the "Jap" and left between 2315 and 2330 hours (R. 69).

Private George Clerk, who occupied the same tent as the accused Harper, testified that he and others were playing "black jack" in their tent on the night of 22 November 1944 and that Harper came in between 2330 and 2400 hours. There was much talk about the capture of the "Jap"; that Harper then went to bed; that the card game continued until about 0130 hours at which time Harper was there asleep (R. 70-71). Private Clerk demonstrated to the court that he had a gold tooth in the front part of his mouth (R. 73).

Private First Class Curtiss J. Connor testified substantially as did Private Clerk (R. 71-73). Technician Fifth Grade Horace Anderson told the same story, namely, that they were playing black jack; that Harper came in between 2300 and 2400 hours talking about how he captured a "Jap" and thereafter went to bed. It appears that the capture of the "Jap" caused considerable commotion in the area because none had been captured by the outfit before and none since (R. 74-76).

Technician Fifth Grade Willie Millage (R. 76-78), Technician Fifth Grade Reese London (R. 78-79), Private Henry J. Nixon (R. 79-80), Corporal Jules Henry (R. 80-81), Technician Fifth Grade James Lee (R. 81-82), and Technician Fifth Grade Leandrew Winfield (R. 82-83), all of whom were present, playing, sitting around, or watching the game of black jack, told of Harper coming in about 2330 hours, relating his story about the capture of the "Jap" and retiring. Corporal Jules Henry demonstrated to the court that he had a gold tooth in the front of his mouth.

Technician Fifth Grade Leonard Williams, who occupied the same tent as the accused Jones and Cooper, testified that Jones and Cooper came in about 2300 hours and did not leave the tent again that night; that Jones spoke about the capture of the "Jap" (R. 83-87).

Sergeant Leroy Colbert, also a tent mate of the accused Jones and Cooper, told of their coming in about 2315 hours. He said that

Jones and Cooper talked to the boys for about thirty minutes about the capture of the "Jap" and that all the boys talked about it; that he did not see Jones or Cooper leave the tent again that evening (R. 88-89).

Private First Class Henry Loing (R. 89-91) and Technician Fifth Grade Percival Crawford (R. 92-94), both tent mates of Cooper and Jones, repeated the same story. There was considerable excitement about the fact that a "Jap" had been captured (R. 93). Several of them wanted to go over to see the "Jap" that very night (R. 93).

Captain Walter S. Stumpp, commanding officer of the 153d Engineer Construction Battalion, made a pretrial statement, part of which was introduced in evidence by the defense, wherein he stated in substance that he was called to the orderly room of his company about 2100 hours on 22 November 1944; that he saw "about five Negro soldiers, a Philippino [sic] woman and a man suspected of being a Jap." "They [the colored soldiers] said that the boy ran away so they suspected him of being a Jap and caught him after a chase. They then brought the man and girl to this headquarters. * * * The negroes left about a half hour later. We detained the girl and boy overnight" (Def. Ex. 4).

If the accused left the 153d Engineer Battalion area about 2130 hours, as Captain Stumpp said, it was not possible for them to commit the crime charged, considering that it would take them one hour and twenty minutes to go to the scene of the crime and back to their own area.

Technician Fifth Grade Bernard Robertson, a tent mate of the accused Robinson, testified that Robinson came into the tent about 2330 hours, talked about capturing a "Jap," and did not leave the tent again that evening (R. 119).

Private Moses Boutte and Technician Fifth Grade Napolion Odom testified to substantially the same thing except that the latter said that the accused Patterson also came into the tent (R. 120-126). Private Boutte and Tec 5 Odom demonstrated to the court that each had a gold tooth in the front of his mouth (R. 120, 123).

Technicians Fifth Grade Will Joseph and Mervin N. Sasser, each of whom has a gold tooth in the front of his mouth, told of seeing the accused Robinson and Patterson between 2300 and 2310 hours on the night in question and testified that each talked about capturing a "Jap." Neither of the accused left their tent again that night (R. 130). Sasser said he believed the time the accused came in to be about 2330 hours (R. 129). Technician Fifth Grade Edward Conrad, also of the 1351st Engineer Dump Truck Company, demonstrated that he had a gold tooth in the front center part of his mouth.

The five accused, Patterson, Robinson, Jones, Harper and Cooper, all testified substantially in accordance with the facts hereinabove outlined (R. 134-149, 153-197). Each denied the alleged attack upon Simplicia. Each said that they returned to their company area after leaving the "Jap" at the 153d Engineers; that they talked with Captain Draper and other officers of their organization when they returned at about 2300 hours; that they told their respective tent mates of their experience in capturing the "Jap"; that there was considerable excitement and that they soon thereafter retired for the night.

Hubert Lewis, a general prisoner at the Tacloban jail, testified that there was a lineup of about twenty-five or thirty-five men, which included the several accused, Copeland, himself and others. He said that the prosecutrix, after picking out Copeland as her attacker, secondly picked him out of the line as another one of the several men who attacked her (R. 199). (Admittedly Lewis had nothing to do with the offense.)

Staff Sergeant David Blossom of the 1351st Engineers testified that on the night in question he was working in the motor pool and that about 2300 hours the accused came into the motor pool and told him about the capture of the "Jap" (R. 204-205). He was the last of a series of thirty odd witnesses who testified for the defense. Can it be that these thirty persons, officers and enlisted men, testified falsely? Or is it not more likely that the prosecutrix was mistaken? She had seen and talked to the accused earlier that evening and may have had in mind that they returned. It was dark. She made two wrong identifications. In the light of her doubtful testimony, the physical facts and the overwhelming weight of the defense testimony, it can hardly be said that the case against the accused was established by "substantial evidence." The law requires a certain measure of proof which, in my opinion, is not contained in the record. As was said in CM 205811, Fagan, 8 B.R. 229, 233: "We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure."

In Duffy et al v. People, 197 Ill. 357, 64 N. E. 308, the Supreme Court of Illinois said:

"To sustain this conviction, we must do so on the unsupported testimony of the complaining witness, against the equally emphatic testimony of plaintiffs in error, denying that they had anything to do with the assault, or that they were even at or near the place at the time it was committed, and against strong corroborating testimony of several reputable witnesses to the effect that

the accused could not have been present at the assault. True, the presiding judge, who heard and saw the witnesses testify, had better opportunities than we have to judge of their credibility; but we cannot, on the record before us, sustain the conviction on that ground.

* * *

"After a full consideration of the case as disclosed by the record, we have reached the conclusion that the case should be remanded for another trial, in which the guilt or innocence of the plaintiffs in error may be made more clearly manifest."

5. "Proof beyond a reasonable doubt, or the identity of the accused as the person who committed the crime, is essential to a conviction" (2 Wharton's Crim. Evid., 11th Ed., sec. 932; McNeil v. State, 104 Fla. 360, 139 So. 791; People v. Scott, 296 Ill. 268, 129 N. E. 798). As is pointed out in Wharton's Criminal Evidence, 11th Edition, Volume II, Section 936, extreme caution must be exercised in considering evidence of identity. The "predisposition to connect an accused with a crime often leads to fancied resemblances, and witnesses give color to their testimony according to the force of such prejudice. The clearest impressions of the senses are often deluding and deceptive to a degree that renders them worthless when tested by the actual facts. Often, grievous and irreparable wrongs are inflicted by reliance upon impressions that are frequently so valueless as to demand their complete rejection * * * " (sec. 936).

In view of the foregoing, the convictions, as a matter of law, cannot be sustained. The reviewing authority has already so determined in the cases of the accused Robinson and Patterson. Their convictions have been disapproved (GCMO #39 and #40, Headquarters, United States Army Services of Supply, APO 707, 5 May 1945). The record of trial is likewise legally insufficient to support the convictions of the other three accused.

Jesse V. Robinson Judge Advocate.
Major, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
With the United States Army Forces
In the Pacific

9 October 1945

Board of Review
CM P-164

UNITED STATES)

v.)

Privates JOHNNIE ROBINSON)
(38521343), JOHN PATTERSON)
JR. (38267127), PUGA L. JONES)
(38522517), FRANK HARPER)
(38519845) and PRENTIS COOPER)
(38521203), all of 1351st)
Engineer Dump Truck Company.)

) Trial by G.C.M., convened at
) APO 72, 20, 21 and 22 February
) 1945. Sentence as to each:
) Dishonorable discharge, total
) forfeitures and confinement
) at hard labor for life. United
) States Penitentiary, McNeil
) Island, Washington.

OPINION

CLEMENTS, Judge Advocate.

1. There are several factors in connection with the establishment of the identity of the accused that should be noted.

Simplicia, the prosecutrix, stated in court at the time of making her identification of the three accused she identified, "Those are the three I know, I don't know any others" (R. 20); and in another part of her testimony she said: "I didn't recognize the others, I only recognized the one with the gold tooth because I don't know them" (R. 22). When she was asked, "At the time when you first saw these soldiers [when they came to your house to rape you] how many of them were you able to see by the light that was present in the house" she testified, "I only recognized three in the house" (R. 28). When asked who tried to have intercourse with her, and which one was the first one, she testified: "I could not identify because it was very dark, there was no light"; and when asked if she could see their faces clearly at the time of the intercourse, she testified: "I only recognized them when they went to the house because there was a light" (R. 23). She therefore testified clearly that she got a look at only three of the men who raped her. In spite of this fact, at a lineup soon after the alleged rape, she identified two of the accused and two other soldiers, a total of four (Some testified that she identified five (R. 60).), as the men who had raped her (R. 113, 199).

A reading of all the evidence of identification impels the conclusion that the identity of the accused was based almost entirely upon the fact that they were the soldiers seen by Simplicia, Augustina and Amando during the early part of the evening before the alleged rape occurred when Augustina and Amando were taken into custody by the accused. Augustina and Amando were permitted to identify the accused Harper and Cooper as two of the soldiers who were at Simplicia's house earlier in the evening (R. 36, 39). When Simplicia identified the accused Jones and Cooper at the first pretrial lineup, she talked with and apparently was advised by Augustina and Amando before she made the identification (R. 50, 51, 162, 163). Shortly after the alleged rape, and a few days before the second pretrial lineup, which was at the Tacloban jail, Simplicia, Augustina and Amando were permitted to ride on the same boat with the accused, who were being taken to the Tacloban jail, and they viewed the accused "All the time" they were on the boat (R. 141). Simplicia then identified some of the accused at the aforementioned lineup at the Tacloban jail. The view that Simplicia was basing her identification upon seeing "suspicious" soldiers before and after the alleged rape is given considerable support by the fact that at the Tacloban jail lineup she identified General Prisoner Hubert Lewis, who also had been on the boat with the accused and her on the way to the Tacloban jail, and who admittedly was in confinement at the time of the alleged offense and could not possibly have been one of the rapists (R. 198-200).

2. It is true that "Where a witness in his testimony identifies the accused, he may testify that on a prior occasion he made an extra-judicial identification of accused, and persons hearing the extra-judicial identification may likewise testify to it (CM ETO 3837, 1944)." However, the rule does not mean that it is not necessary to consider all the facts and circumstances surrounding the identification in each case. Under the unusual circumstances of this case no identification was made without some damaging fact occurring just prior to the identification. At the first pretrial identification, as stated above, Simplicia conferred with Augustina and Amando, who had seen the accused on an occasion before the alleged rape but not at the time of the rape. A few days before the second pretrial identification, Simplicia had been permitted to ride with and look at the accused on a boat that was taking them to the Tacloban jail where the identification was made. Just before the identification in court, Simplicia and Augustina saw the accused being brought into the building where the trial was conducted and they discussed the accused (R. 27). Augustina had seen only the soldiers who were at Simplicia's house a few hours before the alleged rape occurred and admittedly did not know the identity of the accused who committed the alleged rape. The admission of some of the evidence as to identity may have been error injuriously affecting the substantial rights of the accused, but for the reasons stated below it is not necessary to decide that question.

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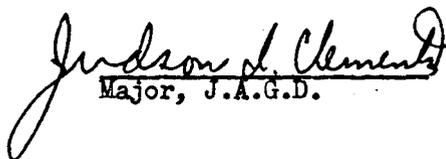
3. As stated in Major Joseph S. Robinson's opinion,

"As is pointed out in Wharton's Criminal Evidence, 11th Edition, Volume II, Section 936, extreme caution must be exercised in considering evidence of identity."

and,

"The rule is that there must be substantial evidence--substantial enough to warrant a court's finding of guilt beyond a reasonable doubt (CM 203511, Wedmore, 7 B.R. 221, 227; CM 223648, Nugent, 14 B.R. 39, 42), and that lacking such substantial evidence it is the duty of the Board of Review to hold the record of trial legally insufficient to support the conviction (CM 205811, Fagan, 8 B.R. 229, 233; CM 203511, Wedmore, supra)."

In my opinion the record does not contain substantial evidence of the identity of the accused as the persons who committed the offense. I have come to this conclusion after careful consideration of the matters mentioned above, all the circumstances of the case, and the conclusions reached by Major Robinson, in which I concur. It therefore becomes the majority holding of the Board of Review that the record of trial is legally insufficient to support the findings and sentences as to each accused.

 Judge Advocate.
Major, J.A.G.D.

Army Service Forces, Branch Office of The Judge Advocate General,
APO 75, 20 October, 1945.

To: Commanding General, United States Army Forces Western Pacific,
APO 707.

1. In the foregoing cases of Private Puga L. Jones, 38522517, Private Frank Harper, 38519845, and Private Prentis Cooper, 38521203, all of the 1351st Engineer Dump Truck Company, attention is invited to the holding by a majority of the members of the Board of Review that the record of trial is legally insufficient to support the findings and sentences as to each of the three accused. I concur in that holding and recommend that the findings of guilty and the sentences as to all accused be vacated.

2. Under the provisions of Article of War 50 $\frac{1}{2}$ the record of trial is transmitted for vacation of the findings and sentences in accordance with the foregoing holding and for a rehearing or such other action as you may deem proper.

3. The question of the guilt of the several accused under the evidence depended upon identification of any one of them by the prosecutrix. In view of the admission by each and every one of the original five accused that they had been together during the entire evening, so far as the evidence set forth in the record is concerned if one of them had been properly identified by the prosecutrix as one of the group who raped her, all five of the accused would have been properly convicted. However, as has been pointed out in the majority holding, the identification of these accused involves a fatal defect; the record clearly reveals that in identifying the accused as her rapists she did not in fact identify them as such but rather as individuals who had earlier during the evening visited her at her house. She clearly assumed that this group returned later and raped her and her identifications were made upon that basis. She contended that six men raped her, three of whom came into the house where one seized her by the wrist and took her outside followed by the other two. She indicated that in her opinion the one who took her by the wrist was Harper and stated that she did not, at that time at least, recognize the other two nor did she recognize any of the "six" outside her house because of the darkness. That the prosecutrix in her identifications of the accused was not limiting herself to the brief period involved in the rape but rather included the period when the five accused visited her earlier in the evening is clearly shown by the fact that while there were only three of the rapists that she could possibly have identified according to her own admission, that is, the three who entered her house just prior to the raping, she subsequently identified five men as being her assailants.

4. In connection with the consideration to be given the matter of a rehearing attention is invited to the report of investigation dated 22 June, 1945, signed by Captain Howard A. Draper, CE, and included in the papers accompanying the record of trial, to the effect that the rape of the prosecutrix in this case was committed after the five accused had

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(Cont'd) 20 October 1945)

returned to their camp and that the individuals who committed the rape constituted only three of the accused, Harper, Robinson and Patterson, together with two other soldiers named McKithen and Gary. If further investigation indicates that these last five named soldiers are the ones who raped the prosecutrix, attention is invited to the fact that Harper should be retried before a different court-martial utilizing the same charge sheets as in the instant case with new charges respecting Gary and McKithen, a nolle prosequi being entered with respect to Cooper and Jones. Patterson and Robinson may not be retried because of the disapprovals of their sentences.

5. When copies of the published orders in these cases are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in these cases, please place the file number of the record in brackets at the end of the published orders, as follows:

(CM P-164).



ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

ARMY SERVICE FORCES
 In the Branch Office of The Judge Advocate General
 With the United States Army Forces
 In the Pacific

1 October 1945

Board of Review
 CM P-170

UNITED STATES)
)
 v.)
)
 Privates First Class LEO B.)
 JACKSON (34961752), NATHANIEL)
 CHAPPELL (34961739), JAMES)
 WADE, JR. (34245902), and)
 JAMES E. LIGGINS (36021762),)
 all of 1941st Engineer)
 Aviation Utilities Company.)

Trial by G.C.M., convened at
 APO 719, 7, 8, 9 and 10 June
 1945. Sentence as to each:
 Dishonorable discharge, total
 forfeitures and confinement
 at hard labor for life.
 United States Penitentiary,
 McNeil Island, Washington.

HOLDING BY THE BOARD OF REVIEW
 ROBERTS, DRIVER and ROBINSON
 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 upon the following charges and specifications:

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

Specification 1: In that Private First Class Leo B. Jackson, Private First Class Nathaniel Chappell, Private First Class James Wade Jr., and Private First Class James E. Liggins, all of 1941st Engineer Aviation Utilities Company, acting jointly and in pursuance of a common intent, did, at APO 72, on or about 4 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mellie Suase.

Specification 2: In that Private First Class Leo B. Jackson, Private First Class Nathaniel Chappell, Private First Class James Wade, Jr., and Private First Class James E. Liggins,

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all of 1941st Engineer Aviation Utilities Company, acting jointly, and in pursuance of a common intent, did, at APO 72, on or about 4 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Anunciacion Suase.

CHARGE II: (Finding of not guilty.)

Specification: (Finding of not guilty.)

Each accused pleaded not guilty to the specifications and the charges, but was found guilty of Charge I and the specifications thereunder and not guilty of Charge II and its Specification. Each accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

One Raymundo Veloso, a "Traveling barber" and one time cashier in a gambling place (R. 19), resided in a small house located about fifty feet off the road in the "City of Bucog, under the Barrio of Bucog" APO 72 (R. 10, 11, 22-23, 30, 31). The entire house was about twelve feet long and ten feet wide with a sleeping room six by ten upstairs (R. 23, 32-33). On the night of 3- 4 April 1945, Veloso was upstairs sleeping on the floor (R. 12). Five other persons were sleeping in the same room (R. 12, 23). They were Veloso's cousins Mellie Suase, sixteen years of age (R. 52), and her sister Anunciacion Suase, the two girls alleged to have been raped; Veloso's mother; his daughter; and another female identified simple as "Emilia" (R. 12, 23).

About 0300 hours on the night in question Veloso was awakened by a negro soldier who stuck a carbine against his abdomen (R. 12). The negro asked his name and told him to produce his pass (R. 12). Veloso opened a small Bible to obtain his pass, whereupon the negro soldier "snatched" 500 pesos which he kept hidden therein (R. 13). After looking at the pass the negro soldier said, "Let's go to the MP" (R. 13). Veloso remarked, "Before I go with you show me my warrant of arrest" (R. 13). The negro soldier showed a piece of paper which Veloso was able to read because the soldier focused a flashlight on it. It read "Merry Christmas" or words to that effect (R. 14), whereupon Veloso said, "I will not go" (R. 14). The negro soldier then cocked and pointed his carbine at Veloso. At the same time another soldier grabbed him and he was taken downstairs (R. 14).

Mellie Suase, who was sleeping on a "bamboo" bed (R. 23), and Anunciacion, who was sleeping on the floor (R. 32), were both awakened and also taken downstairs by one or more colored soldiers (R. 14, 23, 32-33, 43-44). Both girls were crying (R. 23-24). The record fails to disclose whether any of the others were awakened, or what they did if they were awakened (R. 23). There was no light in or about the hut other than the flashlight which was used by one of the colored soldiers (R. 14). It was difficult to distinguish faces on account of the darkness. The moon was up but the moonlight was not constant because of the passing clouds (R. 24, 39, 44).

Raymundo Veloso, Mellie Suase and Anunciacion Suase were ordered by one of the negro soldiers to get into an army truck (a 3/4 ton weapons carrier), which they did, and the vehicle moved off (R. 14, 33, 44). Four colored soldiers were seen in the truck (R. 33, 44). Only three had taken part in the activities in and about the house (R. 14, 33), the fourth remained in the driver's seat (R. 33). Neither Veloso nor his two cousins, Mellie and Anunciacion Suase, knew any of them nor had they ever seen them before (R. 13, 40).

The weapons carrier carrying the four colored soldiers and their involuntary guests proceeded toward "Dulag" (R. 15, 33). Before reaching Dulag it turned left and "stopped near a big mound of sand near the river" (R. 15, 33). The trip took approximately thirty minutes (R. 24). Veloso was ordered to get out of the truck, which he did together with the girls, one holding onto his right arm and one holding onto his left (R. 15, 33). He was taken around to the left front side of the truck where he was covered by two negro soldiers each pointing a gun at him (R. 16). Mellie was taken a short distance away near a "big pile of sand" and forced to the ground by one of the colored soldiers while Anunciacion was held at the rear of the truck by another colored soldier (R. 15, 25). The soldier who was with Mellie forced her to the ground and when she resisted "boxed" her on "the lower left jaw" (R. 45). The negro soldier got on top of her and tried to pull up her dress but she "tried hard to pull it down too" (R. 46). After an unsuccessful attempt to have sexual intercourse with her he took her back toward the truck and turned her over to another colored soldier who returned with her to the sand pile and forced her to the ground. She testified that she did not know "exactly" whether or not the soldier effected penetration although she felt pain in her vagina. The second soldier then brought Mellie "towards the truck" and the first one who had failed again took over, returned her to the sand pit and this time was successful in having sexual intercourse with her despite her resistance (R. 46-47). There were fresh blood stains on her chemise (R. 47, 50-51). She was unable to recognize any of the four accused (R. 51), but does remember kicking on the leg the first soldier who attacked her (R. 52).

In the meantime the negro soldier who had taken Anunciacion to the back of the truck forced her to the ground and pulled up to her waist the white dress which she was wearing (R. 34). She tried to resist but he choked her until she became exhausted and then had sexual intercourse with her. Within a few seconds after the first soldier had finished with her, another one arrived. She was weak, nervous and exhausted and the second soldier also had sexual intercourse with her (R. 17, 18-19, 34). She could not see the faces of the negro soldiers who attacked her nor did she know what kind of clothing they were wearing (R. 35-36).

When the two girls were finally brought back to the truck they, along with Veloso, were ordered to get in. Veloso had observed the number on the hood of the weapons carrier which he memorized. The number, 2228210, was painted in white on the left side of the truck toward the front of the hood (R. 19-25). Veloso and the two girls were returned to their home about 0430 hours (R. 20). Veloso went inside his house to see if the others were all right. He then went to the Philippine Civil Affairs Unit which was not far away. They directed him elsewhere. At 0700 hours he reported to the Provost Marshal's office (R. 20-21).

On the night of 4 April Mellie was examined by an army physician who found "a small superficial laceration at the base of a caruncula myrtiformis near the posterior fourchette." The report continues: "This was of fairly recent origin but showed no fresh bleeding. * * * There was a small (0.5 cm.) hematoma of the left labium minorum" (R. 48). No spermatazoa was found in the smears taken from the cervix and lateral fornices (R. 49). The medical report is silent as to evidence of bruises or injury on other parts of her body (R. 48).

It was stipulated that if Captain Robert Dutton, Medical Corps, were present he would testify that "The failure to discover spermatazoa in a smear approximately 19 hours after an alleged intercourse is equivocal. It does not prove the nonexistence of intercourse 19 hours previously, and of course does not prove the action of intercourse during the last 19-hour period" (R. 49). Captain Dutton's stipulated testimony continued: "After examining Mellie Suase and observing the laceration, it is my opinion that this laceration was caused by some trauma. This laceration may have been caused by masturbation, by an accidental bumping of the vagina, or by intercourse" (R. 53).

Anunciacion also was given a physical examination at the 116th Station Hospital on the evening of 4 April. The report of the examination reads as follows: "Marital introitus. No lacerations, abrasions or other signs of external violence. * * * " (R. 37). " * * * because of Anunciacion Suase's marital status it cannot be determined whether she had intercourse during the last 24 hours" (R. 37). No spermatazoa was found on the smear taken from the cervix and lateral fornices (R. 37-38).

Anunciacion testified on cross examination that she had been married; that her husband died in 1943 and that she had no sexual relations since that time other than on the night of 3- 4 April (R. 39).

With reference to the identification of the individuals involved in the incidents related above, when Veloso was asked on direct examination to point out "any of these men here" who had entered his house "that night" he indicated the four accused and stated that "Pfc James E. Liggins was the driver" (R. 22). On cross examination he admitted that he was not able to distinguish the faces of any of the four negro soldiers either at the time they forced him to enter the truck at his house (R. 24) or upon his return to the house from the sand pile (R. 27). He did say, however, that "On the way home we met a truck--of course, the light was on--and the driver turned his face toward me, and he was talking to another negro soldier, so I saw the face of the driver" (R. 27). Veloso remembered being brought before a lineup of ten negro soldiers on the evening of 4 April 1945 at which time he did not identify any of the four accused but did "pick out" another soldier (R. 28). He further testified that he "went back and forth three times in front of a soldier who is here at this time, but I did not pick him out at that time because I was in doubt very much." At a second lineup on the afternoon of 5 April he did not "recognize" any of the accused. However, he said that he was "inside the jeep" and "was not brought in front of the line" on that occasion. In answer to the question "How are you able to identify these four accused now as being the attackers of the two girls--when you couldn't recognize them the first time?" Veloso replied, "Now that they are here--and accused." Upon being asked whether there was any other reason he said, "Yes; regarding the one at the left most (indicating Pfc. James E. Liggins), because the first time I was brought in front of the negro soldiers I passed in front of this fellow three times--back and forth three times. The officer interrupted, and I was so far away from him that I pointed at the wrong man" (R. 29).

On the question of identification Anunciacion Suase testified that she could not identify any of the four accused with the exception of the accused Chappell. She had "recognized" him in the truck on the return journey from the sand pile when they met another truck "with his lights on" (R. 40). She admitted that at a lineup of negro soldiers on 5 April 1945 she looked over the line, "went" back to the jeep and then returned to the line before pointing out accused Chappell. She explained that she had him "in mind" but instead of pointing him out at once returned to the jeep and reported having seen him to "the American soldier" who suggested that she "go back and point him out" (R. 41).

Signed voluntary statements made by the accused were introduced in evidence (Exs. 3, 4, 5 and 6). Each accused in his statement denied that he participated in or had any knowledge of the offenses charged.

Accused Liggins stated the weapons carrier was taken by him in regular course at 1830 hours on 3 April 1945; that the usual trip ticket had been issued and the car duly checked out; that with him were a number of men, including the other three accused, all of whom he let out at various points on the road, except the three accused, Chappell, Wade and Jackson; that the four of them drove to a "Chinaman's" where he (Liggins) bought a bottle of whiskey; that Jackson and Wade each bought a bottle but that Chappell stayed on the truck; that they then drove along the road a "short distance" and turned around; that he decided to go back to the company area because he didn't have time to go to Tacloban as originally planned (Ex. 8) since he had to take two electricians, Corporal Becks and Private First Class Washington, to FEAF headquarters; that he drove Becks and Washington to their destination and that Wade, Chappell and Jackson came along. The four of them stayed at the FEAF headquarters for about fifteen or twenty minutes and then returned to their organization. His return was delayed "possibly 15 minutes" because of a traffic interference at one of the bridges. Continuing his statement he said, "I got back to my company area around 0130 hours. I signed in the weapons carrier at 0200 hours. I put down the mileage in from the speedometer of the weapons carrier.

"On arriving at the 1941st, I went to their tent with Jackson, Wade and Chappell, and had drinks out of the second and third bottles of whiskey. Isaac Kimble was awake in the tent, and asked for a drink. I left for my own tent, and don't know whether they finally gave him a drink or not.

"I then went back to my own tent and went to bed" (Ex. 4).

Accused Wade's statement is substantially in accord with that of accused Liggins. Wade said that returning from the "Chinaman's" he slept in the car; that he had been drinking all day; that Jackson awakened him about 2230 hours or 2300 hours when they were back in the company area; that he sat down on the box drinking and talking to some of the boys. Liggins then asked him if he wanted to go along to take Becks and Washington to work, which he did. He said that they stayed at the FEAF area where Corporal Becks and Pfc. Washington worked about fifteen minutes and the only delay on the return trip was at the bridge where some men were working. They all returned to camp between 0130 and 0200 hours on 4 April 1945 and he went to his tent and to bed (Ex. 5).

Accused Leo B. Jackson, in his statement said substantially the same thing. He said he had been on detail all day and "knocked off work" about 1745 hours. He took a shower and ate his dinner. After eating he returned to his tent and saw Wade, Liggins and Chappell playing cards there. About 1900 hours they left and, as he expressed it, "went to the motor pool and got the weapons carrier that Liggins drives, and

a trip ticket. We drove toward Duclag [sic]. When we came to the intersection of the main road we turned west and drove to the second village where we bought three pints of whiskey from a Chinaman for ten pesos a pint." He then traced their movements, which accord substantially with what the others said, and continued, "We arrived at camp at about 2230 hrs. * * * At about 2330 hrs we four men took Cpl Becks and Washington to FEAF Hq so they could go to work. * * * I was feeling [sic] sick from the drinks so I laid down on the bench of the truck. * * * The next thing I remember was turning into the road going to camp. I don't know what time it was when we reached the motor pool but I went straight to bed" (Ex. 6).

Accused Chappell's statement is substantially the same as the others. He mentions leaving his company area in the evening of 3 April 1945 in the weapons carrier and letting certain men off at various points on the road. He tells of going for liquor; about the places they stopped at and their return to the post. Continuing he said, "Later, Liggins asked me to go along while he drove Becks and Washington up to FEAF Hqs. Area to go to work. They were supposed to go on duty around 2400. We dropped Becks and Washington off at FEAF. Then we drove away. I dropped off to sleep and don't know whether they stopped for more liquor or not. All I know is that when we got back to the 1941st Area, someone of the boys gave me another drink of whiskey. Chestnut was awake in the tent, and I borrowed his knife to open a can of peanuts. Then I went to bed. I don't know when we got back to the area, but it was still very dark; around 0130 or 0200, I think. After eating some peanuts I went to bed and stayed there until reveille" (Ex. 3).

Corporal Enoch G. Ward was the motor dispatcher of the 1941st Engineer Aviation Utilities Company in April 1945. His hours were from 0730 to 1900 but he sometimes went to work as early as 0645 (R. 57, 58). On the morning of 3 April he dispatched vehicle no. 2228210 to Private First Class Otis Norwood and made out and signed a trip ticket therefor. Norwood returned the vehicle to the motor pool about 1700 or 1715 hours on 3 April and at that time he looked at the speedometer and entered the mileage which it registered, 05616, on the trip ticket (R. 72-73, Ex. 7). Corporal Ward wrote the same number at the bottom of the ticket in the space opposite "Vehicle released at." Norwood, the driver of the vehicle, gave him that figure when he came in (R. 58, 59, Ex. 7).

Ward dispatched the same vehicle at 1830 hours on 3 April to accused Liggins (R. 59, 60). The trip ticket shows "Time in" 0200 hours, and in the spaces under "Speedometer" an "Out" mileage of 5646 and an "In" mileage of 5717 (Ward did not write either figure or see either of them written.). The figure 5646, in ink, obviously has been altered and appears to have been written originally 5616. At the bottom of the

ticket opposite "Vehicle release at" is the figure 5757. The hand-written name "James E. Liggins," appears on the space for the driver's signature. Ward was not present when the vehicle was released. There was no dispatcher at the motor pool all night, and drivers returning vehicles after the dispatcher had gone off duty deposited the trip tickets in a box provided for that purpose (R. 60, 61, Ex. 8).

On 4 April Corporal Ward dispatched the same vehicle at 0700 hours to Pfc. Johnnie Hawkins as the driver. According to the trip ticket (Ex. 9) at the time the vehicle was dispatched the speedometer reading was "05717" (R. 61-63, Ex. 9).

On cross examination Corporal Ward stated that at 0830 hours on 4 April when he first saw the trip ticket on which accused Liggins is named as the driver (Ex. 8) the "Out" mileage of 5646 was written in but the "In" mileage of 5717 had not-as yet been filled in (R. 63-66).

Private First Class Johnnie Hawkins, a member of the same company as the accused, had vehicle no. 2228210, a three-quarter ton weapons carrier, permanently assigned to him. He did not drive it on 3 April 1945 but on the morning of 4 April he took it out about 0700 hours after finding it at the orderly room (R. 74-77). He read the speedometer at that time and it registered 05717 miles. He wrote that number on the trip ticket (Ex. 9). He had been on guard duty from 0300 to 0500 hours and during that time had not seen any vehicle come into the motor pool. He did not know whether vehicle no. 2228210 had been there during that time. When he drove it on 4 April he observed on the glove compartment some stains which had the appearance of smeared fingerprints (R. 78). Laboratory tests disclosed that they were blood stains (R. 87).

On cross examination the defense introduced a pretrial statement of Pfc. Hawkins in which he said that when he saw the weapons carrier about 0600 or 0615 hours on 4 April it was in the motor pool (R. 85, Def. Ex. A). He insisted he did not remember saying that, but toward the end of his testimony said that when he got into the vehicle it was at the motor pool (R. 79, 87).

Private First Class Jake Chestnut testified that on 3 April 1945 he went to bed about 2130 hours and did not awaken until 0600 hours the next morning. He did not give Chappell a knife at any time that night. Chappell did, however, give Chestnut's knife back to him at reveille on 4 April (R. 89-91). Chestnut had made a pretrial statement to an investigating officer that during the night of 3- 4 April he had made a loan of a knife to Chappell. He said the statement was not true and that he had made it because Chappell had asked him to do so (R. 90, 92, 93).

Private First Class Isaac Kimble testified that he went to bed at 2130 hours on 3 April and did not awaken until 0600 hours the next morning. Accused Wade, Chappell and Jackson had beds in his tent

at that time but he did not hear either of them come in that night. When he woke up just before reveille they were in their beds (R. 94-96).

It was stipulated that the total distance over the route described by accused Liggins in his statement (Ex. 4) as having been driven by him on the night of 3- 4 April 1945 was eighty-four miles and that the distance from the motor pool of accuseds' company to the home of Raymundo Veloso, thence to the sand pit where the "alleged attacks took place," thence to the Veloso home again and then back to the motor pool was twenty-six miles (R. 97).

4. The evidence for the defense:

Corporal Frank H. Burks testified that he was "CQ, and in charge of the guard" on the night of 3- 4 April 1945 (R. 104). His was a twelve-hour tour of duty running from 1900 hours on 3 April to 0700 hours on 4 April. The guards were posted every two hours (R. 104). Between 0300 and 0500 hours he did not hear or see any vehicle enter the company area (R. 105, 107). At 0500 hours he posted Corporal Osby who relieved Hawkins (R. 105). That while Osby was on duty he (Burks) did not see any vehicle enter or leave the motor pool or the company area. He said he knows of his own knowledge that none did leave or enter (R. 106), and that no vehicle was parked by the orderly room where he stayed (R. 106, 108). He slept only about an hour that night between 0200 and 0300 hours (R. 108).

Corporal Osby, who was on guard duty from 0500 to 0700 hours said he relieved Johnnie Hawkins at 0500 hours; that he was guarding the company area including the motor pool (R. 109) and that during his tour of duty he is positive (R. 110) that no vehicle entered the motor pool or the company area (R. 109). He said he does not remember seeing a weapons carrier parked outside the orderly room either when he went on duty or when he went off, and that he saw no one moving around the company area during those hours except the mess sergeant (R. 111).

Second Lieutenant Pat R. Griffin, "Administrative Officer" of the 1941st Engineers, testified that about 1900 hours on 4 April 1945 there was a lineup of ten or twelve colored soldiers including the four accused. Raymundo Veloso was "instructed to go up and down the line of men, look at them and point out anyone that had to do with a case or whatever he was concerned with. * * * He was told to pick out the men he recognized" (R. 112). Veloso was also told that he could view the men as long as he wanted. He viewed them for ten or fifteen minutes (R. 113) and then identified Corporal John Becks as the offender (R. 113). (Becks is not an accused and had nothing to do with the crime.)

(b16)

On the afternoon of 5 April 1945 fifteen to eighteen men were again lined up, including the four accused. Veloso made no further attempt to identify anyone (R. 114). The two girls were given an opportunity to view the lineup of men. Mellie Suase "looked back and forth from one and to the other. She stood right in the center of the line, about 5 feet from the line. She must have looked about at least 10 minutes." She failed to identify anyone (R. 114). Anunciacion "went up to the line and looked a long time--between 5 and 10 minutes. She was not sure, then she went back to the jeep with the FEAF Investigator." She then returned to the line and picked out Chappell (R. 114). Upon the basis of orders given to him, Lieutenant Griffin instructed guards, on the night of 4 April, that the four accused were not to speak to each other or anyone else (R. 114).

It was stipulated between the prosecution and the defense that if Investigator Glavin were present he would give sworn testimony to the effect that at the first questioning of the accused on the evening of 4 April 1945 the "bodies, clothing and personal belongings of all four men were searched. No blood stains were found on them or on the garments in their possession" (R. 116). It was further stipulated that although carbines had been issued to each of the accused, same had been turned in by them to the company supply officer on 20 March 1945 (R. 117).

Each accused elected to remain silent (R. 117-118).

5. The evidence shows that about 0300 hours on 4 April 1945 two negro soldiers entered the home of a Filipino, Raymundo Veloso, and at the point of a carbine took him and his two cousins, Mellie Suase and her sister Anunciacion Suase, outside where two other soldiers were waiting. The three Filipinos were forced to enter a truck and were taken on a thirty minute drive to a sand pit where the girls were removed from the truck, their resistance was overcome by force, and two of the soldiers in turn had sexual intercourse with Mellie and the other two had sexual intercourse with Anunciacion. The three Filipinos were then placed in the truck and returned to their home.

It thus appears that the four colored soldiers carnally knew the two Filipino women by force and without their consent, thus consummating the crime of rape upon each of them. Since the four colored soldiers clearly acted jointly and pursuant to a preconceived, common, unlawful design or plan it is immaterial that the evidence does not disclose which of them had sexual connection with which particular girl. Each of them as to each girl either directly committed the act or aided and abetted his confederates in its consummation and one who aids and abets the commission of rape by another person is chargeable as a principal (Bull. JAG, Feb. 1944, p. 62; CM P-119, Edwards, et al, July 1945).

There remains for determination the question whether the evidence establishes the identity of the accused as participants in the offenses of which they were found guilty. At the trial Veloso pointed out the four accused as the colored soldiers who came to his house on the morning of 4 April and stated that accused Liggins was the driver of the truck. On cross examination he said that the only reason he could identify them was because they were there in court and accused, but he also said that on the return journey from the sand pit he saw the face of the driver of the truck by the lights of a passing vehicle. Anunciacion testified that on the way back from the sand pit she saw accused Chappell's face by the light of a passing truck and she identified him at the trial.

The identification of an accused as the person who committed the crime is a question for the jury (Sanders, et al v. United States, 127 Fed. 2d 647; Kerns v. United States, 50 Fed. 2d 602; Litsinger v. United States, 44 Fed. 2d 45) unless the evidence of identification is incredible as a matter of law (23 CJS sec. 1126). Viewed as a whole Veloso's testimony indicates that he had no basis for his trial identification of accused Jackson, Chappell and Wade, but his identification of Liggins the driver was based upon his statement that he saw Liggins' face by the light of a passing vehicle. His inability to pick out Liggins from a lineup in which Liggins was included according to the testimony of defense witnesses, considered in the light of the explanation made by Veloso, was a matter to be considered by the court as affecting the credibility of his testimony. It cannot be said as a matter of law that his testimony as to the identification of Liggins has no probative value. Anunciacion positively identified Chappell at the trial. She also picked him out of a lineup prior to the trial. The testimony of Veloso and Anunciacion thus furnishes substantial direct evidence that accused Liggins and Chappell were participants in the offenses alleged in the specifications of Charge I.

The proof of guilt of the other accused, Jackson and Wade, is wholly circumstantial. To sustain a conviction such proof must not only be consistent with guilt but must also negative every reasonable hypothesis of innocence. Veloso read and remembered the number of the truck used by the four colored soldiers who raped his cousins. A truck bearing that same number was in the motor pool of accuseds' company. It was dispatched to accused Liggins as driver at 1830 hours on 3 April 1945 and according to the admissions in their pretrial statements, the accused, four colored soldiers, rode in the truck together, came back to their camp area, left the truck and all went to bed at the same time. The accused admitted that Liggins was the driver of the truck while they rode in it. He was identified as the driver of the truck used by the rapists. They said in their statements that they came in about 0200 hours but no dispatcher was then on duty and not a single witness testified that he saw any of them at that hour.

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There was considerable inconsistent, contradictory and vacillating testimony regarding the three trip tickets issued for the use of vehicle no. 2228210 on 3 and 4 April, but it was the province of the court to resolve the conflicts and decide which testimony it would believe. Certain inferences indicative of the guilt of the accused could be drawn from this documentary evidence. When the truck was turned into the motor pool at 1700 hours on 3 April the mileage on the speedometer according to the trip ticket (Ex. 7) was 05616 miles. There is no evidence that it was used by anyone from that time until it was dispatched to accused Liggins at 1830 hours. On the trip ticket signed by him (Ex. 8), the "Out" mileage in the blank space under "Speedometer" is written 5646, but the figure obviously has been crudely altered and it is apparent that originally it was 5616, the identical "In" mileage shown on the earlier trip ticket. If the correct speedometer reading when Liggins took the truck out was 5616 then he drove it thirty miles farther than his trip ticket indicated. The record shows that the mileage from accuseds' camp to Veloso's home, then to the sand pit, thence back again to Veloso's house and to the camp was twenty six miles.

When Pfc. Hawkins took the truck from the motor pool at 1700 hours on 4 April he read the mileage on the speedometer and entered it on the trip ticket (Ex. 9). That mileage was 05717, the identical figure shown as the "In" speedometer reading on the trip ticket signed by accused Liggins. From this circumstance the court was warranted in drawing the reasonable inference that the truck was not driven by anyone else on the night of 3- 4 April after the accused brought it back to their camp. If so, it follows that the four accused were the four colored soldiers who rode in the truck to Veloso's home and raped the two Filipino girls named in the specifications of Charge I.

6. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and punishable by penitentiary confinement by section 22-2801 of the District of Columbia Code.

7. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings and the sentences.

Harold Roberts, Judge Advocate.
Colonel, J.A.G.D.

Samuel M. Driver Judge Advocate.
Lieutenant Colonel, J.A.G.D.

(Dissent), Judge Advocate.
Major, J.A.G.D.

ARMY SERVICE FORCES
 In the Branch Office of The Judge Advocate General
 With the United States Army Forces
 In the Pacific

Board of Review
 CM P-170

7 October 1945

UNITED STATES)
)
 v.)
)
 Privates First Class LEO B.)
 JACKSON (34961752), NATHANIEL)
 CHAPPELL (34961739), JAMES)
 WADE, JR. (34245902), and)
 JAMES E. LIGGINS (36021762),)
 all of 1941st Engineer)
 Aviation Utilities Company.)

Trial by G.C.M., convened at
 APO 719, 7, 8, 9 and 10 June
 1945. Sentence as to each:
 Dishonorable discharge, total
 forfeitures and confinement
 at hard labor for life.
 United States Penitentiary,
 McNeil Island, Washington.

DISSENTING OPINION
 ROBINSON, Judge Advocate.

1. The facts are substantially as stated in the majority opinion. But one legal question is presented, namely, identification of the accused as the perpetrators of the crime.

Identification was sought to be established by direct and circumstantial evidence. The direct identification was characterized by the staff judge advocate, whose duty it is to weigh and consider the evidence for appropriate action by the reviewing authority (MCM, 1928, par. 87b, p. 75), as "worthless," "unconvincing" and "entitled to no weight." In his concluding statement he said " * * * there has been no legal identification established by any one of the three victims" (SJA Review, p. 7). The record warrants the conclusion that the reviewing authority concurred in the staff judge advocate's views as to the worthlessness of the direct identification testimony.

A staff judge advocate's review may be looked to in order to determine the basis for the reviewing authority's action. (CM 203511, Wedmore, 7 B.R. 221, 227; CM 217681, Walker, 11 B.R. 301, 309; CM 243091, McCarthy, 27 B.R. 273, 282). In fact it is the only means of ascertaining the reviewing authority's views. The exceptions are cases where the record shows affirmatively that he was not in accord.

The reviewing authority alone, acting on his staff judge advocate's advice, has the power to determine the weight, sufficiency and credibility of testimony (CM 152797 cited on p. 216, MCM, 1928). The language in the cited case is clear: "In such cases [A.W. 50 $\frac{1}{2}$] the law gives to the court-martial and the reviewing authority exclusively this function of weighing evidence and determining what facts are proved thereby" (underscoring supplied), and a board of review, regardless of its own views on the subject, is without power to determine otherwise (CM 234472, Cannon, 21 B.R. 1, 9; CM 239164, Kyles, 25 B.R. 67, 73).

The majority of the Board of Review has here seen fit to base its conclusion (in part at least) on evidence which the reviewing authority and his staff judge advocate have discarded as "worthless"—in effect, usurping the functions of the reviewing authority and the staff judge advocate (MCM, 1928, par. 87b). The circumstantial evidence of identification is hereinafter separately discussed. Even if the Board did have the power to discard the staff judge advocate's review and the reviewing authority's action thereon, its conclusion, as hereinafter pointed out, is, in my opinion, nevertheless wrong.

2. There were three persons present at the scene of the crime in a position to testify as to identification: the victims, Mellie Suase, her sister Anunciacion and Raymundo Veloso. Mellie Suase admitted quite frankly that she was unable to identify any of the accused although admittedly some of the perpetrators of the offense were in close proximity to her for at least one and one-half hours (R. 36), and although, as she said, "The moon was bright, only that some times there were passing clouds" (R. 39).

Raymundo Veloso, the former gambling house employee who appeared at the lineup within less than twenty-four hours after the commission of the offense, positively identified one Corporal Becks. Becks had nothing to do with the crime (R. 22, 113). His positive identification of Becks was made despite the admonition, "Do not point out if you are not sure" (R. 28). The record shows that he made a wrong identification and at the same time failed to identify any of the accused although the four of them were in the lineup.

Upon the trial Veloso, apparently enlightened in the meantime, pointed to the accused as the four guilty persons (R. 22). He sought to excuse his failure to identify them at the lineup which was had on the very day of the crime by saying that he was "quite scared" (R. 28) and "really nervous" (R. 28). Upon being pressed as to why he pointed out Corporal Becks he said, "because he was tall, as I imagined those fellows who came into my house were bending when they went in our room" (R. 29). He finally admitted that he pointed to the accused upon the trial only because they happened to be there and were, in fact, the accused. His exact language was, "Now that they are here—and accused" (R. 29).

The worthless character of his testimony is further demonstrated by his answer wherein he stated, "I am not sure because it appears to me that they are all alike; they are all dark--black" (R. 27). His identification upon the trial of the accused Liggins, which the majority of the Board accept as sufficient, contrary to the staff judge advocate's conclusion that it was "worthless," was preceded by his earlier failure to identify Liggins at the lineup. Veloso's explanation was " * * * but I went back and forth three times in front of a soldier who is here at this time [presumably Liggins], but I did not pick him out at that time because I was in doubt very much" (R. 28).

The record of trial indicates that Second Lieutenant Pat R. Griffin, who was in charge of the first lineup which took place the same day the crime was committed, instructed Veloso "to go up and down the line" and to "point out" or to "pick out" the men he recognized (R. 112). Lieutenant Griffin also told Veloso that he could view the men as long as he wanted. He said that Veloso, after viewing the men for ten or fifteen minutes, then made the erroneous identification of Corporal Becks.

The record shows further that on 5 April 1945 there was a second lineup of fifteen to eighteen men, including the four accused. Veloso was present but made no further attempt to identify anyone (R. 114). It is quite obvious that Veloso's identification of the several accused upon the trial was not based on knowledge but upon imagination or after supplied information.

As a matter of law identification of a defendant not based on knowledge but on imagination, supposition or supplied information is wholly valueless (1-2 Wharton's Crim. Evid., 11th Ed., secs. 265, 932, 936; Wigmore's Treatise on Evidence, 3d Ed., sec. 657; Henderson v. State, 113 So. (Fla.) 689). The staff judge advocate and the reviewing authority so found and I cannot concur with the majority view that this Board may conclude otherwise or that it has the power to do so. There remains, therefore, only Anunciacion Suase's identification of the one accused Chappell.

Anunciacion Suase first stated that she could not see the faces of the negro soldiers who attacked her (R. 35); that she could not even tell what kind of clothing they were wearing (R. 36); that she did not know any of the accused and did not recognize any of them until the return trip when she caught a glimpse of Chappell (R. 40-41). When asked if she recognized Chappell as being an attacker or just being in the truck she replied, "Just being with the four" (R. 41). She then went on to say that when she picked him out in the lineup she had him "in mind" as the one "who really attacked me" (R. 41). When asked if she was positive she said she was not sure. She then testified, "I just can't tell whether I pointed him out really, but he was in front

of me during that investigation" (R. 42). There is nothing to the contrary in the testimony of Lieutenant Griffin who said that she "went up to the line and looked a long time--between 5 and 10 minutes. She was not sure, then she went back to the jeep with the FEAF Investigator." Thereafter she picked out Chappell (R. 114).

Anunciacion Suase's testimony as to the identification is vague, indefinite, contradictory and vascillating. Upon her own admission she failed to identify Chappell as her attacker although that was the basis for her identification of him in the lineup and she was not sure that he was one of the four who were in the vehicle. The other three accused were not identified by her at all either in the lineup or at the trial. The staff judge advocate advised the reviewing authority that her testimony was valueless and not sufficient to establish "legal identification" and there is nothing in the record which would warrant disagreeing with his conclusion on that score.

It is elementary that in every criminal case the identification of the accused as the guilty agent is equally as essential as the proof of the corpus delicti (1 Wharton's Crim. Evid., 11th Ed., sec. 265). The proof of the identity of the accused must like other elements in the case be established beyond a reasonable doubt (Wharton's Crim. Evid., supra, sec. 932).

"Where the evidence shows that a crime had been committed by someone, so that identity becomes the sole fact in issue, the jury should be instructed by the court to acquit the accused unless such identification is established beyond a reasonable doubt" (1 Wharton's Crim. Evid., 11th Ed., sec. 268 (p. 336)). See also Petty v. State, 35 So. (Miss.) 213; Duffy v. People, 64 N.E. (Ill.) 308; MCM, 1928, par. 78a; Winthrop's Military Law and Precedents, 2d Ed., 1920 Reprint, pp. 314-316).

There is no question about the rule that the identification of the accused as the perpetrators of the crime on the one hand and a denial by the accused on the other usually presents a question of fact. There is, however, a certain measure of proof which the law exacts to establish such identification without which a conviction may not stand (Buntain v. State, 15 Tex. App. 490; CM 217681, Walker, 11 B.R. 301, 309).

In People v. Seppi, 221 N.Y. 62; 116 N.E. 793, the New York Court of Appeals said:

"The special effort of the prosecution was to identify the defendant as the slayer. Where a witness positively identifies a defendant as the man who committed a crime, the weight of the evidence of identification is for the jury unless

it is incredible as a matter of law. People v. Trybus, 219 N.Y. 18, 113 N. E. 538; People v. Sanducci, 195 N. Y. 361, 88 N. E. 385; People v. Seidenshner, 210 N. Y. 341, 104 N. E. 420. The identity of the defendant as the person who committed the homicide was not in this case shown with sufficient certainty to preclude a reasonable possibility of mistake."

The direct identification of the defendants in this case is not shown to fill the measure of proof which the law exacts. In CM 228831, Wiggins, 16 B.R. 333, at page 338 the Board of Review, adopting the language in the case of Buntain v. State, supra, said:

" * * * We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions * * *. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens."

See also CM 205811, Fagan, 8 B.R. 229, 233; CM 205920, McCann, 8 B.R. 239. In the McCann case at page 246 the Board of Review held a record of trial legally insufficient because the proof failed to "measure up" to the requirements of the law. We proceed therefore to determine whether the chain of circumstantial evidence arising out of the use of automobile bearing number 2228210 "fills the measure" of the law as to the identity of the accused. In this connection it is necessary to review the oral testimony and dispatch records relating to the use of vehicle number 2228210. This evidence must, of course, be viewed with extreme caution (2 Wharton's Crim. Evid., 11th Ed., sec. 922).

3. Certain so-called dispatch tickets relating to the use of the automobile in question for the days 3 and 4 April were introduced in evidence (Exs. 7, 8 and 9). Not only is the testimony relating to the dispatch tickets vague, indefinite and contradictory, but the tickets themselves contain erasures, changes and alterations, making it extremely difficult, if not impossible, to ascertain what the true facts are. Giving every fair intendment to the prosecution's case it appears that vehicle number 2228210 was taken out on the morning of 3 April 1945 with a speedometer reading of 5562 miles and turned in at 1700 hours with a speedometer reading of 5616 miles (Ex. 7). The driver's name, "James," is written on the dispatch ticket in the dispatcher's own handwriting (R. 58). The name "James" is lined out and the name "Norwood" substituted. It is not known who made the change.

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Norwood's name does not appear on any other part of the exhibit, and in the place for the "Driver's signature" appear the words "John James" written in longhand (Ex. 7). Norwood testified that he filled in the "In" (return) mileage as 5616 miles (R. 73). There is no explanation as to why the driver's signature appears as "John James" and not "Otis Norwood" if, in fact, it was Norwood who drove the car and turned it in at the end of the day.

Norwood's testimony on this score simply adds to the confusion. He first said that he thought he drove the car on 5 April and not on 3 April. Looking at the entry 5616 miles on Exhibit 7, he said that he was sure he wrote it and that "I got it the figure 5616 from the time that I brought the vehicle in that night" (1700 hours, 3 April 1945) (R. 73). Upon cross examination Norwood said, "Wait a minute, sir. I am sorry. That vehicle was taken from me * * * about 10:00 o'clock * * * I did not take that vehicle back to the area. * * * I think the MP brought it back. I am not for sure whether I seen it before that night when I turned my trip ticket in" (R. 73). " * * * when I had taken it out that morning * * * I drove the vehicle up to the utility shop and stopped there, and the MP came right in behind me. The MP came up and said, 'Don't move that vehicle.' I didn't know anything about it, and the motor officer said this was the vehicle the boys messed up in" (R. 74).

The offense herein charged did not take place until between 0330 and 0500 hours on 4 April. The military police therefore could not possibly have been looking for this car on the morning of 3 April unless, of course, it was involved in another crime. It is more probable, however, that Norwood was driving this car on 5 April as was his belief (R. 72), and it follows that he could not have entered the figure "05616" which appears on the dispatch ticket for 3 April.

John James, whose signature as the driver of the car on 3 April bears a striking resemblance to the writing "05616", was not called as a witness for the prosecution. This evidence is extremely important because when the accused Liggins took the car out later that evening he recorded the "Out" speedometer reading as 5646 miles (Ex. 8). If, in fact, it was 5616 miles then he drove the car thirty miles more than he admitted, which is the approximate mileage to and from the scene of the crime (R. 97). Despite all the confusion and vagueness of the proof, it will be assumed for the purpose of argument that vehicle number 2228210 was returned by someone to the motor pool at 1700 hours on 3 April 1945, at which time the speedometer reading was 5616 miles and that that mileage was recorded on the dispatch ticket by someone--Norwood, James or some third person.

The second dispatch ticket (Ex. 8) indicates that the vehicle was duly issued to the accused Liggins at 1830 hours on 3 April 1945 for a legitimate military purpose (R. 73-74). There is no proof, however,

that the car was not used in the interim. In fact, it would appear from Norwood's testimony that it was used (R. 73). The majority of the Board of Review simply infer that it had not been used and that the speedometer reading was the same (5616 miles) when Liggins took it out as it was one and one-half hours earlier. They say "There is no evidence that it was used by anyone from that time 1700 hours until it was dispatched to accused Liggins at 1830 hours" but it was the burden of the prosecution to prove affirmatively that it was not so used. Mere conjecture cannot take the place of proof (Hogan v. State, 170 Ark. 1143, 282 S.W. 984).

The trip ticket for Liggins' use of the car was made out by the dispatcher, Corporal Ward (R. 59). This ticket, like the earlier one (Ex. 7), contains changes, alterations and contradictory markings. It is first written up as being issued to one Hunter at 2330 hours. Hunter's name and the time are scratched out and substituted in their place is the name "Liggins" and the time "1830" hours. The "Out" mileage, which was changed from some other figure, is "5646" The "In" mileage is "5717" and time in 0200 hours (Ex. 8). Liggins, in his pretrial statement, said, "I got back to my company area around 0130 hours. I signed in the weapons carrier at 0200 hours. I put down the mileage in from the speedometer of the weapons carrier" (Ex. 4). There were no changes or erasures on the "In" mileage nor the time the vehicle was signed in.

The dispatcher, Corporal Ward, testified that when a vehicle is returned at night it is the customary practice to put the trip ticket in a box, since no one is on duty (R. 66). When Corporal Ward returned to duty about 0700 hours on the morning of 4 April he wrote on the trip ticket which Liggins had turned in and which he (Ward) found with others taken from the box, the "In" mileage as "5757." Liggins' writing showing that he turned the car in at 5717 miles was written on the same ticket. Ward said that the speedometer reading was called off to him by Hawkins at 7 o'clock that morning when Hawkins was taking the vehicle out for the day (R. 71). If that is true, it would indicate that the vehicle was driven forty miles by someone after Liggins turned it in between 0130 and 0200 hours with the speedometer showing "5717" miles. However, Hawkins said he didn't know whether he called off that speedometer reading to Corporal Ward or not (R. 76). On his own trip ticket for 4 April (Ex. 9), Hawkins wrote down the "Out" mileage as "05717"—exactly the "In" mileage recorded by Liggins.

If Hawkins correctly told the motor dispatcher that the speedometer reading was 5757 then he erroneously entered the figure 5717 as the "Out" mileage on his dispatch ticket for 4 April. He either took the figure 5717 from the last dispatch ticket covering the same car or he called off the wrong number to Corporal Ward, or Corporal Ward misunderstood him. It all makes for interesting speculation, but we cannot condemn four men to imprisonment for the terms of their natural lives on that kind of speculative testimony (2 Wharton's Crim. Evid., 11th Ed., Chap. 15).

From the above mass of confusing testimony and unsupported inferences, two conclusions are drawn connecting the four accused with the crime. First, that when Liggins took the car out the speedometer reading was 5616 miles; that the figure had been changed by him on the dispatch ticket to read 5646 miles; that he therefore drove the car an additional thirty miles (the approximate distance to and from the scene of the offense); that having driven the car thirty miles more than he admits indicates that he is concealing something and since he is concealing something he must have committed the crime. I cannot agree with any such line or reasoning.

The second conclusion is that since the vehicle had "5717" miles recorded on the speedometer and on the dispatch ticket when Liggins turned the car in and since it had "5717" miles recorded on the speedometer when the next driver, Hawkins, took it out the next morning (a fact about which the prosecution's own witnesses tell conflicting stories) that no one else drove the car in the meantime and that therefore Liggins and the other three are guilty. Assuming that there was no change in the speedometer reading it does not follow that the vehicle was not used from the time Liggins brought it in until Hawkins took it out (the five-hour period during which the crime was committed). The staff judge advocate in his review was not unmindful of the fact that the speedometer cable may have been disconnected for the duration of the trip to the scene of the crime and reconnected when the vehicle was returned, nor is the breaking of a speedometer an unheard of event. The majority of the Board pass over these factors without comment. They reason as follows: "From this circumstance [the same speedometer readings] the court was warranted in drawing the reasonable inference that the truck was not driven by anyone else on the night of 3- 4 April after the accused brought it back to their camp. If so, it follows that the four accused were the four colored soldiers who rode in the truck to Veloso's home and raped the two Filipino girls * * * ."

Aside from the fact that the conclusion is a non sequitur, the majority discard entirely the evidence in the record that no vehicle was seen leaving or coming into the company area between 0300 and 0700 hours by the guards or the C.Q. (R. 80, 105-107, 109-110). Three of the accused were seen in their tents getting up for reveille before 0600 hours (R. 91, 95-96). The vehicle was seen in the company area between 0600 and 0700 hours (R. 77, 82, 85). This testimony tends to support the accuseds' contention that they were all in before 0200 hours. It is possible, of course, that the vehicle returned unnoticed, but these facts are pointed out as tending to show the weakness of proof which permeated the entire case.

It is elementary in criminal law that where a fact is sought to be shown by circumstantial evidence, the facts and circumstances must

"point directly and unerringly to the accused's guilt. In other words, they must be of a conclusive character. Mere suspicions, probabilities or suppositions do not warrant a conviction" (2 Wharton's Crim. Evid., 11th Ed., sec. 922).

Circumstances of suspicions however strong or grave, or speculative probabilities, are not sufficient to justify a finding of guilt (Royals v. Commonwealth, 131 S.E. (Va.) 204; Pate v. State, 72 So. (Fla.) 517). It is elementary that circumstantial evidence must be acted upon with extreme caution (Clark v. Commonwealth, 166 S.E. (Va.) 541) and proof must exclude every other reasonable theory or hypothesis except guilt (CM 238485, Rideau, 24 B.R. 263, 272; Cochran v. United States, 41 Fed. (2d) 193; State v. Sinovich, 42 S.W. 2d (Mo.) 877; State v. Willis, 279 Pac. (Wash.) 578; People v. Fitzgerald, 50 N.E. (N.Y.) 846).

In CM 238485, Rideau, supra, the Board of Review said:

"Where the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt. Where the evidence is entirely circumstantial the circumstances must not only be consistent with guilt, but inconsistent with innocence. Mere probabilities do not suffice. Proof of mere opportunity to commit a crime is not sufficient to establish guilt (Dig. Op. JAG, 1912-40, sec. 395 (9); CM 120937, CM 153330, CM 169811, CM 196619, CM 195705). To warrant conviction, circumstantial evidence must not only prove all the elements of the offense but must at the same time exclude every reasonable hypothesis except guilt (Bull. JAG, June 1943, p. 238; CM 233766)."

In People v. Rzezicz, 99 N.E. (N.Y.) 557 at page 565 the New York Court of Appeals said:

"In a criminal case circumstantial evidence to justify the inference of guilt must exclude to a moral certainty every other reasonable hypothesis. Circumstantial evidence in a criminal case is of no value if the circumstances are consistent with either the hypothesis of innocence, or the hypothesis of guilt; nor is it enough that the hypothesis of guilt will account for all the facts proven."

4. It cannot reasonably be said that there is a sufficient quantum of substantial evidence in this record, circumstantial or direct, tending to prove each element of the offense charged—which is the measure

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of proof which the law says a Board of Review must find in order to hold a conviction by a military court legally sufficient (CM 203511, Wedmore, 7 B.R. 221, 227; CM 216004, Roberts Jr., et al, 11 B.R. 69, 73; CM 223648, Nugent, 14 B.R. 39, 42; CM 227239, Wyatt, 15 B.R. 217, 253).

For the reasons stated I am of the opinion that the record of trial fails to identify the several accused as the perpetrators of the crime and is therefore legally insufficient.

 Judge Advocate.
Major, J.A.G.D.