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GENERAL
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BOARD OF REVIEW
OPINIONS

NORTH AFRICAN
THEATRE
MEDITERRANEAN
THEATRE

VOL. 2
1943-1944

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HOLDINGS OPINIONS AND REVIEWS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

NORTH AFRICAN THEATER OF OPERATIONS
MEDITERRANEAN THEATER OF OPERATIONS



VOLUME 2 B.R. (NATO-MTO)
CM NATO 470-CM NATO 1151

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AUTH: TJAG 4/15/46 BY: A.G.K.

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WASHINGTON, D. C.

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v. 2

Judge Advocate General's Department

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Holdings Opinions and Reviews

BOARD OF REVIEW

Branch Office of The Judge Advocate General

NORTH AFRICAN THEATER OF OPERATIONS

MEDITERRANEAN THEATER OF OPERATIONS

Volume 2 B.R. (NATO-MTO)

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(1943-1944)

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

(1)

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

Board of Review

NATO 470

UNITED STATES)

FIRST INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Zeralda, Algeria, 2 July 1943.

Private HOWARD R. SEEGER
(20707035), Headquarters
Company, 16th Infantry.)

Dishonorable discharge, confine-
ment for ten years. Disciplinary
Training Center Number 1, Oran,
Algeria.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Howard R. Seeger, Headquarters Company, 16th Infantry, being present with his company while it was engaged with the enemy, did, at or near El Guetter, Tunisia, on or about April 4, 1943, shamefully abandon the said company and seek safety in the rear and failed to return to military control until he surrendered himself at Algiers, Algeria, on or about April 16, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction of absence without leave was

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introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Disciplinary Training Center Number 1, Oran, Algeria, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that from 1 April to 4 April 1943, the 16th Infantry was engaged with the enemy in the vicinity of El Guettar, Tunisia (R. 7,11,13,19). Both forward and rear command posts of the regiment were under a constant enemy shell fire and occasional air attacks (R. 7,13,18,19), which caused constant damage to lines of communication (R. 8,18). The accused was with the rear command post assigned to the wire section of the regimental Headquarters Company, with specific duties as "trouble shooter and switchboard operator" (R. 8). On 2 or 3 April, he reported back to his place of duty after an unauthorized absence and was placed in arrest with instructions to report to his corporal "every hour on the hour" (R. 9). He commenced to argue with a noncommissioned officer who told accused to be quiet. Accused then remarked that he "would rather do time in the guardhouse than do combat duty" (R. 10,19). At about the same time, he made substantially similar remarks (R. 14, 15, 19). He had shirked his duties (R. 15) and had asked for permanent kitchen police duty (R. 21).

Just prior to 4 April, all men of the company had been on continuous duty for almost 36 hours (R. 13). Accused's section had been required to go out frequently to repair telephone lines damaged by enemy shell fire (R. 7,8). On the morning of 4 April, accused was found to be missing and, as of that day at 0900 hours, was entered on the morning report absent without leave (R. 6,14; Ex. A). He remained absent until 16 April 1943, when he surrendered at Algiers, Algeria, stating that he was "a straggler" (R. 5,22,23).

Accused testified that his first absence was occasioned by an effort to find his baggage which had been left behind when the company had moved forward to El Guettar (R. 16,17). Upon his return, he was told to report to his corporal "if I went anywhere". He testified:

"That night I was put on the switchboard from midnight to three in the morning. After that I went on the board, and the next morning I asked Sergeant Alessandro about going to get some rations and he said to go get them, and after a while, I left. That was about ten thirty in the morning, and I started back to the 1st Q.M., which was about ten miles in the rear. When I got to where they were I found they had moved out, so I just kept on going until I got to Algiers, and then I turned in to the Special Service Command. I told them there that I was a straggler and wanted to go back to my outfit for trial. I stayed there

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for about three days and then they shipped a bunch of us to the replacement pool in Constantine. I was told to stay with them until they caught up with the Division. The next day they pulled out for Oran, so I still stayed with them, and we stopped right near Oran* (R. 17).

A witness for the defense testified that it was after accused was found to be absent on 4 April, that the command post was bombed and shelled (R. 21).

4. It is clearly shown by the evidence that while serving with his organization, which was then actively engaged with the enemy, accused absented himself without authority from his place of duty, went to the rear and stayed there for a considerable period. His absence under the circumstances, amounted to a shameful abandonment of his company and it must be inferred that in fact he sought safety in the rear, as found by the court. There is ample evidence to support the findings of guilty.

5. The accused is twenty-one years old. He enlisted in the United States Army 28 August 1940. No prior service is shown.

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

Samuel P. Hughes , Judge Advocate.
C. G. T. J. J. , Judge Advocate.
Harold Simpson , Judge Advocate.

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WAR DEPARTMENT

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

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

Board of Review

NATO 491

UNITED STATES)

36TH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
APO 36, U. S. Army, 10 August
1943.

Private WILBUR T. MC CLUSKEY
(38050338), Headquarters Company,
3rd Battalion, 141st Infantry.)

Hard labor without confinement
for three months and forfeiture
of forty dollars (\$40) per
month for six months.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

Samuel T. Holmgren Judge Advocate.
O. J. Ide Judge Advocate.
Gordon Simpson Judge Advocate.

Branch Office, JAG, NATOUSA, Board of Review, 24 September 1943.
TO: The Assistant Judge Advocate General, NATOUSA.

For his information.

270376

Samuel T. Holmgren
SAMUEL T. HOLMGREN
Colonel, J.A.G.D.

Chairman, Board of Review

CONFIDENTIAL

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(6)

24 September 1943

NATO 491

MEMORANDUM:

SUBJECT: Record of trial in the case of Private WILBUR T. MC CLUSKEY (38050338), 3rd Battalion Headquarters Company, 141st Infantry.

1. In finding accused guilty of wrongfully taking and using the automobile, the court manifestly and quite properly concluded that the facts and circumstances in the case did not establish the essential element of specific intent characteristic of the crime of larceny. So with respect to Charge I and its Specification, accused has been convicted of an offense which, though analogous to that of larceny, is more appropriate for a situation where a wrongful taking for a temporary use is involved (Mil. Justice Bull. No. 13, May 6, 1942).

2. The evidence shows that during the afternoon of the day alleged the accused had been in Rabat, in close companionship with a Private George F. Hampson. Both were of the same organization. They went into several bars and cafes where they drank rather heavily of wine, resulting in their becoming noticeably drunk. At about 1900 hours they were observed by a witness who testified

"When I saw him he and Private Hampson were walking away from me. They were both pretty drunk. An M.P. said to put them on the truck. We started off to the truck but McCluskey wanted to go back and talk to the M. P. McCluskey talked to the M.P. and the M.P. was buttoning him up--his shirt was unbuttoned. In the meantime Hampson came by in a car and told McCluskey to get in. He got in and that is all we saw of them" (R. 10).

They were thereafter involved in an accident. A military policeman en route to the scene of the wreck was stopped by an officer who had accused and Hampson with him in a weapons carrier. The military policeman examined the men and checked their "dog-tags". He testified accused and his companion seemed to be under the influence of liquor, that they spoke incoherently and seemed dazed but were not very drunk. Hampson said, "I stole the car so don't worry about anything else" (R. 9; Ex. 1).

3. While mere presence of accused at the time and place of the commission of a crime is insufficient to implicate him as an accessory or principal therein, this obviously sensible view has no application where accused by word or act takes some part in its commission and from the circumstances shows him to be a party by preconcert or

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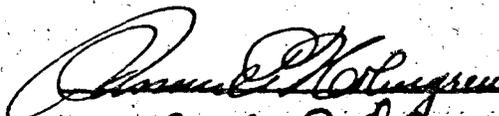
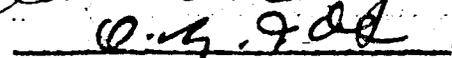
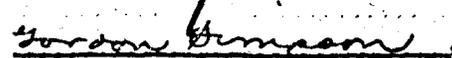
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intent (Dig. Op. JAG, 1912-40, sec. 452 (9)). Accused's connection with this offense was not merely that of presence. He and Hampson were of the same organization and on the day specified, for a considerable period of time before Hampson appeared with the automobile, they had been closely associated together in Rabat. Hampson acquired possession of the vehicle while accused was on the street conversing with a third person. As soon as it was driven up to the place where he stood and Hampson gave the word, accused immediately and unhesitatingly responded by entering the vehicle. It was thereupon driven away. These circumstances are not without significance. They are quite susceptible of an inference that the part he played was in furtherance of a preconceived plan. The fact of their close relationship is at once suggestive of a concurrent knowledge on the part of accused that the automobile had been wrongfully taken. As bearing upon his good faith, accused must have been at least aware of the extreme improbability of a legitimate acquisition of the automobile by his companion and it is further to be noted that the latter stated after the accident, in the presence of accused and without indication of surprise or denial of such knowledge on his part, that he had stolen the car. But irrespective of a concerted wrongful taking, the accused can be held chargeable with knowingly and voluntarily uniting with Hampson in the wrongful use of the automobile. As such, he was no less a principal. Consistently with this principle it has been held that even when one person joins in carrying off property under the belief that it belongs to the other, but learns during the transaction that it was stolen by his companion and remains and completes the removal, he is a joint principal in the larceny (Green v. State, 114 Ga. 918, 41 S.E. 55; cited in 36 C.J. 796). The inference is justified that accused was fully and completely aware of the wrongfulness of the use if not also of the taking of the automobile.

4. It is unnecessary to consider whether the allegations in each of Specifications 1, 2 and 3 constitute a disorder cognizable by the 96th Article of War.

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

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

(9)

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

Board of Review

NATO 534

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

v.

Sergeant FRANK T. BISHOP
(32189508), Technician Fifth
Grade WILLARD (NMI) TODD
(34112094), Corporal ROBERT F.
DERR (32268645), Corporal JAMES
A. SOLUS (32328455), Private
First Class GEORGE (NMI) MOORE
(34178194), Privates GEORGE (NMI)
DRUMMOND (34122891), GARING B.
MAYO (35434114), HERBERT (NMI)
WRIGHT (34292241), ARCHIE (NMI)
BROWN (34133384), and Private
First Class GRANT (NMI) TURPIN,
JR. (14015284), all of Company D,
208th Quartermaster Battalion
(General Service); Staff Sergeant
ANDREW (NMI) HELM (32112228),
Sergeant JACOB N. BONAPARTE
(32085217), Private First Class
ALEXIS M. WAPLES (32071729),
Privates ALLEN F. BARNWELL
(32188218), and HARVEY S. CAMMILE,
JR. (33319767), all of Company A,
242nd Quartermaster Battalion
(Service)

MEDITERRANEAN BASE SECTION

Trial by G.C.M., convened at
Oran, Algeria, 19 July 1943.
Bishop and Helm, dishonorable
discharge and confinement for
twenty-five years.
Todd, Derr, Solus, Brown,
Waples, Barnwell and Cammille,
dishonorable discharge and
confinement for twenty years.
Moore, Mayo, Wright and Turpin,
dishonorable discharge and
confinement for fifteen years.
Drummond, dishonorable dis-
charge and confinement for
five years.
Bonaparte, not guilty.
United States Disciplinary
Barracks, Fort Leavenworth,
Kansas.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Sergeant Frank T. Bishop, Technician 5th Grade Willard (NMI) Todd, Corporal Robert F. Derr, Corporal James A. Solus, Private first class George (NMI) Moore, Private George (NMI) Drummond, Private Garing B. Mayo, Private Herbert (NMI) Wright, Private Archie (NMI) Brown, Private first class Grant Turpin, Jr., all of Company D, 208th Quartermaster Battalion (GS), and Staff Sergeant Andrew (NMI) Helm, Sergeant Jacob N. Bonaparte, Private first class Alexis M. Waples, Private Allen F. Barnwell, Private Harvey S. Cammille, Jr., all of Company A, 242nd Quartermaster Battalion (Service), acting jointly and in pursuance of a common intent, did, at or near Perregaux, Algeria, on or about 15 May 1943, wrongfully conspire to commit a riot, in that they did then and there wrongfully and unlawfully assemble and wrongfully plan to enter the town of Perregaux, Algeria, on or about 15 May 1943, together with other soldiers whose names are unknown, and there wrongfully assault the Military Police in a violent and turbulent manner, by force and arms, with the intent to assist one another against anyone who should oppose them in the execution of the said plan, to the disturbance of the said Military Police and to the terror and disturbance of the inhabitants thereof.

Each accused pleaded not guilty to the Charge and Specification. Bonaparte was found not guilty and all other accused were found guilty of the Charge and Specification. No evidence of previous convictions was introduced except as to Drummond, Wright, Turpin, each of whom was shown to have been convicted once by summary court-martial for violation of Article of War 61, and Brown, convicted twice by summary court-martial for violation of Article of War 61. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor, Bishop and Helm for twenty-five years, Todd, Derr, Solus, Drummond, Brown, Waples, Barnwell and Cammille for twenty years, and Moore, Mayo, Wright and Turpin for fifteen years. As to Drummond, the reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. As to each of the other accused sentenced, the reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The competent evidence relating to the transaction in general is summarized as follows:

Each accused was either a member of Company A of the 242d Quarter-

master Battalion or Company D of the 208th Quartermaster Battalion. These companies occupied a bivouac area about a mile from the center of the town of Perregaux, Algeria (R. 12,13,15,16; Ex. A).

Sometime during the afternoon of 15 May 1943, one Oliver Garvin, First Sergeant of Company A, 242d Quartermaster Battalion, was arrested with some other soldiers by military police in Perregaux and held at the military police headquarters in that town. At about 1830 hours, First Lieutenant Charles E. Bischof, Jr., the commanding officer of Company A, together with Second Lieutenant William L. Manning, also of that company, went to Perregaux for the purpose of returning Garvin, the sergeant, to the bivouac area (R. 6,7,14,80). Garvin was described as having a slight cut on his head, a bruised swollen lip and being "very definitely under the influence of liquor" (R. 7,14). As they left, Garvin turned to a sergeant of the military police and in effect said, "Well, I am not forgetting about this. We will meet again" (R. 14,15). Garvin was returned to camp at about 1945 hours (R. 7,16).

News of Garvin's arrest had already spread to the soldiers in the bivouac area when Lieutenant Bischof departed for Perregaux and while he was in town an unsuccessful attempt was made by twenty-five or thirty excited soldiers in the area to secure ammunition from the supply tent (R. 16,31,32,64). Thwarted in this effort, accused Helm, one of the group, advised them to keep quiet and get the ammunition later (R. 65,66). Accused Barnwell and Waples were also in the group (R. 64) and Cammille was in the immediate vicinity of the tent (R. 32). Second Lieutenant Byron S. Peterson, of Company D, who had stopped them from getting the ammunition, testified that, at about 1830 hours, Cammille approached and

"told me that the boys in camp were very excited about the treatment that the First Sergeant had received in town, and he told me that there was talk that they were going to go in town that evening. When he told me that I went down to the supply tent where there was quite a group of soldiers talking. I asked them what the trouble was" (R. 30).

He testified that they continued talking about the sergeant and that the concensus of the group was that "if no other action would be taken that they would have to do it themselves" (R. 30,39).

When Lieutenant Bischof returned from town with Sergeant Garvin, many soldiers, including practically all the accused, were gathered around the orderly room of Company A (R. 7). After Garvin and the other prisoners were placed in arrest in quarters (R. 8,16), Lieutenant Bischof, to abate the excitement and answer questions as to what he "was going to do about the First Sergeant being beaten up by the MP's" (R. 8), talked to the group for more than an hour. He testified:

"I told them that there would be a proper investigation of the whole matter in the morning and that action would be taken. I didn't know exactly what then, because I didn't

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have the full story, and they began telling me a lot of stories about how they had been mistreated in the town of Ferregeaux by those MP's, such as chasing them out of bars and chasing them away from French people. A few of them were a little excited and running off at the mouth and I gave quite a lengthy speech then, telling them all that I would see that Colonel Sedgwick knew about the conditions and that he would interview the commanding officer of the MP's to see that proper action would be taken and that they would be allowed their proper liberties in town" (R. 8).

Personal complaints and grievances were voiced, including one of accused Waples, who told as many as would listen to him that some weeks before he had been hit over the head by the military police (R. 8,16,17,18,24).

Lieutenant Manring, who had talked with some of the soldiers (R. 18), testified:

"They complained that the MP's, for example, would stop them and ask them for their passes, and then let them proceed a half a block or a block up the street and stop them again and ask them to see their passes. They would be with French girls when the MP's would come up and tell them to go on away and go back to camp. Others complained that they had been at French homes and as they approached the door to go in the MP's had come up to them and said to the French 'Negro no good', and told the boys to go back to camp. Private Waples about three weeks previous to this time had become intoxicated in town -- at least, I believe he was under the influence of liquor -- and was arrested by the MP's. He resisted arrest -- " (R. 17).

Waples had told witness that he had resisted arrest (R. 17) and that "he knew who it was and he would look him up when they got back to the States. The MP wouldn't have his gun then. It would be just man to man and the best man would walk away" (R. 18).

Lieutenant Bischof, in concluding his talk to the men, told them to let the matter rest until morning and ordered them to their tents (R. 8, 19). Shortly thereafter Lieutenant Manring stopped and talked with Helm who stated "that the man seemed to be entirely satisfied about Lieutenant Bischof going in to see the Colonel and they had returned to their tents" (R. 19).

Instead of going to their tents a number of the soldiers, including Todd, Bishop, Solus, Turpin, Brown and Derr, congregated at "about 9:30 or a little later" in the vicinity of the recreation tent. There they talked about going into town to "see the MP's" (R. 19,50,51,57,58,73); Bishop being heard to say, "Let's go up town and shoot up the MP's" (R. 72,76) and, with others, that they "were going to kill up the MP's"

(R. 78). Helm was heard to say to another group that "when they got the ammunition he would go to town and take cover...spread out" (R. 66). At about 2200 hours a group of soldiers, including Helm, Waples, Barnwell and Camille, entered the supply tent, forcibly subdued the guard and made off with a case of ammunition (R. 40,41,68,69,82,87). At or about this same time, Brown also went to a truck mounted with a .30 caliber machine gun and took some ammunition "out of the belt" which he later distributed (R. 73, 75,79). It was planned that everyone was to have ammunition (R. 78) for use against the military police in Perregaux (R. 33,64). Some ammunition was distributed in or near the latrine (R. 28,73). Bishop was present when ammunition was being distributed (R. 78). Drummond received ammunition (R. 28) and Wright was given four rounds from "a fellow from the 242nd Q.M." (Ex. E,F).

All the soldiers were armed with rifles (R. 51,52,79). Bishop led a group from the bivouac area to Perregaux (R. 73), which was entered from different directions (R. 52,63,74). Todd (R. 50,51), Derr (R. 73), Solus (R. 78), Moore (R. 110), Drummond (Ex. A; R. 12,21,23), Mayo (Ex. G,H; R. 107), Wright (R. 28), Brown (R. 76) and Turpin (R. 55, 56,62) went to Perregaux. Brown was with Bishop (R. 74,76). Military police testified, by stipulation, that in Perregaux they apprehended three soldiers, two of whom were Todd and Drummond. These soldiers had told the military police they were in town to see about their first sergeant having been beaten. About six shots were fired at the military police, before Drummond, at the request and warning of the military police, shouted to the soldiers to stop firing (R. 94,95; Exs. B,C,D). Drummond, taken to the military police station, was later turned over to an officer of his company (R. 94). Turpin (R. 55), Todd (R. 55), Mayo (R. 20), Wright (R. 20; Exs. E,F), Brown (R. 75) and Solus (R. 75) were seen armed with rifles returning to camp after the soldiers had been in town.

The following are evidential facts concerning each accused:

BARNWELL

Accused was among those, including Waples and Camille, who made the first attempt at about 1830 hours to get ammunition from the supply room (R. 32,64). He was recognized as one of the soldiers who entered the supply tent (R. 68,82,87). After 2200 hours he was seen with a tommy-gun which was taken away from him (R. 83,84). He had no ammunition at the time (R. 136) and was not authorized to have this weapon (R. 137).

BISHOP

Accused was seen about 2130 hours standing with other soldiers, including Todd, Solus, Turpin and Derr, talking about "going in town" because of the incident "between the First Sergeant and the MP's" (R. 50, 51,57,58). At about 2200 hours he was heard to say to a group of soldiers "Let's go up town and shoot up the MP's, either or they would be doing something to us" (R. 72,76). He was present when ammunition was distributed

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to the group (R. 78) and was heard to say, with others, "we're going to kill up the MP's" (R. 78). Accused had a rifle and led a group from the bivouac area to the town (R. 73). Shots were fired while accused, Brown and others went past a warehouse (R. 74).

BROWN

Accused was with the group of soldiers in camp at about 2200 hours when Bishop said, "Let's go to town and shoot up the MP's" (R. 72,73). Accused went to a truck mounted with a .30 caliber machine gun and got some ammunition "out of the belt". He was observed handing out ammunition (R. 73,75,79). He went to town with Bishop and about six other soldiers (R. 74,76). After having heard shots in town, accused returned to camp with Solus and others (R. 75,77,78).

CAMMILE

At about 1830 hours, accused told one of the company officers that the men were very excited about the treatment the first sergeant had received in town and that there was talk of going into town that evening, "with the intention of meeting the MP's". Accused was present when the lieutenant spoke to the group of soldiers (R. 30). Accused was also in the "immediate vicinity" of the supply tent when an effort was made to get ammunition (R. 32). He was recognized as one of the soldiers, including Helm, Barnwell and Waples, who subsequently entered the supply tent and made off with a case of ammunition (R. 82,87).

DEFFR

Accused was in the group with Bishop, Todd, Solus, Turpin and others talking about going into town "to see the MP's" (R. 50,51,57). Later that evening accused was seen "going up town" with his rifle (R. 73).

DRUMMOND

Accused made a sworn written statement before trial which was received in evidence. He stated that at about 2200 hours, 15 May 1943, he was with a group of soldiers in the latrine. He was drunk and so were many of the others. They were talking about going into town and finding out why one of their sergeants had been beaten. Some one asked "Do we want some ammunition to go into town with us". Accused answered "Yes", took a clip of ammunition and went to his tent and laid down. In the meantime the other fellows had already started for town. "The vino started telling me to go to town". He took his rifle, walked across the field over the railroad tracks and on to the road. A French soldier told him that a number of soldiers had just passed. Accused went on and caught up with the other soldiers. He went to the Vox Theatre. One soldier went into the theatre "to see if any M.P.'s were about". He and another soldier "met two M.P.'s" who ordered them to put up their guns and "we told them some one had beaten up the 1st Sgt and wanted to

find who did it and why they beat him up". Accused admitted in this statement that they came to town to scare the "M.P.'s". While talking with these two military policemen, someone in the next block started shooting at them. Accused ran into a doorway with them and after "a couple shots the MP's told me to tell the men to stop firing". Accused "hollered for them to stop and they did stop". Accused further stated that the "MP's told me if I escorted them back to their bivouac area they would let me go. I did this and they gave me back my rifle and let me go" (Ex. B,C,D; R. 106). Later while accused was walking down the street two other military policemen stopped him and took him to the station. At about 2300 hours he was returned to camp by one of his company officers (R. 12, 21,23). (See paragraph 6 herein).

HELM

Accused was present (R. 22,81) when Lieutenant Bischof talked to the men and afterwards, at about 2145 hours, told Lieutenant Manring that "the men seemed to be entirely satisfied about Lieutenant Bischof going in to see the Colonel and that they had returned to their tents" (R. 19). Thereafter accused, with Waples and other soldiers gathered in front of Sergeant Bonaparte's tent, where accused was heard to say, "Let's go down town. Let's get some ammunition and let's go to town" (R. 82,93). He also said "we would just go up there and break this stuff up" (R. 65). When the first attempt to get ammunition had failed, accused said "Wait until later to get the ammunition" (R. 65), and "Let's keep quiet" (R. 66). Accused also stated that "when they got the ammunition he would go to town and take cover---spread out" (R. 66). Accused with other soldiers, including Barnwell, Waples and Cammille, went to the supply tent when the ammunition was taken (R. 87). Accused and Barnwell each had a tommy gun (R. 83,84). When the soldier in charge set out to report the loss, accused told him not to wake the lieutenant (R. 67,69,70). Accused importuned one soldier about going to town and asked him if he was afraid (R. 88). Accused offered one soldier some ammunition (R. 67).

MAYO

Accused, after being advised of his rights (R. 107), made a written statement to the investigating officer. He stated that about 2130 hours on 15 May 1943, he heard soldiers talking near his tent about going into town with rifles "to scare the MP's". Accused got his rifle and walked alongside the railroad track towards the bridge. Before arriving at the bridge he was given a .30 caliber "bullet" by "a fellow from the 242nd Q.M." Then accompanied by others he went into town. He stopped at a corner near a picture house and heard "someone shoot...behind me further up Rue Verdun". He then started back towards camp and joined other soldiers on the way. One of them shot up into the air. Accused told him to stop but he shot again (Ex. G.H; R. 107). Other evidence showed that at about 2215 hours an officer going towards town met accused and Wright on the bridge as they were returning to camp. They were dressed in fatigues and each carried a rifle. Accused did not have identification tags on him and gave his name as "James Smith" (R. 20,21,22).

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MOORE

Accused stated to the investigating officer that he was in the vicinity of the "truck" from which the ammunition was stolen, went with others to a sergeant's tent where it was distributed and then went to town with others in the company (R. 108,109,110). He stated that their plan was to "go down town and get even with the military police for wrongs the military police had done them" (R. 110).

SOLUS

Accused was in the group with Bishop, Todd, Turpin, Derr and others, talking about going into town "to see the MP's" (R. 50,57). Accused and all the other soldiers had their rifles and ammunition with them (R. 51, 73,78). He joined some soldiers "about a quarter of a mile" from the warehouse where he still had his rifle (R. 78). He returned to camp in company with Archie Brown and two or three other soldiers (R. 75).

TODD

Accused was corporal or acting sergeant of the guard on the night in question (R. 48,49) and was present when the Company Commander of Company D, 208th Quartermaster Battalion, talked to a group "of approximately twenty-five or thirty" men (R. 26,29). At "about 9:30 or a little later" accused was in a group of soldiers, including Bishop, Solus, Turpin and Derr, who were standing near the recreation tent talking about going into town "to see the MP's" (R. 50,51). Accused had his rifle and went to Perregaux with the group (R. 50,51). One witness saw accused with Turpin on their way back to camp after some shots were heard (R. 55,62). Accused told this witness that "Drummond had been caught by the MP's" (R. 55,62).

TURPIN

Accused was seen in camp around 2130 hours on 15 May 1949, standing with several other soldiers, including Bishop, Todd, Solus and Derr, who were talking about going into town "to see the MP's...on account of the incident that happened up town that evening" (R. 50,51,53). All, including accused, had their rifles (R. 51,53). After the shots were fired in town, accused and Todd returned to camp (R. 55,56,62).

WAPLES

Accused was present in the company area when the men were discussing their grievances against the "MP's" (R. 17,22,39). He added a personal complaint of an incident that happened some three weeks before when, as stated, he had been hit over the head with a club by the "MP's". He told this story "to as many men as would get around to listen"... "at least twelve men must have heard him" (R. 17,24). He "seemed to be of the opinion that they should beat up the MP's" (R. 18). Accused was present when the soldiers, including Helm were talking about going to town (R. 93). He was in the group of soldiers who first went to the supply tent to get

ammunition (R. 64) and was with the group when Helm said "Wait until later to get the ammunition" (R. 65). He and two other soldiers later carried a box of ammunition out of the supply tent (R. 69). Accused had a rifle before they went into the supply tent (R. 83).

Two defense witnesses testified that they were in his tent when the shooting took place and that Waples was in bed at the time (R. 120,121, 123,125,128).

WRIGHT

At about 2215 hours an officer going toward Perregaux saw accused with a soldier who later proved to be Mayo--on the bridge, returning to camp. Accused was dressed in his fatigues and had no identification tag. He carried a rifle. Witness testified that "they told me that they were returning from guard duty in the***railway yards" (R. 20,21,22,23). Another officer later testified that neither had been detailed as a guard that night (R. 26). The first witness further testified that some shots were heard about five minutes after he had left accused at the bridge. The following morning an examination of accused's rifle showed that it had been fired. His commanding officer testified that in talking with accused that morning about the previous night the latter "stated he had also been issued ammunition and related to me that he went into town more or less in back of the rest, that he had gotten a late start and ran into these fellows on reaching the edge of Perregaux" (R. 28).

Accused signed a sworn statement which was received in evidence. He stated that on 15 May 1943, he worked until about 2100 hours, and before starting back to camp "began drinking pretty heavy". About a quarter of a mile from camp he met a soldier who told him that "the boys***were in town and were going to straighten out things with the MP's on account of them beating up the First sergeant that afternoon. He said the men were in town with rifles and ammunition". He stated that, "The MP's had been picking on us by not allowing us to go into certain places". Accused reached camp at about 2230 hours. He picked up his rifle and started for town. On the way he met "a fellow from the 242nd Q.M." who gave him four rounds of ammunition. Accused proceeded towards town and got as far as "the fork in the roads", when he met four soldiers who were returning from town. They told accused there was "nothing to it that I might as well go back". On his way back to camp accused fired his rifle into the air twice. An officer approached and asked who fired the shots. Accused told him he did not know. Accused returned to camp and went to bed (Ex. E,F; R. 106,107). (See paragraph 6 herein).

Defense introduced testimony that Waples was in his tent the night the shots were fired; that he was in bed after Lieutenant Bischof made his talk to the men and that when seen he was undressed (R. 118,120,121,128).

Lieutenant Bischof, called as a defense witness, testified that he had given Helm instructions to circulate among the men to help keep the men

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quiet and to see that the men stayed in their tents (R. 133). He also testified that after talking to the men he went into his tent and did not see this accused until after the ammunition had been stolen (R. 134).

None of the accused who was found guilty testified as a defense witness or made an unsworn statement (See paragraph 6 herein).

4. The Specification charges the accused with conspiring to commit a riot by unlawfully assembling and planning to enter the town of Perre-gaux and there violently and turbulently to assault the military police, to the disturbance of the military police and to the terror and disturbance of the inhabitants of that town. The allegations are thus descriptive of the contemplated offense (AW 89; Appendix 4, p. 248), under the definition that:

"A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful. (McClain, Crim. Law.)" (MCM, 1928, par. 147c).

The alleged acts of accused also signify a concerted design to "neutralize for the time being" military authority as represented by the military police. In that respect their acts were imputably mutinous (Dig. Op. JAG, 1912-40, sec. 424). But the charge more appropriately imports a purpose to vent resentment at the military police for personal grievances and accordingly to further an enterprise of a private nature rather than one of impinging upon military authority (Wharton's Crim. Law, sec. 1860; 54 C.J. 829).

The charge as drawn is technically one of conspiracy with no overt act expressly alleged as such. While under the common law this is not required, the absence of such an allegation would be fatal if the offense were to be considered as laid under Section 37, of the Criminal Code (35 Stat. 1096; 18 U.S.C.A. 88; Dig. Op. JAG, 1912-40, sec. 454 (23)). Since the offense of riot involves the execution of an express or implied agreement among three or more persons to commit an assault or battery or a breach of the peace, it consequently possesses some of the essential elements of criminal conspiracy (Wharton's Crim. Law, sec. 1860; 54 C.J. 830). So at common law, we find a conspiracy to commit a riot as falling within a limited class of indictable conspiracies described as "confederacies which, from the mode of their operations, exhibit the features...of aggregation of violence likely to overbear individual resistance and to produce public terror". The exhibition of violence is not by one person, but by three or more, and hence indictability is said to be produced by "a cooperation in application of force constituting an attempt at riot" (Wharton's Crim. Law, secs. 1603, 1629).

A reputable authority, while recognizing the existence of precedents for conspiracies to commit riots, writes it is open to doubt whether rioters themselves can be properly indicted for conspiracy (Wharton's Crim. Law, 12th Ed., sec. 1620). This is because the offense of riot, for the commission of which the alleged conspiracy is formed, necessarily involves as elements of the offense, concert and plurality of agents. It is therefore contended that they cannot be indicted for agreeing or planning to do that which in itself requires their concerted action. Consistently with this view is a decision that a charge of conspiracy will not lie as to crimes that cannot be committed except by concerted action of at least two persons and of such a nature that the immediate effect of their consummation reaches only the participants, so that conspiracy to commit them is in such close connection with the objective offense as to be inseparable therefrom (Curtis v. U. S. (C.C.A. Colo. 1933) 67 F. (2d) 943; cited in 18 U.S.C.A. 88, note 41). But notwithstanding these accused as the exclusive participants in the prospective riot, it is unnecessary for this Board, with the view hereinafter adopted as to the nature of the offense, to express an opinion as to the appropriateness of a charge of conspiracy in this instance. It may be noticed incidentally that while the Specification might be considered as charging a conspiracy to commit an assault and battery, an obviously indictable offense, it is apparent that such an offense was not contemplated by the pleadings.

Neither should the Specification be regarded as appropriate for an attempt to commit the crime of riot, despite the rule that whatever crime is punishable in consummation is punishable as an attempt (Wharton's Crim. Law, 12th Ed., sec. 1603). While conspiracies to commit crimes are analogous to attempts, they are nevertheless subject in general to the legal limitations regarding the latter (Wharton's Crim. Law, 12th Ed., sec. 1607). To exclude such an offense from consideration here, mention need only be made to the absence of essential allegations in the Specification to charge an attempt. It may be observed that allegations appropriate for the offense of riot would more nearly approximate an attempt to commit a riot (Wharton's Crim. Law, 12th Ed., sec. 1859, see note 9).

The Specification however involves and sufficiently charges an offense that is included in that of riot. As a compound offense, it includes as lesser offenses those of unlawful assembly and rout. It has been aptly expressed that:

"if three or more persons meet together for the purpose of beating another who lives a mile off, there is an unlawful assembly. While they are on the road to carry out the purpose, there is a rout. Where they make the attack and beat him, there is a riot" (Clark Elem. L. p. 119; cited 54 C.J. 829, note 10).

This illustration of the distinctions definitely and appropriately brings

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the allegations of the Specification within the category of what is known as an unlawful assembly, which at common law is:

"an assembly of three or more persons: (1) With intent to commit a crime by open force; (2) with intent to carry out a common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighborhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it" (66 C.J. 37).

The essence of this offense is the intent with which the persons assemble, as

"Wherever the intent or purpose of the meeting is such as, if carried into effect, would make the participators rioters, it is an unlawful assembly" (66 C.J. 39).

The fact that the unlawful assembly consisted of soldiers and occurred in a bivouac area is no less within the condemnatory provisions of law than the offense of riot, which is referred to in the 89th Article of War as follows:

"All persons subject to military law are to behave themselves orderly in...camp...and any person subject to military law who commits...riot, shall be punished as a court-martial may direct."

A riot can be a riot even though the rioters are soldiers and it takes place in a military camp (Pitchers v. Surrey County, 39 T.L.R. 7; cited 54 C.J. 830, note 25) and any phase of an offense of that character is obviously within the condemnation of military law as constituting acts prejudicial to good order and military discipline within the purview of Article of War 96.

To constitute the offense of unlawful assembly, no overt act is necessary and all who join, give countenance or support to it are criminally responsible for the acts of their associates (66 C.J. 39, 41, note 54). No formal or express agreement need be proved to establish the unlawful purpose of such an assemblage. It may be inferred from all the facts and circumstances in the case (66 C.J. 42, note 66). In any event the assembly and plan here charged were of a nature directly and palpably to disrupt military order and prejudice military discipline, and were therefore properly chargeable under Article of War 96.

5. It appears from the evidence that on the day alleged soldiers of the two companies bivouacked together near Perregaux, Algeria, became excited and resentful over the arrest in town that day by military police of the first sergeant of one of the companies. The reason for the sergeant's arrest is not disclosed, but it is shown that when seen by

his commanding officer at the military police headquarters the sergeant was definitely under the influence of liquor. The news of his arrest had rapidly spread to the soldiers in the bivouac area resulting in an immediate and intense outburst of feeling against the military police. They voiced personal grievances and charges of discrimination and simultaneously expressed a definitely formed purpose to go into Perregaux and assault the military police. In fact, early in the excitement an attempt was made by some of the soldiers to get ammunition from the supply tent. Momentarily thwarted, they decided to make another effort later. Upon his return to camp with the sergeant, the commanding officer of one of the companies, in order to abate the excitement, talked to the soldiers for over an hour. He promised them that he would take up the entire matter of their grievances the following morning and ordered them to their tents.

Instead of repairing to their tents, a group of the soldiers assembled at a place within the bivouac area where they resumed their talk and plans about going to Perregaux and there violently assault the military police. Expressions such as shooting and killing the military police were heard and everyone was to have a rifle and ammunition. Shortly thereafter a number of soldiers went to the supply tent where they overpowered the guard and made away with a case of ammunition. This was thereupon distributed among certain of the soldiers who, armed with rifles, proceeded to Perregaux. In groups, they approached the town from different directions and when inside, shots were fired at the military police. After three of the soldiers had been arrested by the military police the other soldiers dispersed and made their way back to camp.

In these progressive stages as portrayed by the acts of the soldiers, demonstrating the commission of rout and riot as well as the lesser offense of unlawful assembly, the evidence clearly implicates each of the accused in varying connections. It shows that accused Barnwell, Cammille and Waples made the initial attempt to secure ammunition; that Bishop, Brown, Derr, Solus and Todd were among those who later that evening assembled and planned to make a violent assault upon the military police; that Barnwell, Cammille, Helm and Waples were among those who forcibly restrained the guard while a case of ammunition was taken from the supply tent; and that accused Bishop, Brown, Drummond, Derr, Mayo, Moore, Solus, Todd, Turpin and Wright, all armed with rifles and ammunition, went to Perregaux.

Each of the accused appears thus to have actually participated in the common enterprise. In each instance his criminal responsibility is fixed by the showing that he either was a party to or gave countenance and support to the unlawful assembly. The fact that the evidence shows participation in some later stage of the activities, justifies the inference that he was also a party to the initial assembly and had fully concurred in the general riotous plan. The conclusion is inescapable that their act of assembling in the bivouac area and there concertedly planning a violent and tumultuous assault upon the military police was manifestly unlawful and cannot but be condemned as constituting a palpable

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disorder impinging directly upon good order and military discipline within the meaning of the 96th Article of War.

6. The record of trial shows that during the course of the presentation of evidence by the prosecution, without preliminary explanation for such action, that "The prosecution calls as its next witness the accused, Private Wright" (R. 95). Wright was then advised as to his rights under Article of War 24 and was sworn after stating to the president of the court, in response to a question by that officer, that he understood its meaning. Defense counsel thereupon interjected that he had previously informed Wright as to his rights and had recommended to him that he not testify. The trial judge advocate moved these remarks be stricken from the record as "incompetent, irrelevant and immaterial" and commented that "the choice of testifying or remaining silent and claiming the privileges rests solely with the witness". The court struck out that part of the remarks of defense counsel as related to his advice to Wright not to testify, whereupon defense counsel stated for the record that he had "made his recommendation to the witness before defense counsel had any knowledge whatsoever that the trial judge advocate contemplated calling the accused as a witness for the prosecution" (R. 96). Wright then testified for the prosecution (R. 96-101).

The accused Drummond was also "called by the prosecution" but after being advised of his rights under Article of War 24, refused to be sworn as a witness (R. 102). The court thereupon recalled Wright who was asked by the president of the court whether he had previously understood that he "did not have to go on the stand and testify". Wright answered he had not understood his rights in that regard and the court expunged his testimony from the record (R. 103,104).

Later in the proceedings the record shows that the prosecution desired "to afford the accused Drummond, Mayo, Wright and Moore an opportunity to testify in the prosecution's case. The prosecution is willing to call them if they have any desire to testify on behalf of the prosecution." Each of these accused was then asked by the president if he desired to avail himself "of the offer which has been made by the trial judge advocate". All gave a negative answer except Drummond, who was sworn and gave an affirmative answer to the question of the president: "Do you understand what you are doing, that it is voluntary and nobody is requiring you to do it and you don't have to do it unless you want to?" (R. 112). Drummond then testified for the prosecution, implicating by name Bishop, Derr, Solus, Moore, Turpin and Brown as having said at the meeting that "they were going to scare the MP's" and making self-incriminatory statements that on the night in question he had a rifle and ammunition and that after he arrived in Perregaux with the other soldiers he was accosted by military policemen (R. 112-117). Except as to the attribution of the above statement to the accused above mentioned, Drummond's statement made to the investigating officer, elsewhere admitted in evidence, is in substantial accord with his testimony (Ex. B,C,D; R. 106).

After the prosecution had rested and the defense counsel had announced

he had advised accused of their rights, the court asked the accused if they fully understood their rights. Thereupon Drummond took occasion to say, "I didn't understand yesterday, sir", and added that he then thought he was required to make a statement. The court however adopted the view that Drummond had had his rights fully explained to him and declined to expunge his testimony (R. 142).

The action of the trial judge advocate in calling accused Wright and Drummond as witnesses for the prosecution was unwarranted under the circumstances and was error. It was violative of the letter and spirit of the law that an accused shall "at his own request, but not otherwise, be a competent witness" (MCM, 1928, par. 120d; 20 Stat. 30; 28 U.S.C.A. 632) and further that "his failure to make such request shall not create any presumption against him" (MCM, 1928, p. 125). The record is devoid of any indication that in either instance the accused had previously requested that he become a witness for the prosecution. Contrariwise, the thought appears to have originated with the trial judge advocate who it is indicated initiated the proposal even without the knowledge or expectation of accused's own counsel. Without some initiatory request by accused, his privilege to remain silent was to him inviolable and he was not a competent witness for the prosecution. It was obviously neither fair nor proper for the trial judge advocate to place him in a dilemma by making him decide the question of becoming a witness before the very court before which he was being tried. The court explained to accused his rights with respect to self-incrimination and it may be assumed that accused understood his rights in this regard, but his competency was another matter. By devices such as were resorted to here the rule as to competency, based no doubt on the fundamental right of silence, would be vitiated. The purpose of the law being to preserve to the accused his right to remain silent without prejudice, it was clearly improper for the prosecution to call him as a witness without a previously expressed request on his part (Wharton's Crim. Ev., sec. 1125; 16 C.J. 690). In court-martial proceedings these principles must be given the fullest scope of expression.

If, in this case, an accused had requested that he become a witness for the prosecution, his competency would have been unquestioned, whether called by the prosecution or the defense (28 U.S.C.A. 632; 20 Stat. 30; MCM, 1928, p. 125). But when he properly becomes such a witness, in a case where he is himself on trial, he cannot assert his privilege against self-incrimination (MCM, 1928, p. 125). This rule accordingly renders specious and meaningless the explanation given accused Wright and Drummond concerning rights under the 24th Article of War. In each instance, ironically, the testimony is replete with statements of a self-incriminatory character.

Resort by the prosecution to testimony of an accomplice is normal only upon consideration of necessity, to supply proof which cannot otherwise be obtained. In such instances the usual and proper practice, in the absence of an unequivocal request to testify, is to make a special disposition of the charge against the prospective witness. A promise of immunity,

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for instance, has the sanction of law in court-martial proceedings (Dig. Op. JAG, 1912-40, sec. 395 (57)).

It must be concluded however that, apart from the testimony given by Drummond, with the specific mention therein of Bishop, Derr, Solus, Moore, Turpin and Brown as having said at the meeting that "they were going to scare the MP's", the record contains competent evidence amply sufficient to support the findings of guilty, and that the substantial rights of these and the other accused could not have been injuriously affected by any of the errors and irregularities herein mentioned.

The investigating officer secured signed sworn statements from accused Drummond, Wright and Mayo. These were introduced in evidence (R. 105-8; Exs. B,C,D,E,F,G,H) with the announcement by the president that the statement in each instance was admissible on the issue of guilt or innocence on the part of the one who made it and had no probative value as to the guilt or innocence of any of the other accused. This was proper.

7. The trial judge advocate, in a letter addressed to the Commanding General, Mediterranean Base Section, recommended clemency for Drummond, stating that prior to trial he advised Drummond that if he would testify in the case that fact would be considered by the reviewing authority in the determination of the sentence. He further stated that preceding Drummond's request to have the testimony stricken from the record, he had been in conversation with Helm and Bishop and apparently had been influenced by them. The trial judge advocate expressed doubt whether the charges would have been substantiated in all instances had Drummond failed to testify.

It is noted in this connection that Drummond's statement, introduced in evidence, was only competent on the question of his own guilt or innocence and not as to any of the other accused. If it had been properly adduced, his testimony, on the other hand, would have been competent as against all others, including himself.

8. Accused Bishop is twenty-five years old. He was inducted 9 January 1942 and had no prior military service.

Accused Todd is twenty-eight years old. He was inducted 5 May 1942 and had no prior military service.

Accused Derr is twenty-three years old. He was inducted 1 June 1942 and had no prior military service.

Accused Solus is twenty-three years old. He was inducted 30 April 1942 and had no prior military service.

Accused Moore is twenty-three years old. He was inducted 29 January 1942 and had no prior military service.

Accused Drummond is twenty-three years old. He was inducted 30 April 1942 and had no prior military service.

Accused Mayo is twenty-nine years old. He was inducted 29 June 1942 and had no prior military service.

Accused Wright is twenty-seven years old. He was inducted 27 April 1942 and had no prior military service.

Accused Brown is twenty-seven years old. He was inducted 17 September 1941 and had no prior military service.

Accused Turpin is twenty-one years old. He was inducted 19 August 1940 and had no prior military service.

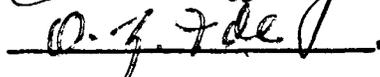
Accused Helm is thirty-four years old. He was inducted into the service 7 April 1941 and transferred to the Enlisted Reserve Corps 22 November 1941. Called to active duty 16 January 1942.

Accused Waples is thirty-two years old. He was inducted 16 April 1941, discharged 25 November 1941, recalled to active duty 16 January 1942.

Accused Barnwell is twenty-three years old. He was inducted 6 January 1942 and had no prior military service.

Accused Cammille is thirty-two years old. He was inducted 10 July 1942 and had no prior military service.

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

 Judge Advocate.
 Judge Advocate.
_____. Judge Advocate.

CONFIDENTIAL

WAR DEPARTMENT

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

(27)

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

Board of Review

NATO 544

UNITED STATES)

v.)

Private OSCAR M. HELTON)
(34288961), Company B, 636th)
Tank Destroyer Battalion.)

36TH INFANTRY DIVISION

) Trial by G.C.M., convened at
) APO 36, U. S. Army, 21 August
) 1943. Dishonorable discharge
) and confinement for life.
) United States Penitentiary,
) Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Oscar M. Helton, Company "B", 636th Tank Destroyer Battalion, did, at Bivouac area of the 636th Tank Destroyer Battalion, near St Leu, Algeria, on or about the night of August 16, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Hamza Zergatte, a human being by shooting him with a rifle.

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

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

3. The evidence shows that at approximately 2000 to 2050 hours, 16 August 1943, "between sundown and dark" (R. 51), accused and two companions started to a French home in the vicinity of the bivouac area of the 636th Tank Destroyer Battalion (R. 6), to get some laundry (R. 12). Accused was carrying a German rifle. The men of the battalion had "been carrying German rifles" and for accused to be thus armed was not unusual (R. 16,26). About this time a group of Arabs and some soldiers were sitting on top of a hill in the neighborhood of the bivouac area of 636th Tank Destroyer Battalion. Hamza Zergatte, a native Arab, left his house which was nearby and "was going toward the rest of the Arabs" when accused, who with his companions was "down at the road at the bottom of the hill", called Hamza toward him, talked to him briefly and picked up his rifle. Frightened, the Arab turned and started running up the hill, shouting "No, No, comrade". Accused raised his weapon and shot Hamza in the back, instantly killing him (R. 34,36,44,45,46). According to one witness, the bullet accused fired appeared to ricochet, "probably about six to eight feet in front of the Arab" (R. 36,37,38). However, an Arab, a companion of the man who was killed, testified he did not "see any ricochet, the shot was fired directly to the body" (R. 46). Accused was five or six yards from his victim when he fired his rifle (R. 50,51). He fled after the shooting and was pursued and disarmed by other soldiers (R. 40,41).

Accused had been drinking during the day of 16 August 1943 (R. 16, 24); he was staggering, his speech was unusual, and he was described as being "pretty drunk" (R. 26). He was observed about 1750 hours armed with a rifle "staggering and hollering" (R. 40,42). A soldier who was with accused at the time of the shooting testified that accused was "pretty well loaded" and "I know Helton quite a while and when he gets tight and his mind goes and he does a lot of things he wouldn't normally do. He don't realize what he is doing" (R. 16).

A medical officer examined the body of the dead man immediately after the shooting and observed that "he had a large hole in the front of his body, approximately over his heart, and gave the appearance that a bullet had left the body at that point" (R. 7). In the opinion of this officer, death was caused by "a gun shot wound in the left side of the chest" (R. 43). This medical officer also testified he examined accused on the "morning of the investigation" (R. 7) and

"found that he was physically well and that the only abnormality I could see was that he had periods of depression during which time he felt that he had to drink, and it was my conclusion the man was sane and in his right mind***I would say that he was below average intelligence" (R. 8,10).

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He was of the opinion that accused knew the difference between right and wrong (R. 10).

Accused testified that on the day of the shooting, he had started drinking about 1100 hours (R. 48) and continued "on and off" during the day. That afternoon he took his rifle "to do some firing along the hill-- to try out the rifle". "At the bottom of the hill", he met some Arabs with whom he had no argument (R. 49), but he saw one of the Arabs coming toward him. He testified

"I didn't know what he was after and something struck in my mind that he had something in his hand and so I made one step towards him and I picked up the rifle and shot in the ground along this way" (R. 49).

He testified further that he was holding the rifle in the crook of his arm and did not intend to shoot the Arab but only to frighten him away; that he was in fear of bodily harm when he saw the Arab coming toward him; that "I was frightened - he was yelling, hollering and I was afraid he was going to jump on me***it struck my mind that he had a stick in his hands" but accused did not actually see any stick. He testified that when he picked the rifle up, the Arab was facing him and before he could "release the trigger, it went off" and the bullet ricocheted and hit his victim, who had in the meantime turned to flee (R. 50,51,52).

4. It thus appears from the uncontradicted evidence that in the vicinity of the bivouac area of the 636th Tank Destroyer Battalion and at the time alleged accused killed Hamza Zergatte, the person named in the specification, by shooting him with a rifle. Accused admitted he fired the fatal shot and demonstrated in his testimony a clear and full recollection of the incident. He did not attribute his conduct to the use of intoxicating drink which the evidence indicated he had taken, but claimed he fired at his victim because he was frightened and feared for his own safety. However, there is substantial evidence that the Arab was unarmed and that accused was in no sense in any real or apparent danger of being assaulted when he raised his weapon to fire. To the contrary, it appears that he called the unoffending Arab toward him, picked up his rifle, and, as the Arab cried out to him "No, No, comrade" and turned to flee, accused stepped toward the retreating man and shot him in the back, instantly killing him. Not only did the assertion of accused that he feared the Arab would attack him appear highly improbable but accused did not claim to have retreated or in any way sought to avoid the fatal shooting. His conduct was obviously wanton, willful and unjustified and the court was fully warranted in concluding that accused did not act in self-defense when he committed the homicide (MCM, 1928, par. 148a). Accused's assertion that he did not intend to shoot the Arab but only fired in the ground to frighten him away (there is some other testimony that the bullet ricocheted) is contradicted by evidence that the fatal shot was fired directly at the body of the victim. It

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was within the province of the court to evaluate these conflicting versions and its conclusion that accused acted deliberately and intentionally when he shot and killed the Arab is supported by substantial evidence. That he may have entertained no specific hatred or personal ill-will toward his victim does not exclude the existence of malice. His reckless and wanton act in firing a rifle at the fleeing man without legal justification or excuse fairly gives rise to an inference of a malign and depraved nature. The court was fully justified in finding that accused was prompted by legal malice in killing deceased and that he was guilty of murder as charged (MCM, 1928, par. 148a; Winthrop's, reprint, p. 672,673).

5. It is alleged that the homicide occurred "at Bivouac area of the 636th Tank Destroyer Battalion, near St Leu, Algeria". The evidence shows the offense was committed in the vicinity of the bivouac area of this battalion but does not show that the battalion was bivouacked near St. Leu, Algeria. The jurisdiction of the court did not depend upon any consideration of geography and this want of proof did not in any way operate to the prejudice or injury of accused (Dig. Op. JAG, 1912-40, par. 416 (10), 428 (12)).

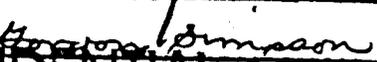
6. The court found accused guilty of murder as charged in violation of Article of War 92, and originally fixed punishment at dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for fifty years. The reviewing authority returned the record of trial to the court with the direction that the court be reconvened for further consideration because the punishment imposed was less than the mandatory sentence fixed by law for the offense of which accused had been found guilty. The court upon reconsideration sentenced accused to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. This was an authorized and proper procedure (Article of War 40 (d)). Accused was not present at the proceedings in revision but his presence was neither necessary nor was it required by the court. There was no impropriety in proceeding in his absence (MCM, 1928, par. 83).

7. Accused is twenty-two years old. He was inducted into the Army of the United States 7 July 1942 at Ft. McClellan, Alabama. He had no prior service.

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

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

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

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APO 534, U. S. Army,
25 October 1943.

Board of Review

NATO 550

U N I T E D S T A T E S)	XII AIR FORCE SERVICE COMMAND
)	
v.	)	Trial by G.C.M., convened at
	)	Ponte Olivo, Sicily, 18 August
Private OSCAR (NMI) MITCHELL	)	1943.
(34067062), Company A, 904th	)	Dishonorable discharge and
Air Base Security Battalion.	)	confinement for ten years.
	)	Disciplinary Training Center
	)	Number 1.

OPINION by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

Original examination by Remick, Judge Advocate.

1. The record of trial in the case of the soldier named above, having been examined in the Branch Office of the Judge Advocate General with the North African Theater of Operations and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and the Board of Review submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General with the North African Theater of Operations.

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Oscar (NMI) Mitchell, Company "A", 904th Air Base Security Battalion did, at Menzel Temime, Tunisia, on or about 28 June 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Richard (NMI) Holt, Company "A", 904th Air Base Security Battalion, a human being, by shooting him with a rifle.

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He pleaded not guilty to the Charge and Specification. Of the Specification he was found guilty except the words "with malice aforethought" and "with premeditation", of the excepted words not guilty. Of the Charge, not guilty but guilty of violation of the 93d Article of War. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge and designated the Disciplinary Training Center Number 1 as the place of confinement. The sentence was published in General Court-Martial Orders Number 3, Headquarters XII Air Force Service Command, 30 August 1943.

3. The evidence shows that on 28 June 1943, the organization to which deceased and accused were assigned was bivouacked among some olive and orange trees at Kenzel Temine, Tunisia (R. 8; Ex. B). Accused's tent was about twenty feet from a tent occupied by Private Richard Holt of his company (Ex. B). Shortly after lunch on the above date accused met Holt about midway between the two tents and asked him what he had done with accused's canteen (Ex. B; R. 12,13,14,18,34). Holt replied that he had put it in accused's tent and accused said if he had done so it was "O.K." Holt began to swear and asked accused if he wanted him to pay for the canteen to which accused replied that he did not. They then engaged in a heated argument in which both men cursed (R. 12,13,34). When Holt began to swear accused left and walked some twenty-five feet, got a "pair of brooms", and began sweeping around his tent (Ex. B; R. 14,16,17). Accused was then within two or three steps of his loaded rifle hanging in a nearby tree (R. 15,16,23). Holt then went some twenty-six feet to the rear of his tent. As Holt went to his tent accused watched him (R. 16,17). Upon reaching his tent Holt reached in and got his rifle and said, "I'll fix this" (Ex. B; R. 12,14,16,17,18,19,21). He then took a few steps, raised his rifle and fired at accused, the bullet striking a limb of a tree above accused's head (R. 10,22). Accused then fired twice at Holt, killing him instantly (R. 7,10,12,15). Accused went immediately to his company commander, surrendered his rifle, and said "It was either Holt or me" (R. 8).

An eye witness testified that when Holt fired, accused reached over a clothes line and got his rifle which was hanging in a nearby tree (R. 15). This witness also testified that accused had his rifle in his hands when Holt fired (R. 15). At another place in the record this witness said that when Holt went to his tent accused reached over a clothes line and got his rifle out of a tree (R. 15). On being recalled this witness testified "Holt got his gun and walked up a little piece from his tent; Mitchell got his directly after Holt got his" (R. 35). Another eye witness testified that Holt had his rifle first (R. 19).

A diagram of the scene of the homicide was identified as Exhibit "B" and introduced in evidence (R. 9). The correctness of the exhibit was attested by persons familiar with the scene and it was used by witnesses in locating their respective positions and the positions of the principals

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at the time of the homicide. It appears from this diagram that at the time accused was fired at by Holt he was several feet beyond the tree in which his rifle had been hanging, that is, that after 'accused secured his rifle he retreated several feet before he was fired at and before he fired the fatal shots at deceased (Ex. B).

On the occasion in question Holt had been drinking and was staggering (R. 12,13,19). On the preceding day he had informed his first sergeant that someone had his canteen and upon being told to draw a replacement said he did not want another, he wanted his own and, "in a fierce way", said he was going to "get" the man who had his canteen (R. 29).

The defense offered two witnesses. Accused's platoon leader, a lieutenant, testified accused had been under his direct command for nine months and that he had had no occasion to reprimand accused except for drinking wine, "which seemed to be common practice", and that he would rate accused as "very satisfactory" in the performance of his duties as a soldier (R. 27). Defense also presented accused's first sergeant who testified that he had known accused for more than a year and had not had to reprimand him (R. 28,29).

A prosecution witness was recalled by the court and testified that Holt fired the first shot and that if he, the witness, had been accused he would have thought his life was in danger (R. 36).

Accused made the following unsworn statement:

"On June 28th I got up, I was laying down, I was going on guard. Holt was standing out by my tent, I told him I wanted my canteen because I was going on guard, he told me all right and I said all right then I didn't see him no more. They had a lecture up at the mess hall, Lt. Hibbard told us to be on the alert for parachutists. Then I went to the supply room to see about a pair of shoes, they didn't have them so I went back to my tent. There was a bunch around there and Holt was there and I asked him if he put my canteen in the tent. He said yes in one of the tents, I said I had to go on guard tonight, he jumped and said 'you got anything on your shoulder you wants to get it off' and he said I'm going to stop you niggers from fucking with me', I said I didn't want to do anything and I didn't do nothing. Willie Brown said stop arguing. I grabbed some brooms and started sweeping around my tent. I had some blankets hanging on the line and my rifle in a tree. I was sweeping. He said I'll fix you, directly I see the boys running so I threw down the broom and looked around and when I looked up he had his rifle pointed at me and when I saw that I reached up and got my rifle reached over and got a clip out and was trying to get to a tree and just as I got my rifle he shot at me -and I shot twice quick and saw him fall so I started for

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Lt. Hines' tent and I met them and they asked me what's the matter, I said Holt shot at me and I shot him, they put me under arrest, they had me at Menzel Temine. It scared me I didn't know what he was trying to do" (R. 31).

4. It thus appears from the evidence that at the place and time alleged accused shot and killed Private Richard Holt, Company A, 904th Air Base Security Battalion. Just prior to the homicide Holt became enraged because accused asked him what he had done with accused's canteen and an argument ensued in which cursing was exchanged. Accused retired from the scene of the argument and began sweeping around his tent. Holt went directly to his tent, secured his rifle, and exclaimed "I'll fix this". Accused, observing the actions of Holt, secured his rifle from a nearby tree and withdrew. Holt then fired at him, the bullet striking a limb over accused's head. Accused then fired the fatal shots.

Upon these facts the question for determination is whether the homicide was unlawful, that is, whether it was legally excusable on the ground of self-defense. The law of self-defense is stated in Paragraph 148a of the Manual for Courts-Martial as follows:

"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; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor".

In Wharton's Criminal Law, 12th Edition, Section 616, it is said in regard to the necessity of retreat:

"In case of personal conflict, it must appear, in order to establish excusable homicide in self-defense, in some jurisdictions, that the party killing had retreated, either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him. The last qualification is worthy of particular consideration. 'Retreated to the wall' is sometimes given by the old text writers as the exclusive test; but even if we accept this text exclusively, we must remember that it is to be taken in a figurative sense, as indicating a retreat to the limits of personal safety...The true view is, that a 'wall' or 'ditch' is to

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be presumed whenever retreat cannot be further continued without probable death, and when the only apparent means of escape is to attack the pursuer. And retreat need not be attempted when the attack is so fierce that the assailed, by retreating, will apparently expose himself to death".

Applying the principles stated it is manifest, as a matter of law, that accused killed Holt in self-defense and that the homicide was not therefore unlawful as found. All of the evidence demonstrates that accused believed and had reasonable and compelling grounds for belief that if he did not resist the assault upon him with utmost force he would probably lose his life or suffer great bodily harm. The danger he faced was real and imminent. He was not the aggressor in resort to violence, did not provoke the altercation, and withdrew when the exchange of words became heated. The proof admits of no conclusion other than that accused believed and had reasonable grounds for belief that further retreat would not protect him from the danger with which he was beset. His position was such that he was forced to elect instantly whether to risk the imminent probability of being shot in the back at close range with a service rifle or to defend himself by turning his own weapon upon his assailant. He acted quickly but deliberation was not required. As said by the United States Supreme Court:

"Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him" (Brown v. U. S., 256 U. S. 335; 30 C.J. 71).

Accused was justified in his exclamation, "It was either Holt or me".

In reaching the conclusion that the evidence does not support the findings of guilty the Board has observed its duty to refrain from weighing the evidence. The rule as to weighing evidence is thus stated in a holding by the Board of Review, approved by The Judge Advocate General (Bull. JAG, August 1942, sec. 422 (5); CM 223336):

"Convictions by courts-martial may rest on inferences but may not be based on conjecture. A scintilla of evidence --the 'slightest particle or trace,' is not enough. There must be sufficient proof of every element of an offense to satisfy a reasonable man when guided by normal human experience and common sense springing from such experience. The following from an approved holding by the Board of Review is pertinent:

"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 deter-

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mining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A. W. 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference (C.M. 150828, Robles; C.M. 150100, Bruch; C.M. 150298, Johnson; C.M. 151502, Gage; C.M. 152797, Viens; C.M. 154854, Wilson; C.M. 156009, Green; C.M. 206522, Young; C.M. 207591, Nash et al.)".

The Board of Review is of the opinion that there is no evidence in the record from which an inference might reasonably be drawn that accused acted unlawfully in killing Holt.

5. From its findings it is apparent that the court adopted the view that accused killed Holt in the heat of sudden passion caused by provocation, and was therefore guilty of voluntary manslaughter. Whether or not there was sudden passion caused by adequate provocation, all elements of the legal excuse of self-defense were also present and accused was therefore guiltless of voluntary manslaughter or of any other crime. Inasmuch as the beliefs of imminent danger and the necessity of taking life to save his own life existed in the mind of accused and were reasonably grounded the homicide was excusable in self-defense and was not unlawful. Voluntary manslaughter is unlawful homicide (MCM, 1928, par. 149a). It has also been defined as

"The intentional killing of a human being in a heat of passion, on a reasonable provocation, without malice and without premeditation, and under circumstances which will not render the killing justifiable or excusable homicide" (State v. Lewis, 154 SW (Mo.) 716; cited in 29 C.J. 1125). (Underscoring supplied).

See also 29 Corpus Juris 1123. Again, in distinguishing voluntary manslaughter and self-defense, it has been said:

"The dividing line between self-defense and this character of manslaughter seems to be the existence, as the moving force, of a reasonably founded belief of imminent peril to life or great bodily harm, as distinguished from the influence of an uncontrollable fear or terror, conceivable as existing, but not reasonably justified by the immediate circumstances. If the circumstances are both adequate to raise and sufficient to justify a belief in the necessity to take life in order to save oneself from such a danger, where the belief exists and is acted upon, the homicide is excusable upon the theory of self-defense; Com. v. McGowan, 189 Pa. 641, 42 A 365, 69 AmSR 836; while, if the act is

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committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense, the killing is manslaughter" (30 C.J. 45 citing Com. v. Colandro, 80 Atl. (Pa.) 571 and other cases). (Underscoring supplied).

6. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence and that all rights, privileges and property of which accused has been deprived by virtue of the findings and sentence should be restored.

 Judge Advocate.
O. T. G. G., Judge Advocate.
W. J. J., Judge Advocate.

NATO 550

1st Ind.

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

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

1. There is transmitted herewith for your action under the fifth subparagraph of Article of War 50½ the record of trial by general court-martial in the case of Private Oscar (NMI) Mitchell, Company A, 904th Air Base Security Battalion, together with the opinion of the Board of Review that the record of trial is legally insufficient to support the findings and sentence. I concur in the opinion of the Board of Review and recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the findings and sentence be restored. There is inclosed herewith a form of action designed to carry this recommendation into effect should it meet with your approval.



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

(Findings and sentence vacated. GCMD 44, NATO, 29 Oct 1943)

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by proper authority.

CHARGE II: Violation of the 53th Article of War.

Specification: In that General Prisoner Jimmie (NMI) Key (formerly Private, Headquarters Company, 47th Infantry), did, at Casablanca, French Morocco, on or about 28 April 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Casablanca, French Morocco, on or about 7 May 1943.

Charges dated 30 June 1943.

CHARGE I: Violation of the 69th Article of War.

Specification: In that General Prisoner Jimmie (NMI) Key (formerly Private, Headquarters Company, 47th Infantry), having been duly placed in confinement in Atlantic Base Prison #1, on or about 16 February 1943, and having been duly transferred therefrom to Disciplinary Training Center, Atlantic Base Section, on or about 19 April 1943, did, at Casablanca, French Morocco, on or about 6 June 1943, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that General Prisoner Jimmie (NMI) Key (formerly Private, Headquarters Company, 47th Infantry), did, at Casablanca, French Morocco, on or about 6 June 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Marrakech, French Morocco, on or about 12 June 1943.

CHARGE III: Violation of the 93d Article of War.

Specification: In that General Prisoner Jimmie (NMI) Key (formerly Private, Headquarters Company, 47th Infantry) did, at Berrechid, French Morocco, on or about 11 June 1943, feloniously take, steal, and carry away money, value about \$75.00 (seventy-five dollars) in U. S. currency, and other articles of value, the property of Private Robert G. Estridge, Prisoner of War Enclosure #100.

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

Specification: (Finding of not guilty).

He pleaded not guilty to the Charges and Specifications. He was found

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not guilty of Charge IV and its Specification and guilty of all other Charges and Specifications. No evidence of previous convictions subsequent to time when accused's status became that of a general prisoner was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the "findings of guilty of Charges I and III and the Specifications thereunder dated respectively 24 May 1943 and 30 June 1943", approved "only so much of the findings of Charges II and the Specifications thereunder similarly dated...as involves findings that accused did, in violation of Article of War 61, at the time and place alleged, without proper leave absent himself from his organization", approved the sentence but reduced the period of confinement to fifteen years, designated the Federal Correctional Institution, Danbury, Connecticut as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 28 April 1943, accused, who was a general prisoner in the Disciplinary Training Center, Atlantic Base Section, under sentence of a court-martial, escaped (R. 22). His absence from confinement was established by introduction of the morning report (Ex. 3). Military police arrested accused on 7 May 1943, in a hotel in Casablanca. When found he was dressed as a merchant seaman, gave his name as "Justus", said he was from the ship "Monterey" and showed a passport issued to a merchant seaman by that name (R. 23,26). The military police thereupon took accused to the harbor and aboard a vessel claimed by him as his ship. After the ship's master disclaimed knowing accused, he admitted his identity (R. 27).

Returned to confinement on 8 May 1943, accused again escaped on 6 June 1943, by breaking the wire covering of the window of the booth in which he was detained and slipping the lock of the main gate of the outer enclosure. He was returned to confinement 13 June 1943 (R. 21, 28,33; Ex. 4), after having been apprehended at a bar in Marrakech on that date (R. 28,34).

Accused stated to a military police officer that after escaping confinement he went to "Satatt" (probably Settat a city about 75 kilometers south of Casablanca) where he borrowed a sum of money from "another soldier" and later he "had by force taken further money and another set of glasses, wallet, and other personals from that same soldier" (R. 33). As to the money accused told the witness that he had taken, the latter testified "The whole amount was, I think, about \$65.00" (R. 34). Found on accused's person were "wallets, two pair of glasses, and several papers" including a pay card of one "Estridge". Witness testified that "the accused said that that was the card that he had gotten from that soldier, by name..." (R. 34,35). The prosecution asked for a continuance "to see if we can get Private Estridge" to which the defense objected. The following colloquy took place:

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"Prosecution: The point that the prosecution will bring in is that he will testify to the sum stolen and will identify definitely the person who took it.

Defense: You say he will testify as to the sum stolen?

Prosecution: That is right. And also identify the person who took it as being the accused.

Defense: In lieu of a continuance we will stipulate that if Private Estridge were here he would testify to these two things.

Prosecution: We assume that you will stipulate the amount being in the vicinity of \$75.00.

Defense: All right." (R. 40).

4. Any completed casting off of the restraint of confinement, before being set at liberty by proper authority, is an escape from confinement. A confinement is presumed to be legal. The proofs necessary to sustain a finding of guilty under this charge are (a) That accused was duly placed in confinement; and (b) that he freed himself from the restraint of his confinement before he had been set at liberty by proper authority (MCM, 1928, par. 139b).

The evidence is undisputed and conclusive that on the dates alleged in the Specification of Charge I (dated 24 May 1943) and the Specification of Charge I (dated 30 June 1943) accused was in confinement at the places respectively alleged and that on the dates respectively alleged in said Specifications and Charges, he absented himself without proper leave from such confinement. Such confinement was prima facie lawful (Dig. Cp. JAG, 1912-40, sec. 427 (57)) and the unauthorized absence is proof of the casting off of the restraint of confinement without proper authority (MCM, 1928, par. 139b). The proofs of accused's absences from confinement also established the offenses of absence without proper leave, lesser included offenses of the alleged charges of desertion.

Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong to another, with intent to deprive such owner permanently of his property therein. The taking must be by trespass and the existence of intent to deprive the owner permanently of his property may be inferred from the circumstances (MCM, 1928, par. 149g).

In this case the alleged unlawful taking was not seen by any

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witness. However, the accused admitted to a military policeman that he took a sum of money "by force" from another soldier at "Sattat". The time of the taking as established by accused's statement, was after his escape and before he was apprehended at Marrakech, or sometime between 6 June 1943, and 13 June 1943. At the trial defense counsel stipulated that if "Private Estridge" were in court he would testify that accused had "stolen" approximately \$75.00 from him. "Stolen" is the past participle of the word "steal" which means "to take and carry away feloniously" (Webster's International Dictionary). The word "feloniously" imports trespass.

Where time and place are not, as in this instance, the essence of the offense of the crime, proof as to the precise day and exact locality of its commission is not essential. Although the first name of Private Estridge was not established by the evidence he was sufficiently identified to permit accused to plead the former conviction if subsequently brought to trial for the same act (Winthrop's, reprint, 1920, par. 197).

While the confession of accused was admitted in evidence before the corpus delicti was established, the later proof of the corpus delicti cured this irregularity (MCM, 1928, par. 114a).

The Manual of Courts-Martial, 1928 (par. 126b) provides that a stipulation which practically amounts to a confession should not ordinarily be accepted by the court where accused has pleaded not guilty and such plea still stands. The stipulation referred to in the instant case however is not a stipulation of facts but a stipulation as to what a witness would testify were he present. It was suggested by defense counsel and done for the purpose of saving the time of all concerned. This is considered standard practice and the substantial rights of the accused were not injuriously affected thereby.

5. The defense challenged two members of the court for cause. Both the challenged members were sworn and testified that they had been members of a court-martial which had been severely criticized and reprimanded by the reviewing authority for acquitting an accused at another trial. The letter of reprimand was read in open court and made a part of the record. Each of the challenged members testified that in spite of having received the letter of reprimand, above referred to, they felt they could determine the instant case solely upon the facts presented and that the letter would have no bearing upon a finding of innocence if they believed accused to be innocent. After hearing the testimony and argument of counsel the challenged members withdrew and the court was closed and, by secret written ballot, denied the challenge. Such procedure was proper. The burden of maintaining a challenge rests upon the challenging party. The court by denying the challenges indicated its belief that the challenged officers would not be influenced or prejudiced in any way by the reprimand (MCM, 1928, par. 58f). It cannot be said that the court's failure to sustain the

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challenge injuriously affected the substantial rights of accused.

The record of trial shows that accused's status was that of a general prisoner at the time of the trial. It does not affirmatively show that he was under a sentence of dishonorable discharge suspended. However since entries in the morning reports of the Disciplinary Training Center (Exs. 3,4) show a change of accused's status from confinement to desertion by escape, it may be presumed that the officer making the entries required by the regulations has performed his duty in determining the status of accused before making an administrative charge of desertion against him (CM 199224). The sentence of dishonorable discharge, in addition to confinement and forfeitures, in the instant case is proper under the circumstances (MCM, 1928, par. 103d).

6. Accused is twenty-four years old. He was inducted into the Army 6 January 1942. He had no prior service.

7. The court was legally constituted. The sentence is authorized upon conviction of violation of Article of War 69. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings as approved and the sentence.

 Judge Advocate.
W. J. F. Re, Judge Advocate.
Steven J. ... Judge Advocate.

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

APO 534, U. S. Army,
1 October 1943.

Board of Review

NATO 581

UNITED STATES)

v.)

Private HARVEY L. GRANT
(38095525), Company K, 46th
Quartermaster Regiment.)

EASTERN BASE SECTION)

Trial by G.C.M., convened at
APO 763, U. S. Army, 18 June
1943.)

Dishonorable discharge and
confinement for fifteen years.
United States Penitentiary,
Lewisburg, Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

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

Specification 1: In that Private Harvey L. Grant, Company K, 46th QM Regiment, did at Philipville, Algeria, on or about the 27th day of March 1943, with intent to do him bodily harm, commit an assault on Private 1st Class Denis Robichaux by wrongfully striking the said Robichaux and cutting the arm of the said Robichaux with a dangerous weapon, to wit: a knife.

Specification 2: In that Private Harvey L. Grant, Company K 46th, QM Regiment, did at Philipville, Algeria, on or about the 27th day of March 1943, with intent to do him great bodily harm, wilfully and feloneously cut and

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strike Private Bert Joughin with a sharp and dangerous weapon, to wit: a sharp instrument and with such instrument inflict a serious and dangerous wound on the neck of the said Joughin.

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

Specification: In that Private Harvey L. Grant, Company K, 46th Quartermaster Regiment, did at Philipville, Algeria, on or about the 27th day of March 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Private 1cl. Malcolm E. Arnold, 299th. M.P. Company, a human being, by cutting him on the neck with a sharp and dangerous instrument.

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specifications. Of the Specification, Charge II, he was found guilty except the words "with malice aforethought, deliberately and with premeditation", of the excepted words, not guilty, and of Charge II not guilty, but guilty of violation of Article of War 93. Evidence of four previous convictions was introduced. Three of these convictions were by summary court-martial, one in violation of Article of War 65, disobeying a lawful order of a non-commissioned officer, the second in violation of Article of War 96, absence without leave, and the third in violation of Article of War 96, drunk and disorderly and impersonating a non-commissioned officer. The fourth conviction was by special court-martial for violation of Articles of War 61 and 96, absence without leave and drunk in uniform. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for fifteen years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that accused and one Private Eugene Baker, Company K, 46th Quartermaster Regiment, went into Philipville, Algeria, 27 March 1943, and late that afternoon, were at the home of some Arabs who resided at 58 Rue Clemenceau. There accused got into an argument over 50 francs he claimed one of the Arabs owed him (R. 44,60,114,135,147, 148). The same evening, Corporal Dennis J. Robichaux, "Allied Force", was walking home with a girl who lived in an upstairs apartment at 58 Rue Clemenceau. As he reached the place, he heard a commotion inside and concluded he "would go in and convince the men to come out and leave peace in the house" (R. 44, 217). He entered and found four Americans in the apartment where the two Arabs lived (R. 44). He testified:

"It was an argument I found out that one of the arabs owed one of the colored boys 50 francs. I went up to Grant and told him I would give him 50 francs if

he would come outside and settle the argument. He said he would so we stepped down to the kitchen and I gave him a 100 franc note. He said he didn't want that he wanted 50 francs and he pushed me into a little bedroom I fell on the bed. He came over with a knife in his right hand and grabbed my throat with his left and attempted to slash me and cut my jacket. I grabbed his right hand and had my knees against his chest and pushed back towards him. He let loose and we went back to the kitchen. I found 50 francs in change and placed it on the table and as he counted it I***dashed out of the door" (R. 44).

Robichaux identified the jacket he was wearing at the time of the assault and testified the knife which cut the jacket was in the hand of accused; that it was a British knife with a blade open on one end and a can puncher on the other; that when accused cut at him the only wound he received was a scratch on the arm (R. 45); that accused was "pretty well oiled", and was talking boisterously; "you couldn't understand him,*** (his sentences) didn't connect very well but enough to understand what he was saying" (R. 50). It was brought out in cross-examination that at the police station several days later, Robichaux was able to identify accused and Barry out of a line-up of four colored soldiers as two of those present at the house at the time he was attacked and he identified accused as the one "that tried to slash me" (R. 51,52).

Accused, Baker, Technician Fifth Grade Luster D. Gore, Company K, 46th Quartermaster Regiment, Private Pate Barry, Company I, of the same Regiment, and the two Arabs were in the apartment at the time Robichaux entered. Baker asserted it was Barry who pushed Robichaux on the bed (R. 115); he testified that

"Grant started arguing about 50 francs. Then Barry he came in and a white boy said he would pay 50 francs if they stopped arguing so Barry asked Grant what was the matter and Grant said he owed him 50 francs. Then Barry said he would kill some of these son-of-bitches and he ran to the back to the little room. That time the white boy was in there Barry pushed the white boy on the bed and Gore and I left" (R. 114,115).

He did not see a knife in accused's hand; he testified Barry "had a open knife when he stood in the door" (R. 115) but he did not see Barry cut anybody's field jacket (R. 121,122). He saw Grant with a knife when they left camp and saw it "after we got in town" (R. 119). At one time he testified accused was drunk (R. 115) but later that he did not know "if he was drunk or not" (R. 116).

Gore heard the argument over the 50 francs and testified accused had "this here arab" by the collar and was holding a knife in a drawn

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position (R. 124); that he did not see a knife in Barry's hand; that Barry came in the kitchen and "didn't say nothing" (R. 125); that he (Gore) and Baker left to avoid trouble; that "before we left Grant and this little arab were in the bedroom and the white soldier was standing in the door" (R. 130).

In describing the controversy over the 50 francs, Barry testified

"when I walks in the place Grant was back there with an arab he had him by the collar with one hand and a knife in the other hand and he attempted to cut this arab. I spoke to the other two boys I asked them what was the matter they said it was something about some francs Grant said the arab owed him. While he had the arab there a white soldier came and spoke to Grant and he didn't seem to pay him any attention. He said he would pay him the money which he did pay him and after the white soldier paid this Harvey Grant this money Harvey Grant he tried to grab him and keep him. It seemed like whiskey had run him to a crazy spell or something" (R. 78).

One of the two Arabs claimed he was so drunk he did not remember what happened (R. 135) and the other testified "I entered at 1830 and stayed at all not even 5 minutes" (R. 179); he claimed he did not see the "difficulty which occurred in which an American soldier was discussing a question of 50 or 100 francs" (R. 181); however, he identified accused as one of those in the room "because this one has got a face that is very remarkable" (R. 182,183).

Madame Marcelle Zekri, who also lived in an upstairs apartment at 58 Rue Clemenceau, observed some colored soldiers visiting the Arabs about noon on 27 March. Later that afternoon, a young lady came to the Zekri apartment and was accosted by one of the soldiers. Madame Zekri asked the soldiers to get out, that "we are married and respectable" (R. 60). She told the soldiers, one of whom she identified as accused, "This ain't no cat house". She testified that accused replied "Try and get me out", but she finally talked them into leaving (R. 60,61). She described accused as "coffee and milk" colored (R. 61,63). She testified further that Robichaux

"walked in there, the accused was in there and a little short heavy set boy was in there, the tall one was there and the black one was starting an argument***They were at Amars***Robichaux walked in (and when he) seen it didn't look so healthy he decided to walk out as he started one of the American boys grabbed him and pulled out a knife and threatened him."

That the one who threatened him was the "chocolate and milk boy same color like the accused" (R. 62). When Madame Zekri saw the threat with the knife, she ran out and found two soldiers "who said they were MP's" (R. 62).

In the meantime, about 1945 hours 27 March 1943, Privates First Class Bert D. Joughin and Malcolm E. Arnold, both of 299th Military Police Company, were walking along Rue Clemenceau in Phillipville. Neither was on duty or armed. It was dusk but not yet dark (R. 7,8,14,15,23). When they came near the scene of the disturbance at 58 Rue Clemenceau, Madame Zekri "grabbed" Arnold's arm and led him and Joughin into the court yard (R. 8). Balconies of the upstairs living quarters overlooked the open roofed court. A staircase directly ahead of the corridor from the street led upstairs. To the right, downstairs across the court, were the living quarters of the Arabs (R. 28; Pros. Ex. 1; Def. Ex. 1). Joughin testified that as the two soldiers entered this court, accused pushed Arnold into a corner and

"The first thing he said was that we were sons-of-bitches
 He said if we made a move he would cut us to pieces
 we never said a word***While he was cussing us he hit
 me on the back of the head and hit Arnold***I was just
 raising my head up when I saw him hit Arnold. It cut
 the back of my neck***I didn't know I was cut till I
 got to go out the door" (R. 8,9).

Joughin felt blood on his neck and both he and Arnold ran toward an English dispensary about two and a half blocks away (R. 9). Joughin observed that Arnold had been cut "through the ear around back of neck"; the cut was six or seven inches long (R. 10). Before reaching the dispensary Arnold fell and two "red caps picked him up" (R. 11). He was taken to a hospital where he died two days later (R. 11,12,13).

Joughin was cut across the neck and five stitches were taken in the wound (R. 9). He testified that at the time of the cutting Barry was standing on the steps leading up from the court yard and that he "said 'Don't you sons-of-bitches move' and went out"; that he could identify accused by a little scar on his right eye, by "his scar and looks" (R. 14,15,16,17). He did not see the knife in accused's hand (R. 25, 205). About a week later at French headquarters barracks, Joughin "spotted" accused who was with six "other fellows". He was positive accused was the man who committed the assaults (R. 21,22,23).

Barry corroborated Joughin's assertion that it was accused who did the stabbing; he testified he saw the knife and saw the blows delivered; that he said to accused, "Boy, there is the MP", and accused replied "God damn the MP I will cut the bastards" and with that "ran into them" (R. 78,79,199). On cross-examination, he admitted having made an untruthful statement to an officer to the effect that he had gone to a barber shop and a show and was not present at the scene of the fatal affray (R. 82,83,87).

Davis testified that the next morning after the stabbings, Barry told him that

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"he had a round with the MPs in a house and they wouldn't let us out so I cut my way out" (R. 143).

That Barry showed him the knife he used, and said "Don't say anything about it" (R. 143). In his testimony, Barry denied having told Davis he cut the "MPs" (R. 86,87).

Madame Zekri testified that the two colored soldiers

"walked toward the MPs till they got them against the wall. The very black one was facing the one on my left, the cream colored was facing the MP next to me also across the hall***I seen the very black one bring out the knife in his hand***Just the black one pulled out a knife the accused didn't pull out a knife" (R. 63).

Asked if she saw anybody cut the military policemen, she replied "All I seen is the motion and I got scared and walked away" (R. 63).

An officer of the Royal Army Medical Corps treated Arnold at the 100th General Hospital. He found a deep laceration extending from just in front of the right ear through the lobe and across the back of the neck to two and one-half inches beyond the middle line of the neck. This was a clean cut incise wound. The muscles on the right side were completely severed at the base of the skull. The facial nerve was severed where it emerges from the skull. In the depths of the wound the ligament connecting the skull to the first cervical vertebrae was severed. At 1115 hours 29 March 1943, the wounded man expired. In the opinion of this medical officer, death was caused by the laceration by a sharp instrument he had received prior to admission to the hospital (R. 29,30,31,33,34). The shock, hemorrhage and the infection which set in through the spinal fluid were contributing factors (R. 41).

Another British medical officer made a post-mortem examination and testified that in his opinion the primary cause of death was an infection which set in from the wound rather than the wound itself (R. 35,36,37); he attributed Arnold's death to hemorrhage (R. 39).

Accused testified he and Baker went into Phillipville about noon 27 March 1943, and met an Arab who invited them to his house; that they played the radio, drank some wine and ate dinner and after walking around, returned to the house and did not go out again that afternoon; that Gore was there and later Barry came in; that accused

"was talking to the arab about 50 francs I couldn't make him understand. After while a white boy came in there he asked what the trouble was. The white boy said, 'What's wrong?', I told him he owed me 50 francs. I said, 'He owed it to me I don't want your money'. So Barry asked and I told him, he said he would kill up some of these bastards so Barry grabbed the boy. Gore went on out, Baker went

out behind. After while later on Barry and the boy was tussling in there in the corner after that the white boy went out and Barry went out in the court yard. Later on I went out, when I started out I met the MPs coming in. I walked to the side around them and went out to the street. I caught a truck with two soldiers in it and got to camp about 2100 hours. The next day or two I was in a convoy to Tebessa***Someone drove in a jeep Barry was in and was driver. Barry said, 'Grant come here' and said, 'You remember where we was at the other night I fucked up two MPs up there.' I walked on off and he said, 'Don't say anything about it.'" (R. 147,148).

Upon cross-examination accused testified Barry had told him

"I fucked up 2 MPs I am looking for one of them to die" (R. 177).

When asked by the court for further explanation, he testified that Barry told him "I fucked up 2 MPs I cut them" (R. 177). Accused testified that he had a knife when he went into Phillipville that day - it "was about 6 inches long, opener on one end" (R. 148). He testified that Barry had an open knife in the Arabs' house but he could not tell if Barry had the knife in his hand when arguing with Robichaux because "I didn't pay much attention to him" (R. 159). He denied that he argued with or even touched "the white boy" (R. 148). He testified that he remembered everything perfectly (R. 155), that "I wasn't drunk I was drinking but I remember" (R. 172).

4. It thus appears from substantial evidence that at the place and time alleged accused, with intent to do them bodily harm, committed assaults upon Private First Class Dennis Robichaux and Private Bert Joughin, the persons named in Specifications 1 and 2, Charge I, by cutting them with a dangerous weapon, to wit, a knife. It further appears that at the place and time alleged accused cut with a knife and wounded Private First Class Malcolm E. Arnold, the person named in Specification, Charge II, and that two days later Arnold died as a result of the injury thus inflicted. Accused was provoking a quarrel with an Arab who he claimed owed him fifty francs and when Robichaux intervened to quell the disorder and offered to pay accused the amount in dispute, accused turned upon him, shoved him on a bed and slashed at him with an open knife, cutting his jacket and slightly wounding him. Terrified by the turbulent conduct of accused, a French woman sought the help of military policemen and found the luckless Joughin and Arnold, unarmed and off duty, walking along the street. She guided them into the courtyard of the house where the accused, upon seeing the soldiers threatened to cut them, shoved them in a corner and struck both in the back of the neck with a knife, grievously wounding them. Five stitches were taken in the wound inflicted on Joughin and the cut on Arnold's neck extended from the right ear to a point two and one-half inches beyond the middle of the back of the neck. These blows were

struck viciously and without any justification or excuse. There was some testimony indicating that it was Barry who committed the assaults but the court concluded on the basis of convincing proof that accused was the man who wielded the knife.

The assaults upon Robichaux and Joughin were willful and they were committed in a manner likely to produce great bodily harm. All the attendant circumstances justify the inference that accused entertained the specific intent of inflicting bodily harm on his victims (Dig. Op. JAG, 1912-40, sec. 451 (10)). He was properly found guilty of the assaults alleged in Specifications 1 and 2, Charge I.

The court's action in reducing the fatal assault upon Arnold from an act of murder to that of voluntary manslaughter may have been induced by the belief that the homicide was "committed in the heat of sudden passion caused by provocation" (MCM, 1928, par. 149a) or, in the language of Section 274 of the Criminal Code of the United States (18 U.S.C.A. 453), "upon a sudden quarrel or heat of passion". The homicide was obviously willfully, feloniously and unlawfully committed, as found. That the court saw fit to find accused guilty of manslaughter only was a disposition favorable to him and certainly without injury to any of his substantial rights.

There was some evidence that accused was under the influence of intoxicating liquor when he assaulted his victims. However, in his testimony, he demonstrated a clear recollection of what happened, he claimed to have remembered everything perfectly well and said while he had been drinking he was not drunk. Sufficient drunkenness to have affected the capacity of accused to entertain the specific intent to commit the crimes with which he was charged is not indicated by the evidence.

5. Defense counsel interposed a motion that the charges be stricken in that they "do not state a crime" (R. 5). The Specifications under Charge I alleged assaults with intent to do bodily harm with a dangerous weapon and the Specification under Charge II alleged murder. The allegations adequately aver commission of these offenses as denounced by the Articles of War (AW 92,93) and as defined in the Manual for Courts-Martial (pars. 148,149a).

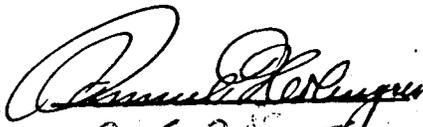
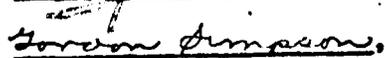
6. At the close of the evidence and before voting on the findings a member of the court became suddenly ill. The court adjourned until the next day when upon reconvening this member was reported absent sick in hospital. A medical officer introduced by prosecution testified to the fact that the member was ill and expressed the belief that he might be returned to duty in about a week (R. 221). Defense counsel thereupon requested an adjournment for a week. The court regarded this as a motion for a continuance and after considering the matter in closed session overruled the motion. The question of continuance is one for the sound discretion of the court and where a motion therefor is based upon the

absence of a member through illness, the denial of the motion cannot but be deemed a reasonable exercise of that discretion (Dig. Op. JAG, 1912-40, sec. 377). The relief of a member of the court during the progress of a trial may even be effected by the convening authority (Dig. Op. JAG, 1912-40, sec. 395 (46)). The action of the court did not injuriously affect any substantial right of accused.

7. In the re-direct examination of Madame Marcelle Zekri (R. 65-70) prosecution proceeded to question witness as to certain testimony she had given under cross-examination which to the prosecution appeared different from statements she had previously made to an investigating officer. These questions were suggestive of an attempt to impeach the witness. The general rule is that a party is not permitted to impeach his own witness. An exception is recognized when a witness is shown to be hostile and the party calling him has been surprised by the evidence given by the witness (MCM, 1928, p. 133). But the interrogation of the witness in the instant case did not reach the point where it constituted an impeachment, as no contradiction of her testimony was demonstrated. It is obvious however that the effect of any irregularity in this matter was beneficial rather than detrimental to the rights of accused.

8. Accused is twenty-nine years old. He enlisted in the United States Army 17 February 1942, at Camp Wolters, Texas. No prior service is shown.

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

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

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

Board of Review

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UNITED STATES)

EASTERN BASE SECTION)

v.)

) Trial by G.C.M., convened at
) Bizerte, Tunisia, 19 August 1943.
) Dishonorable discharge and
) confinement for forty-one years.
) United States Penitentiary,
) Lewisburg, Pennsylvania.

) Private GEORGE (NMI) TERRELL
) (35115198), Company G, 46th
) Quartermaster Regiment.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

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

Specification 1: In that Private, then Technician Fifth Grade, George Terrell, Company G 46th Quartermaster Regiment did, near Mateur, Tunisia, on or about the 23rd day of June, 1943, with intent to commit a felony, vis: rape, commit an assault upon Fatima bent Salah, by willfully and feloniously seizing the said Fatima bent Salah, tearing her clothing from her body and throwing her upon the floor.

Specification 2: In that Private, then Technician Fifth Grade, George Terrell, Company G 46th Quartermaster

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Regiment did, near Mateur, Tunisia, on or about the 23rd day of June, 1943, with intent to commit a felony, viz: rape, commit an assault upon Zura bent Saad, by willfully and feloniously seizing the said Zura bent Saad by the arms and throwing her upon the floor, at the same time uttering the words "zig zig", a French term meaning sexual relations.

Specification 3: In that Private, then Technician Fifth Grade, George Terrell, Company G 46th Quartermaster Regiment did, near Mateur, Tunisia, on or about the 23rd day of June, 1943, with intent to do bodily harm, commit an assault upon M. Roustain, now deceased, by willfully and feloniously seizing the said M. Roustain by the body and shaking him violently and pushing him against the wall, the said M. Roustain being a man of seventy-seven years of age.

Specification 4: (Finding of not guilty).

He pleaded not guilty to the Charge and Specifications and was found guilty of the Charge and Specifications 1, 2 and 3, and not guilty of Specification 4. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for forty-one years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on the evening of 23 June 1943 accused drove a truck to the vicinity of a group of houses at Michaud, near Mateur, Tunisia (R. 10). He went to the home of one Marc Roderer, knocked on the door and when it was opened by Roderer's wife demanded "in a bad manner" a drink of water "and to wash his hands". She showed him a faucet on the outside of the house. At this time Madame Roderer's father-in-law, Maurice Roustain, seventy-six years old, was in the garden near the house. As accused left the door to get the water he grabbed Roustain, shook him by the shoulders, hit him against the wall and injured his elbow (R. 5, 6,7,8). Roustain thereupon, with accused after him, ran into the house and out again. Outside accused grabbed and shook him again and later offered to shake hands (R. 9).

Accused then went to the nearby "gourbi" (hut) of Ayed ben Mohamed (R. 13) broke the door (R. 10,14) and entered. He grabbed Zura bent Saad, the wife of Ayed ben Mohamed, by the arms, threw her on her side and "asked for zig-zig", (meaning sexual relations (R. 17)), (R. 13,14). She screamed (R. 10,12,14). He released his hold and offered her candy. He did not unbutton his trousers. Zura was very scared and ran out of the hut (R. 14,15).

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Accused then went into the nearby "gourbi" of Fatima bent Salah (R. 10 14), hit her and threw her upon the ground. He tore the clothes from the upper part of her body and unbuttoned his trousers (R. 16,17). She screamed (R. 10,12). She managed to get up and run out of the house. She testified that while she was trying to get away, accused offered her candy as he grabbed at her (R. 16,17).

Madame Roderer testified that accused was either "drunk or crazy. I don't know which" (R. 7). Another witness was uncertain as to his state of sobriety and stated "He was walking straight" and not "falling all over the place" (R. 9). Still another thought he had been drinking (R. 12). According to the testimony of one witness to the assault upon Roustain, the witness stated in answer to accused's interrogation, that he was an Italian, and accused said "Italian no good" and simultaneously, as described in the record, "indicated a sawing motion with his right hand under the chin, running across the throat" (R. 12,13).

Accused made an unsworn statement through counsel stating that he did not recall any of the incidents presented by the evidence (R. 19).

3. It thus appears from the evidence that at the time and place alleged accused wrongfully entered two Arab huts and in each of them seized the woman occupant with the obviously present intent of having carnal knowledge of her by force and without her consent. This intent is clearly inferable from the evidence; in one instance the act of violence was accompanied by the significant words "zig-zig" and in the other, where accused forced the woman to the floor and unbuttoned his trousers, his purpose was clearly demonstrated. Concomitantly with such intent, the requisite overt act amounting to an assault was also established. Although accused desisted in his use of force, the facts justify an inference that in both cases, at the beginning, he intended to overcome the woman's resistance by force. What accused did immediately after the assault, whether by enticement or subterfuge, does not relieve him from responsibility. Once the assault with intent to commit rape had been made, it was no defense that accused resorted to other means to accomplish his purpose or voluntarily desisted (MCM, 1928, p. 179).

With respect to Specification 3, the evidence shows that accused made an unlawful assault upon an elderly man by forcibly taking hold of his shoulders and hitting him against the wall, thereby resulting in injury to the man's elbow. The accused's act constituted not only an assault but a battery and from the evidence there is justifiable basis for the inference that accused had the concurrent intent to commit bodily harm upon the person named in the Specification (MCM, 1928, par. 149n).

The attendant facts and circumstances justify the conclusion of the court that the accused in each instance was capable of entertaining the specific intent alleged, despite evidence of his having been drinking intoxicating liquor.

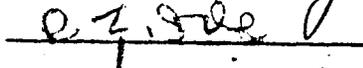
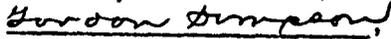
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4. Accused is 24 years old. He was inducted into the army 27 November 1940, with no prior service.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. The sentence is the maximum allowable upon conviction of the offenses under the three specifications. Penitentiary confinement is authorized for the offense of assault with intent to commit rape as alleged in Specifications 1 and 2, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 455, Title 18, United States Code.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

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APO 534, U. S. Army,
6 October 1943.

Board of Review

NATO 603

UNITED STATES)

v.)

Garrison Prisoner WILLIAM)
(NMI) SUCI (32321683),)
Company I, 531st Engineer)
Shore Regiment.)

II CORPS)

) Trial by G.C.M., convened at
) APO 302, U. S. Army, 25 June
) 1943.

) Dishonorable discharge and
) confinement for twenty years.
) United States Disciplinary
) Barracks, Fort Leavenworth,
) Kansas.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

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

Specification: In that Garrison Prisoner WILLIAM (NMI) SUCI, Company "I", Five Hundred Thirty-first Engineer Shore Regiment, did, at Arzew, Algeria, on or about 16 April 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Perregaux, Algeria, on or about 1230 hours, 18 May 1943.

CHARGE II: Violation of the 69th Article of War.

Specification: In that Garrison Prisoner WILLIAM (NMI) SUCI, Company "I", Five Hundred Thirty-first Engineer Shore

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Regiment, having been duly placed in confinement in the Five Hundred Thirty-first Engineer Shore Regiment Stockade on or about 16 April, 1943 did, at Arzew, Algeria, on or about 16 April 1943, escape from said confinement before he was set at liberty by proper authority.

He pleaded guilty to the Specification, Charge I, except the words "desert the service of the United States and did remain absent in desertion until he was apprehended", substituting therefor, respectively, the words, "without leave absent himself from his organization and did remain absent until he surrendered himself", of the excepted words not guilty, of the substituted words guilty and not guilty to Charge I but guilty of violation of Article of War 61. He pleaded guilty to Charge II and its Specification. He was found guilty of the Charges and Specifications. Evidence of two previous convictions was introduced; one for absence without leave in violation of Article of War 61 and the other for escape from confinement in violation of Article of War 69. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 16 April 1943, accused was tried by a Special Court-Martial and sentenced to confinement at hard labor for five months and to forfeit \$40 per month for a like period. That sentence was never remitted or suspended (R. 6). Following the trial in that case accused was returned to the 531st Engineer Shore Regiment Stockade at Arzew, Algeria (R. 7,9). At approximately 1730 hours on that date a check-up of garrison prisoners was made and accused was not present. A place was found in the stockade fence through which it was possible for a prisoner to leave the stockade. The prison sergeant did not see accused again until 18 May 1943 (R. 7), when he was returned by a provost marshal officer. Accused had previously been placed in solitary confinement "on bread and water" for three days for disobedience of orders and breaking confinement (R. 8). A sergeant had told accused that if he tried to escape he would shoot him (R. 8,9). A certified true copy of an extract copy of the morning report of accused's company for the month of April 1943, was received in evidence without objection by the defense showing the following entry:

"22 - To correct remarks of 16 Apr (TJMcQ)1943 Pvt Suci
fr Conf in 531st ESR Stockade to desertion

(W.E.T.)"

(R. 10; Pros. Ex. A).

The law member stated that the Exhibit had no value except to show continued unauthorized absence (R. 10).

An extract copy of the morning report of the same company for the

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month of May 1943, was also introduced showing the following entry:

"29 - To complete remarks of 13 May 1943 Pvt Suci fr
des to conf 531 ESR Stockade W.E.T. (TJMcQ)"
(R. 12; Pros. Ex. B).

Second Lieutenant William C. Reeves, Company C, 794th Military Police Battalion, testified that on 1 May 1943, accused was drunk in Perregaux and urinated against a wall near the military police station. He was put into confinement while witness tried to contact accused's organization by telephone. Failing in this, witness on that same date released accused and ordered him to report back to his organization. On 18 May 1943, witness received a telephone call from accused's organization commander stating that accused had not returned (R. 12). Later that day about 1230 hours witness again saw accused on the street "about a block and a half" from and walking in the direction of the military police station and arrested him. He did not resist, made no remarks and went to the station with the witness. He was in uniform (R. 13,14,16).

A noncommissioned officer of accused's company testified that on 6 May 1943, he saw accused at Sidi Bel Abbes which is about 67 miles from Arzew, where his organization was located. When admonished by witness to return to his organization accused replied, "I'm going to turn myself in this following Wednesday" (R. 14,15).

Accused made an unsworn written statement, which was read to the court by defense counsel and appended to the record as Defense Exhibit A (R. 17). His statement reads:

"I left the stockade on or about 16 April 1943. My reason for leaving was because I felt I had been done an injustice in being sentenced to 5 months at Hard Labor and a \$40.00 forfeiture of pay, while another Soldier tried by the same Court received only 3 months at Hard Labor and a \$22.00 forfeiture of pay. My Service Record was better than his. I became angry and just felt as though my Officers & Non-Commissioned Officers had it in for me.

"I felt like getting out, I didn't know what I was going to do. I just had a crazy idea. After leaving the Stockade, I wandered around not knowing what to do. I was afraid to go back and afraid to stay out. I went as far as Casablanca and returned to Arzew, hoping to be picked up. I then went to Oran and then To Sidi Bel Abbes. There I met a Sergeant White and a Sergeant Preacher. I told them I was going to turn myself in on Wednesday. This was on Sunday May 16, 1943. Then I went to Perregeaux and walked up to the M.P. station and turned myself in to the Officer in Charge. I did not have any intention of deserting the Service of the United States Army" (Def. Ex. A).

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4. It thus appears from the uncontradicted evidence together with his pleas of guilty and the admissions contained in his unsworn statement that at the place and time alleged accused, having been duly placed in confinement in the 531st Engineer Shore Regiment Stockade, escaped that confinement before he was set at liberty by proper authority and remained unauthorizedly absent from that stockade and his status of confinement until apprehended in Ferregaux, Algeria, about 1320 hours 18 April 1943.

Accused pleaded guilty to having absented himself without leave at the place and time alleged in violation of Article of War 61. His unsworn statement was consistent with that plea. The competent evidence shows that following his escape from confinement from the 531st Engineer Shore Regiment Stockade, accused was unauthorizedly absent from 16 April 1943, to 18 May 1943. The inception of his absence was established by proof that he was not present at the stockade on 16 April 1943, when a check-up of garrison prisoners was made; he was arrested by military police in Ferregaux, Algeria, about 1 May and released and told to return to his organization; he failed to return and again was apprehended at Ferregaux on 18 May and then confined. Accused had been convicted by a special court-martial on 16 April 1943, and sentenced to confinement at hard labor for five months and forfeiture of forty dollars a month for a like period. He resented the imposition of this punishment, became angry, felt his officers and noncommissioned officers "had it in" for him and determined upon an escape. He succeeded in escaping and remained away from the stockade for thirty-two days. His unauthorized absence was terminated by apprehension and arrest. Although accused claimed in his unsworn statement that he had no intention of deserting, there is substantial evidence to support the Court's conclusion that he absented himself with the intent not to return to the service of the United States. His confinement as a result of his conviction on 16 April, his admitted resentment at the sentence adjudged against him, his indisputably established escape from the stockade, his prolonged unauthorized absence,--these and the general circumstances in evidence impel the conclusion that accused was guilty of desertion as charged (MCM, 1928, par. 130a; Winthrop's, reprint, pp. 637, 638, 639).

Accused pleaded guilty to escape from confinement in violation of Article of War 69. His unsworn statement and the evidence are consistent with that plea. He was properly found guilty of this offense as charged (MCM, 1928, par. 139b).

5. The entries contained in the morning reports introduced in evidence (Pros. Ex. A, B) were not made by the certifying officer upon personal knowledge as to the facts recited (R. 9, 10, 11). They were therefore objectionable on the ground of hearsay (MCM, 1928, par. 117; Dig. Op. JAG, 1912-40, sec. 395 (18); Vol. II, No. 2, Bull. JAG, Feb. 1943, sec. 395 (18)). It must be noted however that the facts as recited in the morning reports were otherwise established by competent and undisputed evidence and also confirmed by the admissions contained in accused's unsworn statement and his pleas of guilty. It is manifest that the admission of the morning reports as well as any other evidence of hearsay

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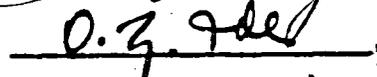
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character in the case could not have affected prejudicially his substantial rights (AW 37).

6. The data as shown on the charge sheet indicates that accused is 37 years old. Defense counsel stated in court that accused is 40 years old. He was inducted into the Army of the United States 22 April 1942 and had no previous service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The sentence is within the maximum authorized upon conviction of the offenses charged. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

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

Board of Review

NATO 635

UNITED STATES)

II CORPS

v.)

) Trial by G.C.M., convened at
) APO 302, U. S. Army, 12 June
) 1943.

) Private DAVE C. GANN
) (34042918), Battery D,
) 178th Field Artillery.

) Dishonorable discharge and
) confinement for ten years.
) United States Penitentiary,
) Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private David C. Gann, Battery D, 178th Field Artillery, did, at Battery D, 178th Field Artillery Bivouac area near Mateur, Tunisia, on or about 15 May 1943, willfully, feloniously and unlawfully, with intent to murder him, commit an assault upon Private Robert L. Mode, Battery D, 178th Field Artillery, by hitting him on the head with a dangerous thing, to wit, an end gate of a two-wheel, one ton cargo trailer.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of four previous convictions was introduced. Two of these convictions were by summary court-martial for being drunk on duty

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in violation of Article of War 85 and drunk in camp in violation of Article of War 96. The other two were by special court-martial for being drunk and disorderly in uniform in a public place in violation of Article of War 96 and for breach of restrictions and absence without leave in violation of Article of War 96. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that at about 1400 hours on 15 May 1943 in the bivouac area of their battery near Mateur, Tunisia, accused and Private Robert L. Mode, both of Battery D, 178th Field Artillery, had an argument which ended in a fight. They were separated by a sergeant who told them to wash their faces as they were bleeding. At about 1630 hours the same day accused said that Mode had kicked him and that he was going to "get" him (R. 4,6,8). "I'll get him before the day is over" (R. 11). Accused picked up a rifle and attempted to strike Mode with it and two soldiers took the rifle away from him (R. 8,11). Mode was lying on the ground asleep at the time (R. 5,8). At approximately 1730 hours while Mode was still asleep on the ground "lying flat on his back", accused struck him on the head with the tailgate of a one ton trailer making a "hole" over his right eye (R. 5,6,8,9). Accused then threw the tailgate, which was exhibited in court, on the ground and was quoted variously as having said "I wish to God I had killed him", "I hope, God damn, I killed him" and "I hope I damn near killed him" (R. 8,10,12). Accused had been drinking (R. 6,13). One witness said "He looked like he was drunk to me" (R. 9). Another said "I think he had been drinking, but I don't think he was drunk" (R. 13). Another witness said, "It seems to me like he was drunk, or had been drinking...he went off some where early in the afternoon...when he came back he was definitely drunker than when he started out" (R. 14,15). Still another witness testified "I could properly say he had been drinking very heavily...he was approximately out of his head" (R. 15,16).

Accused testified that "...I got drunk in the morning, kept going on further and passed out about noon. I don't remember anything else that happened until the next morning" (R. 17).

4. It thus appears from the uncontradicted evidence that at the place and time alleged, accused committed an assault on Private Robert L. Mode, the person named in the specification, by hitting him over the head with an end-gate of a one ton trailer. The end-gate was not particularly described by any witness, but its general shape and weight is a matter of common knowledge. It was exhibited at the trial and it was for the court to inspect the implement and conclude whether it was adaptable to the end in view. After quarrelling and fighting with his victim early in the afternoon, accused expressed his determination to "get him" before the day was over. Later he would have struck Mode with a rifle had other

soldiers not restrained him. Still later, more than three hours after the first quarrel, accused picked up the end-gate and as Mode lay on the ground asleep, struck him with it viciously on the forehead, threw it down and expressed the hope that he had killed his victim. From these circumstances, the court was fully warranted in inferring that this assault was aggravated by the concurrence of the specific intent to murder, that is, unlawfully to kill with malice aforethought. A malevolent, deliberate and evil purpose of attacking his victim with fatal effect characterized the actions of accused. The court properly concluded that the attack was malicious, willful, felonious and unlawful and that accused was guilty of assault with intent to commit murder, as alleged (MCM, 1928, par. 149 1; Dig. Op. JAG, 1912-40, sec. 451 (2)).

Accused's only defense was that he was too drunk to know what he was doing. However, his actions comported with a full understanding of his conduct and he deliberately went about carrying into effect threats he had previously expressed. There is evidence that accused had been drinking but was not drunk. The court's determination that accused had sufficient control of his faculties to be held accountable for his conduct has ample support in the evidence (MCM, 1928, par. 126a).

5. Accused is thirty-two years old. He was inducted into the Army of the United States 21 April 1941 and had no prior service.

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

 Judge Advocate.
O. Z. J. De Judge Advocate.
Gordon Simpson Judge Advocate.

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

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

Board of Review

NATO 643

UNITED STATES)

EASTERN BASE SECTION)

v.)

Trial by G.C.M., convened at
APO 763, U. S. Army, 7
September 1943.)

Private HOMER (NMI) MOOR)
(34225077), 601st Ordnance)
Company (AM).)

Dishonorable discharge and)
confinement for twenty years.)
United States Penitentiary,)
Lewisburg, Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Homer Moor, 601st Ordnance Company (AM), did, at Djebel Abiod, on or about July 10, 1943, aid and abet Private Morris Lee, 601st Ordnance Company (AM) in the forcibly and feloniously and against her will having carnal knowledge of Dabbia bet Amara ben Kamis by the said Private Morris Lee.

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

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his natural life. The reviewing authority approved the sentence but reduced the term of confinement to twenty years, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that at about 0930 hours on 10 July 1943, near Djebel Abiod, Tunisia, two colored soldiers armed with rifles, entered the home of Dabbia bet Amara ben Kamis, the wife of Amar ben Azeb Salem, and "took" her outside. The woman testified that one of the soldiers thereupon tore off part of her clothes, "lifted up the rest", threw her on the ground and against her consent and protestations had intercourse with her. His penis entered her private parts. During the transaction she was "crying and hollering for help" (R. 5,6,8,14) and "defecating herself". The "blood came out" on her face where she was scratched (R. 7). She struggled but was helpless "because he was large and strong" (R. 14). This took place about 30 yards from the hut. In response to a question as to what the soldier who accompanied the assailant did, the woman testified:

"After they both went into the house one of them grabbed me by the arms and took me outside, the other soldier was behind him and that man did that to me, he was standing there" (R. 7).

Amar ben Azeb Salem testified that he heard the voices of his wife and children crying from a point about 200 meters distant. He was a "soldier guard" in the service of the French Government and had just left the house after having been home on pass. He started running back to the house and saw two colored soldiers in the hut, "one standing up and one on my wife" (R. 8) "attacking her...having sexual connection with her". As witness approached, the soldier who was "standing up" said, "Police, Gendarmes", and went away. The soldier who was attacking the woman stood up and "shot at me with his rifle...it did not hit me because I hit the ground...as I got up I saw the one standing up run away. I approached nearer to the house and I faced the other soldier face to face and we both shot at one another..he fell and died" (R. 9).

At sometime prior to 10 a.m. accused returned to the bivouac area, about two and a half miles from the scene of the rape, reported to Lieutenant Peter Gnatuk, 601st Ordnance Detachment that Private Morris Lee had been shot by an Arab and at about 1000 hours, accompanied this officer to the locale of the Arab hut where Lee's dead body with a bullet hole on the left side was found on the ground about "twenty-five or thirty-five" yards from the hut (R. 11,12). The assaulted woman could not identify accused as the other soldier but her husband testified "it looks just like him" (R. 5,8,9,10).

Accused, after being advised that he need not make a statement and that what he said might be used against him, made the following sworn

written statement to the investigating officer which was offered in evidence by the prosecution and received without objection (R. 13).

"Around 8:00 o'clock Private Lee and myself left our bivouac area for a walk. We had our rifles with us and also 15 rounds of ammunition. We walked over the hills and circled around and when we returned we came by a house. We did not enter the house. We were on our way back to our bivouac area when this Arab came out of the bushes. He had a rifle and he shouted "Allez". He came up on the side of us as we walked along he was in rear of us. We pointed down the hill to show him we were going away. He was holding his rifle in front of him. We then turned around facing him. When we turned around we held our rifles in front of us. Lee pointed his rifle at the Arab. Lee fired his rifle. The Arab fired and I fell to the ground and rolled over. I then jumped up and ran over to the area. I returned to the bivouac area and reported to Lieut. Gnatug that an Arab had shot Lee." (Exhibit 7).

Accused made an unsworn statement, which, besides following substantially the statement he had previously made included the additional statement that there were two Arab men there, one of whom had a rifle and that there were no women there at all (R. 14).

4. It thus appears from the evidence that at the time and near the place alleged, accused and Private Morris Lee, armed with rifles, entered the home of Dahbia bet Amara ben Kamis and that one or both of them took her outside where Lee forcibly and without her consent had carnal knowledge of her. She cried out and called for help; she resisted but because of the superior strength of her assailant she was unable to prevent him from ravishing her. This was rape as alleged (MCM, 1928, par. 148b). Accused had assisted in seizing and carrying the woman outside her house; he stood by armed with his rifle while his companion forced her to submit to him; and warned him of the approach of the woman's husband. This showed not only presence at the scene of the crime but demonstrated an active aiding and abetting in its commission.

While accused could have been charged as a principal he was not improperly charged as an aider and abettor. The findings of guilty involve findings of rape. At common law accused would have been a principal in the second degree (16 C.J. p. 125, sec. 112, and p. 133, sec. 123; 52 C.J. 1036 sec. 50, note 68b; Wharton's Criminal Law, 12th Ed., sec. 256). The distinction between principals in the first and second degree is a distinction without a difference and is no longer required in indictments (Wharton's Criminal Law, 12th Ed., secs. 245, 259 and 745; 52 C.J. 1049, sec. 73). The distinction has been abolished by statute in the United States courts (18 U.S.C.A. 550). Even before the enactment of the abolishing statute the rule was that all of those present at the

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place of a crime and either aiding, abetting or assisting its commission were principals (U.S. v. Snyder (C.C. Minn. 1882) 14 F. 554; U.S. v. Boyd (C.C. Ark. 1890) 45 F. 851; U.S. v. Hughes (D.C. Tex. 1888) 34 F. 732). Aiders and abettors under rules of general application may be charged as principals (52 C.J. 1049, sec. 73; Wharton's Criminal Law, 12th Ed., sec. 245).

Although two persons cannot be jointly guilty of a single joint rape, because by the very nature of the act individual action is necessary, all persons present aiding and abetting one another in the commission of rape are guilty as principals and punishable equally with the actual perpetrator of the crime (52 C.J. 1036, sec. 50).

This principle as stated in the United States Criminal Code, as follows:

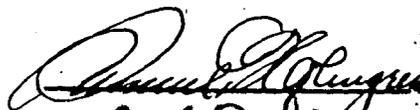
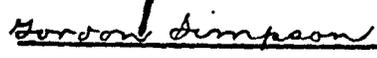
"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal" (18 U.S.C.A. 550).

has been expressly held applicable to cases tried by courts-martial (C.M. 157840, Gulp et al; C.M. 145175 (1921); Dig. Op. JAG, 1912-40, par. 451 (62); NATO 385).

By his voluntary as well as his unsworn statement, accused denied his guilt. The court declined to give credence to his claims of innocence. There is sufficient evidence to support the findings of guilty.

5. Accused is 24 years old. He was inducted into the Army of the United States 4 July 1942. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

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

Board of Review

NATO 646

UNITED STATES)

EASTERN BASE SECTION)

v.)

Trial by G.C.M., convened at
Mateur, Tunisia, 6 July 1943.

Privates HENRY C. SIMPSON)
(33134039), WILLIE (NMI) HILL)
(38031975), CLAXTON (NMI) BAKER)
(36162166), OLRIC R. BECKLES)
(12043479), and WILL (NMI))
BROWN (34049340), all of)
Company C, 98th Engineer Regiment)
(General Service).)

Hill and Beckles: findings of
not guilty.
Brown: findings of guilty but
finding and sentence disapproved.
Simpson and Baker: dishonorable
discharge and confinement for
life.
"Federal" Penitentiary, Lewis-
burg, Pennsylvania. Pending
further orders Disciplinary
Training Center No. 1.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Henry C. Simpson, Private
Will Brown, Private Claxton Baker, Private Willie Hill
and Private Olic Beckles, all of Company "C", 98th
Engineer Regiment, did, acting jointly and in pursuance
of a common intent, on or about Saturday, the 17th day
of April, 1943, near Le Tarf, Algeria, forcibly and
feloniously and against her will, have carnal knowledge
of S N E Yamina bent Mohammed.

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Each accused pleaded not guilty to the Charge and Specification. Hill and Beckles were found not guilty and Brown, Simpson and Baker were found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for "a period" of his natural life. The reviewing authority disapproved the findings and sentence of Brown and ordered a rehearing in his case. He approved the sentences in the cases of Simpson and Baker, designated the "Federal" Penitentiary, Lewisburg, Pennsylvania as the place of confinement but directed that they should be confined at Disciplinary Training Center No. 1, Oran, Algeria, pending further orders and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 2130 hours on 17 April 1943, fourteen soldiers, all colored save one, came to the dwelling of Tebib bent Mohammed, near Le Tarf, hit Tebib on the mouth, grabbed him by the arms (R. 6,8) and took him to the vicinity of a nearby hut occupied by one Bonrasi Ali ben Mohammed, his wife, Urida, her sister, Yamina and his three children (R. 8,12,13,17). Some of the soldiers entered the hut and forcibly removed Bonrasi. With Tebib he was placed under the armed guard of some of the soldiers about ten meters from the hut (R. 9,10,11). Bonrasi's brother Hassan and a native soldier, hearing the noise, came over and were also placed under restraint (R. 12). When the soldiers seized Bonrasi, Yamina, who was naked, tried to run away. She was seized outside (R. 12,18,19) where one of the soldiers grabbed her by the legs, one by the shoulders and hands. Her assailants laid her on the ground. Seven or eight of the soldiers thereupon "attact" her (R. 19,21). When asked if and how she resisted, Yamina testified, "I put my legs together, and they grabbed me by the shoulders and the hands, got between my legs. I cried and cried, and finally gave up." She testified that she was in fear of her life (R. 20). When asked through the interpreter the question "How many soldiers were able to penetrate the witness...with their penis" Yamina testified that "She was dizzy and don't know exactly how many... thinks seven or eight" (R. 21). The soldiers left after having violated her and did not give her anything (R. 20,21). She could not identify any of accused (R. 21). When asked to state her name prosecutrix replied "Yamina" (R. 19). During the assaults described, three of the soldiers who had entered Bonrasi's hut remained inside and "did things" to Urida (R. 18,51,52), the details of which are immaterial to the instant case. Screams from both women were heard (R. 9).

Private LeRoy Speed, Company C, 98th Engineers, previously "convicted for this same offense" (R. 42), testified that Baker and Simpson were in the group that visited the Arab "shacks" on the night alleged (R. 39). He saw accused Baker on top of a naked Arab girl in front of the door of a hut (R. 40,45,46). He testified that she was not trying to fight him off; "She was laying there like she told him to get on. I reckon, I don't know" (R. 46). There were more than five soldiers gathered around her while Baker was on top of her (R. 46,47). The prosecution offered, "for the sole purpose of rebutting the questions asked by the defense of LeRoy

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Speed and for the purpose of showing a consistency of statements", and "to impeach its witness LeRoy Speed", a signed sworn statement of witness which over objection by defense was introduced in evidence (R. 47,48; Ex. C). In this statement Speed states he "saw somebody screwing her; I guess that everybody but me got on her;...I know that Baker was on her because I saw him..." (Ex. C).

Lieutenant Colonel Will G. Robinson, J.A.G.D., Staff Judge Advocate, Eastern Base Section, testified that he investigated the present case and took a statement of accused Baker which was reduced to writing and which Baker swore to but refused to sign. After being advised that he need not make any incriminating statement (R. 34), Baker stated to the witness that he was in the neighborhood of Tebib's hut on the night alleged and saw several Arabs being guarded by one of the soldiers. He saw a naked girl run out of Bonrasi's hut who was seized by someone, thrown to the ground and "screwed by either Will Brown or Chris Brown". He said that he stood where he could "overlook the screwing" and saw "one boy get on, followed by other boys as the other fellow got off". Baker refused to state whether or not he had had sexual relations with the girl (R. 36). Accused Simpson, likewise warned as to his rights made a signed sworn statement which was received and read in evidence over the objections of defense counsel (R. 37; Ex. B). Simpson stated therein that at about 2130 hours he was with Speed and other soldiers returning from town to camp and that "on the way out there was some talk about getting some tail but no statement about where we might get it". He saw Speed guarding three or four Arabs who were sitting on the ground in front of a hut. He saw "a naked Arab girl...under a colored boy who was screwing her; the other boys were standing around watching...I know I saw Sergeant Brown on the girl and some of the other boys; I screwed her myself...when I screwed her she did not try to prevent me from doing it and I cannot say whether she just lay and took it or co-operated". He thought some of the boys gave her some money. Technician Fourth Grade Henry P. Middleton, who had been previously convicted for implication in the same affair, testified that both Baker and Simpson were in the group at the Arab huts at the time alleged (R. 48, 49). Staff Sergeant Garrett Allen was one of the soldiers at the Arab huts and testified that Simpson was in the group (R. 32).

The defense did not present any witnesses and each accused elected to remain silent.

4. It thus appears from the evidence that at the time and place alleged the accused, Baker and Simpson, were among a group of soldiers who at night went to some Arab huts where with force and violence they placed the Arab men under an armed guard and seized and forced to the ground an Arab girl named Yamina, who in a nude condition had tried to escape from the soldiers. The evidence clearly shows that the two accused were in the group gathered about this girl and that each of the soldiers took turns in violating her person. Baker was seen "on a naked Arab girl" and Simpson admitted that he "screwed her". While penetration of the woman's genitals is manifestly implied in Simpson's admission that he "screwed her", it is likewise inferable that it was

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accomplished by Baker, who was observed on top of her on the ground. Proof of penetration may be established by the circumstances and need not be in any particular form of words (52 C.J. 1090,1091, sec. 124). In the instant case penetration is the only inference comfortable with the evidence. With these facts, there is the further showing that Yamina resisted to the full extent of her ability; that "they got between my legs"; that she cried and feared for her life; and that she believed seven or eight of the soldiers penetrated her person. These with the other facts and circumstances justify the court's findings that each of the accused had unlawful carnal knowledge of this woman by force and without her consent. The elements of the offense are thus established (MCM, 1928, par. 148b, p. 165). The circumstances also show that the rapes were accomplished in the course of a common venture in which each accused or participant aided the other. The finding of joint action in pursuance of a common intent was therefore justified.

5. At the close of prosecution's case, defense counsel moved for a "directed verdict" for the reason that "rape is not an offense that can be committed jointly" (R. 53,54). It is of course true that two or more persons cannot jointly and directly commit a single rape, because by the very nature of the act individual action is necessary (52 C.J. 1036, sec. 50). Paragraph 27, Manual for Courts-Martial, 1928, states that

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

and elsewhere it is stated that

"where an offense is of its nature several and distinct to such a degree that it cannot be committed by two or more jointly, it of course follows that there can be no joinder of defendants in the same indictment" (31 C.J. 755, sec. 315).

This rule however does not prevent the joinder of a person for aiding and abetting another in the commission of the crime of rape (52 C.J. 1036, sec. 50). He is then chargeable as a principal (52 C.J. 1049, sec. 73; Wharton's Criminal Law, 12th Ed., sec. 245; CM, NATO 385). But despite any appropriate criticism that it was bad pleading to charge the accused as was done in this case, it is manifest that the allegations of the Specification taken in conjunction with the evidence fully support the position that each of the accused separately raped the woman. Since it clearly appears the one or the other of them could have been charged and found guilty as a principal for being an aider and abettor, his conviction thereunder would seem no less proper where proof shows him as the actual perpetrator of a separate and distinct rape, as well as an aider and abettor. Circumstances of a common venture and intent serve moreover to support the Specification. In view of these considerations, the irregularity, if such it was, cannot be held to have injuriously affected the substantial rights of the accused or either one of them (Dig. Op.

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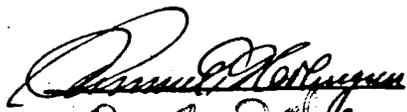
JAG, 1912-40, sec. 416 (17)). There is authority for the view that two or more persons may be jointly indicted and convicted of rape on a count which charges them jointly and not separately with the offense (People v. Musial, 349 Ill. 516, 182 N.E. 608).

6. Some time after the arraignment defense counsel announced that "Private Baker has expressed the desire to exercise the privilege of one peremptory challenge against Captain Lazar" (R. 16). When asked if he wished to challenge for cause accused replied in the negative, whereupon the law member ruled that a peremptory challenge was not then in order. This ruling was correct. The record discloses that before arraignment accused had been accorded his right to exercise such a challenge. The right of peremptory challenge must be exercised when it is tendered and a failure to exercise it constitutes a waiver of the privilege. It must be made before arraignment (CM 199231, Cosmay; CM 216361, Weber). A denial of such privilege, after it has once been waived is not error (United States v. Davis, 103 F. 459; Pointer v. United States, 151 U.S. 396). The ruling of the law member did not involve a determination of a challenge in the sense wherein it would have required a vote by the members of the court by secret written ballot (AW 31; MCM, 1928, par. 51; see also Dig. Op. JAG, 1912-40, sec. 375 (3)).

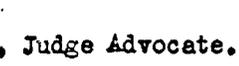
7. The woman who was raped, named in the Specification as "S N E Yamina bent Mohammed", testified that her name was "Yamina". She was shown to be the sister of Urida, the wife of Ali ben Mohammed (R. 11,19). The proof thus sufficiently identifies her as the injured person named in the Specification. She is the only woman shown to have been raped by accused and upon the pleadings and evidence it is clear that each accused could successfully plead the judgment in this proceedings in bar of any future prosecution for the rape, at the time and place alleged, of the woman named in the Specification. The substantial rights of accused are not affected by the absence of further evidence as to her name (AW 37).

8. Accused Simpson is 23 years old. He was inducted into the Army 14 January 1942 and had no prior service. Accused Baker is 26 years old. He was inducted into the Army 22 November 1941 and had no prior service.

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

 Judge Advocate.

 Judge Advocate.

CONFIDENTIAL  Judge Advocate.

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

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APO 534, U. S. Army,
9 October 1943.

Board of Review

NATO 696

UNITED STATES)

EASTERN BASE SECTION

v.)

Trial by G.C.M., convened at
Mateur, Tunisia, 8 August
1943.

Private ELBERT C. POKORNEY
(35430830), Company D, 335th
Engineer Regiment (General
Service).

) Dishonorable discharge and
) confinement for life.
) United States Penitentiary,
) Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

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

Specification: In that Private Elbert C. Pokorney, Company "D", 335th Engineer Regiment (GS), did at Hospital Road near Bizerte, Tunisia, on or about 0300, 24 July 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one SALAH BEN AHMED BERJED, a human being and a male adult Arab, by shooting him with a machine gun.

CHARGE II: Violation of the 93d Article of War.

Specification 1: (Finding of guilty disapproved by the reviewing authority.)

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Specification 2: In that Private Elbert C. Pokorney, Company "D", 335th Engineer Regiment (GS), did at Hospital Road near Bizerte, Tunisia, on or about 0300, 24 July 1943, with intent to do him bodily harm, commit an assault upon ALI BEN HASSEIN, a male adult Arab, by shooting him in the leg and hand with a dangerous weapon, to wit a machine gun.

Specification 3: In that Private Elbert C. Pokorney, Company "D", 335th Engineer Regiment (GS), did at Hospital Road near Bizerte, Tunisia, on or about 0300, 24 July 1943, with intent to do him bodily harm, commit an assault upon KHEMAIS BEN SALAH, a male Arab child of five years, by shooting him in the leg, body, and head with a dangerous weapon, to wit a machine gun.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of three previous convictions by summary court-martial was introduced, two for absence without leave in violation of Article of War 61 and one for absence without leave in violation of Article of War 61 and for being drunk in uniform in a public place in violation of Article of War 96. He was sentenced to be hanged by the neck until dead. The reviewing authority disapproved the finding of guilty of Specification 1, Charge II, approved the sentence and forwarded the record of trial under the provisions of Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence, commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 0300 hours on 24 July 1943, accused, armed with a Thompson sub-machine gun, went to a native village about two hundred fifty meters from the Hospital road in the vicinity of Bizerte, Tunisia, awakened one of the Arabs and offered to sell some clothing (R. 5,6,8,11). This Arab testified that

"When we told him we didn't want to buy, he said, 'Mademoiselle, madame, mademoiselle, madame'*** From his insistence, Salah and Homouda went to the police. When the police came about ten or fifteen meter away with their flash lights, he***picked up the clothes, got up to run, the police said, 'Grab him, and hold him'. So we did until the police arrived" (R. 6).

Soldiers from the nearby 80th Station Hospital who had responded to the call for help, came up and found ten Arabs holding accused on the ground (R. 6,11,14,18). The soldiers took the Arabs off accused, "discharged a clip" from his gun which they observed had not been fired, and "walked him" towards his camp where they gave him back the clip and gun and released him about fifty feet from his tent (R. 11). While

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being taken away from the village by the soldiers; accused "made a statement to the fact that he was coming back" (R. 14). He did return in about fifteen minutes (R. 6,19).

An Arab witness testified that when accused

"went away with the police, we were very much afraid thinking he might come back, so we were gathered around and he came back and used the sub-machine gun and shot at the people" (R. 6).

In this fusillade Ali Ben Hacene was wounded in the leg and hand (R. 6, 7,10,19). After the shooting in which Hacene was injured, accused went back to his camp and got a rifle and some ".45 calibre" ammunition. A soldier quartered in the same tent with accused testified that he had heard two bursts of firing from a machine gun earlier in the night (R. 52, 54), and that after accused "brought that tommy gun in the tent he went out with another rifle and I hear some more firing". After procuring the rifle, accused returned to the village where a dog began barking at him. An Arab came out of his gourbie and lighted a match to see if the dog had bitten the intruder. Accused pointed his gun at the Arab and insisted he was the one who had called "the police". He then started demanding "zig,zig" and was led away by another Arab at whom he presently fired his weapon. He then came upon Salah Ben Ahmed Berjed outside his gourbie and renewed his demands for a woman with whom he might have sexual intercourse. Upon being refused this demand, accused shot Salah who did not move after he was hit. "He died in the same place". When Salah's son, who was variously described as being from four to seven years old (R. 17, 19,20,24), was awakened by the shooting and arose, accused also shot the child, striking him in the head and chest (R. 19,20,24).

Between 0345 and 0400 hours that morning, a guard at accused's camp saw him pass the post armed with a .30 calibre rifle. He approached "almost within the line of the Arab village". When challenged by the guard, the actions of accused appeared normal (R. 47,48,49). About fifteen minutes before he saw accused, the guard had heard a gun fire "about four" times (R. 48). He asked accused if he did the firing and accused replied that "it was none of my fuckin' business" (R. 50). Earlier that morning, the guard had heard shots which "sounded more like a machine gun or a Tommy gun" (R. 49).

At approximately 0400 hours that morning, as he estimated it, the first sergeant of accused's company heard "about four" rifle shots. He arose and with one of the company officers, went to accused's tent. Accused was there. The sergeant found a Thompson sub-machine gun and an ammunition clip under the mattress of accused's bed. The clip, which holds thirty rounds when full, was empty (R. 43,44,47). The sergeant also found a Remington .03 rifle in accused's tent (R. 45) and he testified that "right outside was seven .45 cartridges" (R. 44). Both the sub-machine gun and the rifle smelled of "fresh powder burns" (R. 44,45,46). "The rifle looked like it had a little bit of blood. The Tommy gun had a lot of blood".

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Accused was bleeding (R. 45,46). The sergeant then went over to the Arab village which was some five or six hundred yards from the camp (R. 44,47). He testified

"When we got over there, we found a dead Arab in one hut, outside there was another one shot, shot in the right eye and about five minutes later there was an Arab woman brought a child out there shot. They put the child and the wounded Arab in the ambulance and took them to the hospital" (R. 44).

About 0030 hours, on 24 July 1943, a medical officer of the 80th Station Hospital examined an Arab who had been shot through the thigh and brought in to the hospital for treatment and later, about 0500 or 0530 hours he examined two other Arabs who were also brought to the hospital, suffering from gun shot wounds. One of these two was an elderly man. He had been shot through the eye. The other was a child five or ten years old who had been shot through the chest and the left eye. This officer did not identify any of the wounded persons (R. 35,36).

All four of the Arabs who were witnesses testified accused was drunk (R. 9,22,32,34). One of these Arabs based his conclusion upon the conduct of accused "in falling down and by pushing us like that and putting his hand on us and Mademoiselle, and things of that sort" (R. 10). On the other hand, a sergeant who was among the soldiers responding to the Arabs' call for help when accused first went to their village, testified that

"accused had been drinking, but he was not drunk***the man seemed to be in very good senses. He wasn't staggering. He was walking straight. He carried on a very sensible conversation" (R. 12).

He testified they gave accused's gun back to him because "He wasn't drunk" (R. 13). Another sergeant in the same group of soldiers testified accused "was drinking, but he was not incoherent" (R. 17).

Accused elected to remain silent.

4. It thus appears from the evidence that at the place and time alleged, accused shot with a firearm and instantly killed Salah Ben Ahmed Berjed, the person named in the Specification of Charge I, and that he committed assaults on Ali Ben Hassen and the small son of Salah, the persons named in Specifications 2 and 3, Charge II, respectively, by shooting each of them with a firearm. Accused had gone, armed with a sub-machine gun, to an Arab village near Bizerte, Tunisia, where he demanded a woman with whom he might have sexual intercourse. Alarmed at the nature and insistence of accused's demands, two Arabs went to the nearby Army hospital for help and as the soldiers responding to the call approached, accused tried to flee but was set upon and held by a group of the Arabs. The soldiers disarmed accused and took him to his camp where they returned

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his gun and ammunition and left him near his tent. About fifteen minutes later, in keeping with a previously expressed threat, accused returned to the Arab village and began firing into a group of Arabs with a sub-machine gun. In this fusillade, Ali Ben Hassein was shot in the hand and leg. Apparently having exhausted the ammunition in his sub-machine gun, accused returned to his tent, obtained a rifle and went back to the village where he manifested resentment at the Arabs for having called on the soldiers for help. He menaced one native with his rifle, shot at another and began insisting again that the Arabs get him a woman. This demand was made directly upon Salah Ben Ahmed Berjed and when Salah refused, accused wantonly shot and killed him. He then turned his gun on Salah's small son and shot and gravely wounded him. Callous indifference to the lives of his victims or vicious malice characterized the conduct of accused. He acted with a persistent willfulness; deliberation and premeditation marked his misconduct. There was ample evidence from which the court might reasonably conclude that accused was not too drunk to know and appreciate the nature and consequences of his acts and that he entertained the deliberate intent to kill when he shot Salah Ben Ahmed Berjed and the specific intent to do them bodily harm when he shot Ali Ben Hassein and the small son of Salah. Malice is to be inferred from the nature and violence of accused's conduct and the absence of any circumstance which would excuse or justify his assaults. He was properly found guilty of murder and of the assaults with intent to do bodily harm with a dangerous weapon, as alleged (MCM, 1928, par. 148a and 149n; Winthrop's, reprint, pp. 672,673; Dig. Op. JAG, 1912-40, par. 451 (10)).

5. Specification 2, Charge II, alleges the name of the assaulted party as Ali Ben Hassein and the proof shows the name to have been spelled Ali Ben Hacene. There is no variance. The two names are sounded alike and the difference in the spelling is immaterial (45 C.J. 383).

Specification 3, Charge II, describes the assaulted person as "Khemais Ben Salah, a male Arab child of five years". The proof does not show the name of this child to have been Khemais but it does establish that accused shot a boy five to seven years old, the son of Salah. "Ben Salah" means son of Salah. The rule is laid down in 30 Corpus Juris 289 as follows:

"A variance in a witness' references to the christian name of deceased does not affect the sufficiency of the proof of identity of deceased. Where the surname of the person killed is established, his identity with the person named in the indictment may be shown by proof of his occupation".

The same authority states that circumstantial evidence is sufficient to establish the identity of deceased. There can be no reasonable doubt that the person alleged in the Specification to have been assaulted and the person shown by the evidence to have been injured are identical. His surname was proven and his status as the small son of Salah was shown.

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Accused was not injured or misled in consequence of this situation (AW 37). He could successfully plead the conviction in this case in bar of any further prosecution for the assault upon this child.

The allegations in each instance charge accused with having employed a machine gun in committing the offenses of which he was found guilty. The proof showed that Ali Ben Haseein was shot with a sub-machine gun and indicates that Salah Ben Ahmed Berjed and his small son were shot with a rifle. The variance in these respects is not substantial and accused was in no wise injured or misled (AW 37).

There is no direct medical evidence that Salah Ben Ahmed Berjed died as a result of the shot fired at him by accused. However, the court might properly find that Salah died as a result of accused's act without expert testimony respecting the cause of death (30 C.J. 140). Salah fell where accused shot him and never moved. He died where he fell. There can be no doubt that accused killed him.

6. Accused is 23 years old. He was inducted into the Army of the United States 19 May 1942 and had no previous service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings as approved and the sentence. Punishment by death or imprisonment for life is mandatory upon conviction of violation of Article of War 92. Penitentiary confinement is authorized for the offense of murder as alleged in Charge I and its Specification, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Section 454, Title 18, United States Code.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

(85)

APO 534, U. S. Army,
9 October 1943.

Board of Review

NATO 696

UNITED STATES)

EASTERN BASE SECTION

v.)

Trial by G.C.M., convened at
Mateur, Tunisia, 8 August
1943.

Private ELBERT C. POKORNEY
(35430830), Company D, 335th
Engineer Regiment (General
Service).

) Dishonorable discharge and
) confinement for life.
) United States Penitentiary,
) Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

NATO 696

1st Ind.

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

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

1. In the case of Private Elbert C. Pokorney (35430830), Company D, 335th Engineer Regiment (General Service), attention is invited to the foregoing holding by the Board of Review that the record of trial is

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NATO 696, 1st Ind.

9 October 1943 (Continued).

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

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

(NATO 696)



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

(Sentence as commuted ordered executed. GCMO 41, NATO, 9 Oct 1943)

CONFIDENTIAL

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

(87)

APO 534, U. S. Army,
16 October 1943.

Board of Review

WATO 697

UNITED STATES	)	MEDITERRANEAN BASE SECTION
v.)	
Private HENRY (NMI) GARDNER, JR.	)	Trial by G.C.M., convened at
(38287217), Company C, 484th Port	)	Oran, Algeria, 4 August 1943.
Battalion, Transportation Corps.	)	Dishonorable discharge and
	)	confinement for life.
	)	United States Penitentiary,
	)	Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Henry (NMI) Gardner Jr., . . .
Company "C", 484th Port Battalion, did, at Oran,
Algeria, on or about 17 June 1943, with malice
aforethought, wilfully, deliberately, feloniously,
unlawfully, and with premeditation kill one Private
George (NMI) Caulley, a human being by shooting him
with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War, 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence but commuted

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it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of the natural life of accused, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that at about 1800 or 1830 hours on 17 July 1943 (R. 9,10,16,22), at the camp area of Company C, 484th Port Battalion, at Oran, Algeria (R. 29,30), accused entered his tent where several of his tent-mates, including Private George Caulley, Company C, 484th Port Battalion, were on their bunks (R. 5,10,16). Accused had been drinking (R. 6,16,26). One of the soldiers suggested to accused that he had been "drinking again" and some bantering conversation ensued (R. 6). The occupants of the tent indulged in "playing, picking on" accused in apparent levity (R. 16). Accused presently secured his rifle and started "pranking" by pointing the weapon at the various men in the tent and "talking about what he would do to the different boys" (R. 7). He did not appear to be angry. An occupant of the tent offered to "fix" the rifle for accused but accused refused to release it (R. 7). A corporal who was present finally took the rifle from accused and hung it in its rack in the tent (R. 8). At about this time accused asked Caulley for a "G-I knife" which accused had previously lent him (R. 6; Ex. C). Caulley, who was engaged in dressing for a formation (R. 16), said he wished to use the knife and would return it the next morning (R. 6). Accused remarked that the two had been friends for a long time and added "If you don't give me my knife we are going to lose our friendship" (R. 10). One eyewitness testified

"Henry Gardner told me that he knowed what he would do. He would shoot George. And I told him to quit bluffing that way because he didn't mean what he said. He had been drinking. Henry Gardner told me that if I didn't believe it he hoped God wouldn't let him live, that he would shoot George Caulley" (R. 7).

Accused, in the end, told Caulley the latter might retain the knife and Caulley temporarily left the tent (R. 6).

Caulley soon returned to the tent for his gas mask and accused renewed his request for the knife. Caulley repeated that he wanted to carry it to work that night and would return it to accused the next morning. Caulley then left the tent to fall in with his formation. Accused at once secured his rifle from the rack and exclaimed "If he don't give a damn for his life, I don't either". Accused then took a cartridge from his pocket, put it in the rifle and called to Caulley. Accused was sitting on his bunk facing the tent door. When called Caulley turned about, whereupon, at a distance of ten to fifteen feet, accused "threw up the rifle and shot him" (R. 11, 17,20). Caulley fell to the ground (R. 22), with a bullet wound in the abdomen. He was taken to a hospital but died a few minutes after the shooting and before reaching the hospital (R. 27,28). Death resulted from internal hemorrhage caused by the bullet wound (R. 28).

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The first sergeant of the company, who was nearby when the shot was fired, went into the tent described and asked "who shot him". Accused replied "I did, Sarge" and pointed to his rifle at the side of his bunk. The rifle contained an empty cartridge (R. 29).

At about 1900 hours on 17 June 1943, accused was questioned by a Provost Marshal sergeant, advised of his rights under the 24th Article of War and warned that any statement he made might be used against him (R. 30; Ex. C). Accused then made a written statement as follows:

"A little after 1800 hours on 16 June 1943, GEORGE CAULLEY asked me if I was going to work. I told him no, and he said to me let me have your knife. I let him have my knife as he was going to work and I wasn't. He then went off to work at the Port. I later took a ride down to the port on the mess truck, and I saw GEORGE CAULLEY there. He asked me to take two cans of chicken, which he had wrapped up in his jacket, back to camp. I asked him if I could have one of the cans, and he said yes, but leave one for me. About 20 minutes to four on the afternoon of 17 June 1943, when GEORGE CAULLEY woke up I asked him for my knife, and he said he was not going to give it back to me. I asked him again to give my knife back to me, and he said he wouldn't, as he was going to take it to work with him and use it to open cans with. I asked him again and he did not agree to give me my knife. I then reached up in the tent in which we both slept and got my rifle down and sat down again. GEORGE was standing outside of the tent at this time. I put my hand in my pocket and took out a loaded shell and put it in the rifle. As I was doing this I said to GEORGE, remember what I told you a few minutes ago, if you don't give me my knife you may not go to work. I then shot him. My 1st Sergeant, WILLIAM KINDLE, came in the tent where I was still sitting and took my rifle away from me" (Ex. C).

He signed similar statements on 18 June and 15 July 1943 (Exs. D,E).

Corporal Elmer Evans, of accused's company, who was in the tent at the time of the incidents described above, in expressing the view that accused had been drinking, testified

"the way he acted, he didn't act like he was sober at all. He was just betwixt and between to me. It seemed like to me that he knowed what he was doing and then again he didn't, as far as I can explain" (R. 8).

Corporal Charlie T. Brown, of the company, who at one time took the rifle from accused, testified that accused was under the influence of liquor (R. 14) and was not sober (R. 13) but witness "wouldn't say he was drunk" (R. 12). Private Riley Gully, of the company, who was in the tent,

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testified that accused's eyes were "red, sleepy and droopy" and that apparently he had been drinking but "the man wasn't drunk" (R. 18). First Sergeant William DeBarry Kindle, of the company, who saw accused immediately after the shooting, testified that in his opinion accused had been drinking but was not drunk (R. 26). Captain William N. Etheridge, Medical Corps, testified that he examined accused at about 2130 or 2200 hours on 17 June 1943, and noted a slight alcoholic odor on his breath but found him in complete possession of his faculties and not drunk (R. 38).

Private James Adams, 399th Port Battalion, a witness for the defense, testified that on the date of the homicide accused was with witness from about 1000 hours to about 1200 or 1230 hours. During this time each consumed about two glasses of cognac and about two glasses of wine. The two walked back some eight or ten blocks to the company area. While walking accused "staggered a little" (R. 35). When witness left him accused was drunk (R. 34).

Accused declined to testify or make an unsworn statement.

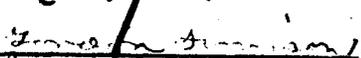
4. It thus appears from uncontradicted evidence that at the time and place alleged accused unlawfully shot Private George Caulley, the person named in the specification, with a rifle and that Caulley died at once as a result of the wound inflicted. The shooting followed a petty dispute between the two men and the utterance of threats by accused. The circumstances exhibit nothing approaching legal excuse or justification. The homicide was deliberate, willful and premeditated. No adequate motive appears but malice aforethought is plainly inferable from the circumstances and the remarks of the accused. The elements of murder are fully established. Accused had been drinking but there is nothing in the circumstances or in the testimony of the eyewitnesses to indicate that he was not mentally responsible for his acts in all respects. The evidence is legally sufficient to support the findings of guilty.

5. The Charge Sheet shows that accused is twenty-one years of age. He was inducted into the military service on 26 November 1942 without prior service.

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

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

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

APO 534, U. S. Army,
16 October 1943.

Board of Review

NATO 697

UNITED STATES)

MEDITERRANEAN BASE SECTION)

v.)

Trial by G.C.M., convened at
Oran, Algeria, 4 August 1943.)

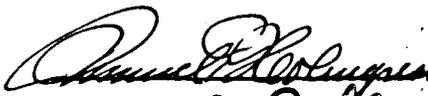
Private HENRY (NMI) GARDNER, JR.)
(38287217), Company C, 484th)
Port Battalion, Transportation)
Corps.)

Dishonorable discharge and)
confinement for life.)
United States Penitentiary,)
Lewisburg, Pennsylvania.)

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

 Judge Advocate.

O. T. Ide, Judge Advocate.

James Simpson, Judge Advocate.

NATO 697

1st Ind.

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

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

1. In the case of Private Henry (NMI) Gardner, Jr. (38287217),
Company C, 484th Port Battalion, Transportation Corps, attention is
invited to the foregoing holding by the Board of Review that the record

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NATO 697, 1st Ind.
16 October 1943 (Continued).

of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

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

(NATO 697).



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

(Sentence as commuted ordered executed. GCMO 42, NATO, 16 Oct 1943)

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

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

Board of Review

NATO 699

UNITED STATES)

ATLANTIC BASE SECTION

v.)

Trial by G.C.M., convened at
Casablanca, French Morocco,
13 August 1943.
Dismissal.

Second Lieutenant JAMES B. SAYRES)
(O-1300716), Infantry, attached)
to Company B, 10th Replacement)
Battalion, 2d Replacement Depot.)

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant James B. Sayres, Infantry, Company B, Tenth Replacement Battalion, Second Replacement Depot, did, without proper leave, absent himself from his camp at or near Casablanca, French Morocco, from about 1 July 1943, to about 11 July 1943.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due and to become due. The reviewing authority approved the sentence and transmitted the record of trial to the confirming authority, the Commanding General, North African Theater of Operations, for action under Article of War 48. The confirming authority confirmed the sentence and forwarded the record

NATO 699

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of trial for action under Article of War 50½.

3. The evidence shows that accused unauthorizedly absented himself from his station at Camp Marshal Lyautey, French Morocco, on 1 July 1943 and returned to duty at 1400 hours 11 July 1943 (R. 5, Pros. Ex. 2). He made the following unsworn statement:

"There is nothing I can say in my behalf. I am guilty of the Charge and specification. I drank too much, and I stayed in town. That is the only thing that happened, sir" (R. 7).

4. It thus appears from the uncontradicted evidence together with his pleas of guilty that accused, without proper authority, absented himself from his station and organization at Camp Marshal Lyautey, French Morocco, on 1 July 1943 and remained unauthorizedly absent until 1400 hours 11 July 1943. He was absent without leave as alleged and the court properly found accused guilty as charged (MCM, 1928, par. 132).

It is alleged that the offense was committed at or near Casablanca, French Morocco. The court judicially knew that Camp Marshal Lyautey, from which the evidence shows accused had absented himself, was near Casablanca (Underhill's Criminal Evidence, 4th Ed., sec. 62).

5. After the rights of accused as a witness had been explained to him, he first elected to remain silent. Then defense counsel proceeded with a statement to the court which was tantamount to an unsworn statement in behalf of accused. The prosecution objected to this procedure, and in making his ruling, the law member explained that

"defense counsel is giving an unsworn statement to the court in extenuation, and you have already told the court that the accused would remain silent" (R. 6).

Defense counsel then stated

"It is his military upbringing that prohibits, and makes him timid in the presence of others. It is this that keeps him silent. I thereby feel it is my duty which compels me to speak in his behalf" (R. 6,7).

The law member replied

"We can't compel the accused to do anything, if he chooses to remain silent" (R. 7).

The unsworn statement of accused followed this announcement by the law member. This procedure was unusual but under the circumstances, did not injuriously affect the substantial rights of accused.

6. Accused is twenty-four years of age. He was commissioned as a

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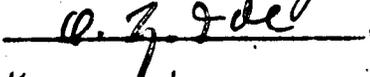
Second Lieutenant, Infantry, 20 November 1942.

7. In forwarding the record of trial to the Commanding General, North African Theater of Operations, the reviewing authority stated:

"2. Lieutenant Sayres' offense consisted of an absence without leave from the Second Replacement Depot for a period of approximately ten days, during which time he was in Casablanca apparently under the influence of intoxicants.

"3. It is believed that Lieutenant Sayres may be of some value to the service and that the ends of justice can be accomplished by commuting the sentence to a heavy forfeiture of his pay. This is his first offense".

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review holds the record of trial legally sufficient to support the sentence. Dismissal is authorized upon conviction of violation of Article of War 61.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

NATO 699 1st Ind.
 Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army,
 28 September 1943.

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

1. In the case of Second Lieutenant James B. Sayres (O-1300716), Infantry, Company B, 10th Replacement Battalion, 2d Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record

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NATO 699, 1st Ind.
28 September 1943 (Continued).

in this case, please place the file number of the record in parenthesis
at the end of the published order, as follows:

(NATO 699).



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

(Sentence ordered executed. GCMO 32, NATO, 28 Sep 1943)

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

(97)

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

Board of Review

NATO 701

UNITED STATES	)	ATLANTIC BASE SECTION
)	
v.	)	Trial by G.C.M., convened at
	)	Casablanca, French Morocco,
Second Lieutenant RALPH GORDON	)	26 July 1943.
NELSON (O-1298907), Infantry,	)	Dismissal and total forfeitures.
Company C, 10th Replacement)	
Battalion, 2d Replacement Depot.)	

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

Original Charge.

CHARGE: Violation of the 96th Article of War.

Specification: In that Ralph Gordon Nelson, O-1298907, 2nd Lt., Inf., attached to Company A, 10th Replacement Battalion, 2nd Replacement Depot, did at Casablanca, French Morocco, on or about 1 June 1943 enter an off limits area to wit Old Medina, with an enlisted man.

Additional Charges.

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

Specification 1: In that 2nd Lt. Ralph G. Nelson, attached to Company C, 10th Replacement Battalion, 2nd Replacement

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Depot, having been restricted to the limits of Camp Marshal Lyautey, French Morocco, did, at Camp Marshal Lyautey, French Morocco, on or about 18 June 1943, break said restriction by going to Casablanca, French Morocco.

Specification 2: In that 2nd Lt. Ralph G. Nelson, attached to Company C, 10th Replacement Battalion, 2nd Replacement Depot, was at Casablanca, French Morocco, on or about 18 June 1943, drunk in uniform in a public place, to wit, Casablanca, French Morocco.

Specification 3: In that Second Lieutenant Ralph G. Nelson, Infantry, attached to Company C, Tenth Replacement Battalion, Second Replacement Depot, having received a lawful order from Major Franklyn D. Fry, Adjutant General's Department, to sit down, the said Major Franklyn D. Fry, Adjutant General's Department, being in the execution of his office, did at Casablanca, French Morocco, on or about 18 June 1943, fail to obey the same.

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

Specification: In that 2nd Lt. Ralph G. Nelson, attached to Company C, 10th Replacement Battalion, 2nd Replacement Depot, did, at Casablanca, French Morocco, on or about 18 June 1943, behave himself with disrespect toward Major Franklyn D. Fry, AGD, his superior officer, by saying to him "Fuck you, I will not take any orders from you, you can bite my ass", or words to that effect.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that at 0100 hours (R. 18,21) on 1 June 1943, following a report of a complaint by an Arab concerning a dispute over some ducks, a military policeman found accused and a sergeant about 500 yards within Old Medina (R. 15), an off-limits section of Casablanca (Pros. Ex. 5). All of the main entrances to Old Medina were marked with signs stating that the place was off-limits to American personnel (R. 17). The signs were "about 2½ feet long, and about two feet in height" and there were smaller signs painted on the walls. They were above the level of the eyes of the ordinary person walking in and there was "a possibility of missing if you are not looking for them" (R. 20). The signs were not lighted, but upon arriving at close range they could be seen. There were

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several entrances "around that same vicinity" which were also marked plainly (R. 18). Accused told the military policeman he did not know he was off limits (R. 17).

Accused was returned to camp that night at about 0200 hours and later in the day he was brought before "Colonel Dockum" (R. 22), who told him he was restricted to the area of the 2d Replacement Depot "until further instructions and action by Atlantic Base Section Headquarters" (R. 23). Accused said he understood the order. Major Franklyn D. Fry, Headquarters Section, 2d Replacement Depot, then took accused before his Battalion Commander and repeated the verbal instructions as ordered by Colonel Dockum (R. 24).

At about 0820 hours 18 June 1943, Second Lieutenant William W. Marshall of the 794th Military Police Battalion, Company A, received a call to pick up an officer near the Second Base Post Office in Casablanca (R. 35). He found accused in the hallway of an apartment house. He was "sort of leaning up against the wall" trying to zip up the front of his trousers. He talked incoherently and staggered (R. 36). He created no disturbance (R. 37). Accused had not been relieved from restriction (R. 27).

At about 1000 hours on the same day Major Fry, who was then Provost Marshall of the 2d Replacement Depot, went to a police station, apparently in Casablanca, and saw accused there. Accused walked to a desk, where a sergeant was busy and demanded to know what the charges were. Major Fry told accused the sergeant was very busy and to sit down. He repeated the order. Accused told Major Fry in effect "...no paratrooper will take an order from you; I won't take an order from you and you can gnaw my ass" (R. 24,28), and "Fuck you, I won't take any orders, you can bite my ass" (R. 44). Major Fry testified that at the time he gave the order he was accused's superior officer in that he was Provost Marshall of accused's organization and was then in the execution of his duties (R. 25). Major Fry was in uniform and accused could see "his rank and grade" (R. 28). Accused was also in uniform (R. 37). He repeated the order three or four times and accused "wouldn't still sit down". Major Fry turned accused over to another officer who "finally succeeded in getting him seated" (R. 26,27,44). In Major Fry's opinion accused was drunk. "He had the general appearance of a drunken man. He wasn't too steady on his feet and he was quite talkative" (R. 25). Accused's language in addressing Major Fry was profane and obscene (R. 28), "antagonistic, not friendly, and disrespectful" (R. 29).

Accused testified only in regard to Charge I, Specification 1. He stated that on the night of 1 June 1943 he attended an officers' dance at the Red Cross Building which ended a little after midnight. He was placed in charge of two ducks by an officer and he instructed a sergeant who was helping at the dance to "take over". Accused did not have a "date" and as his transportation was being used to take some nurses home he and the sergeant wandered off down the street and into the Medina

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(R. 48). He did not know where the Medina was, had not been given instructions as to its boundaries (R. 49) and saw no signs (R. 48). Upon cross-examination accused testified that he had been in Casablanca only once. He had heard of the Old Medina (R. 50) and understood it was restricted (R. 51,57). He had had a few drinks before attending the dance (R. 57) and took several drinks during the course of the evening (R. 58).

4. It thus appears from the evidence that at the time and place alleged in the Specification, Charge I, accused entered an area in Casablanca, known as Old Medina, which had been officially declared off limits and prohibited to American personnel (except where entrance was specifically authorized for official business), same having been published in a bulletin emanating from Headquarters Atlantic Base Section at a prior date. The area had been duly posted by signs at all of the entrances. Accused knew that the area was off limits but claimed that he did not know its location or boundaries and that he did not see the warning signs when entering the area. The court could accept or reject any or all of the testimony of any of the witnesses and by its finding of guilty indicated that it did not believe that accused was unaware of the boundaries of the restricted district when he entered it. The offense committed amounted to a violation of standing orders and as such is punishable under the 96th Article of War (CM 122636 (1918); Dig. Op. JAG, 1912-40, par. 454 (33)).

It further appears from uncontradicted evidence that following his arrest in the Old Medina accused was restricted to the camp area until further notice and accused said he understood the order. As alleged in Specification 1, Charge I of the additional charges, he later left the area and went to Casablanca without having been set at liberty by proper authority. These facts constitute an offense properly chargeable under the 96th Article of War. "Colonel Dockum" is nowhere identified as accused's commanding officer nor is he shown to have had authority to impose restrictions upon accused. This failure of express proof is of no consequence since an arrest is presumed to be legal, the contrary not appearing (MCM, 1928, par. 139a).

The evidence further shows that at 0820 hours on the date and at the place alleged accused was found by a military policeman in the hallway of an apartment house. He was in uniform. He talked incoherently and staggered. The front of his trousers were open. He was taken to a police station where he walked to a desk and demanded to know what the charges were against him. He was told to sit down by the Provost Marshall and the order was repeated three or four times. Accused refused to obey the order and became profane and disrespectful towards his superior saying among other things "...no paratrooper will take an order from you. I won't take an order from you and you can gnaw my ass", and "Fuck you, I will not take any orders from you, you can bite my ass", or words to that effect. Although accused was drunk the court was justified in inferring that he was mentally capable of recognizing the officer to whom he was disrespectful. It is thus clearly established by the undisputed evidence that accused was drunk in uniform, was disrespectful to and refused to obey the lawful order

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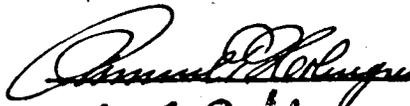
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of a superior officer then in the execution of his office, as is alleged in Specifications 2 and 3, Charge I of the additional charges, and the Specification, Charge II of the additional charges.

The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty.

5. Accused is 27 years old. He entered active service 11 September 1940 and was commissioned as Second Lieutenant November 1942. No prior service is shown.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. Dismissal is authorized upon conviction of violation of Articles of War 63 and 96. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

 Judge Advocate.
O. F. F. de Judge Advocate.
4. J. J. J. J. Judge Advocate.

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

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

Board of Review

NATO 701

UNITED STATES)

v.)

Second Lieutenant RALPH GORDON)
NELSON (O-1298907), Infantry,)
Company C, 10th Replacement)
Battalion, 2d Replacement Depot.)

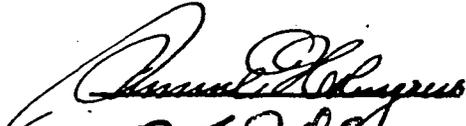
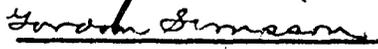
ATLANTIC BASE SECTION

Trial by G.C.M., convened at
Casablanca, French Morocco,
26 July 1943.
Dismissal and total forfeitures.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

NATO 701

1st Ind.

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

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

1. In the case of Second Lieutenant Ralph Gordon Nelson (O-1298907),
Infantry, Company C, 10th Replacement Battalion, 2d Replacement Depot,

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NATO 701, 1st Ind.
4 October 1943 (Continued).

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attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

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

(NATO 701).



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

(Sentence ordered executed. GCMD 38, NATO, 4 Oct 1943)



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

(105)

APO 534, U. S. Army.
19 November 1943.

Board of Review

NATO 757

UNITED STATES)

ATLANTIC BASE SECTION)

v.)

Trial by G.C.M., convened at
Casablanca, French Morocco,
10 August 1943.)

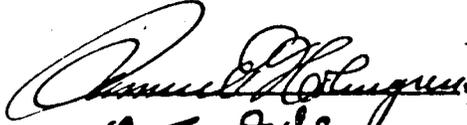
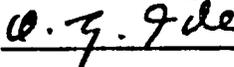
Private HENRY (NMI)
KUPERSMITH (32318808),
Headquarters Company,
6th Port Headquarters,
Transportation Corps.)

Dishonorable discharge
(suspended) and confinement
for one year.)
Disciplinary Training Center,
Atlantic Base Section.)

HOLDING by the BOARD OF REVIEW

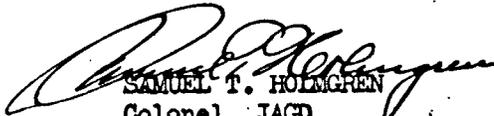
Holmgren, Ide and Simpson, Judge Advocates.

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

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

Branch Office, JAG, NATOUSA, Board of Review, 19 November 1943.
TO: The Assistant Judge Advocate General, NATOUSA.

For his information.


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

270508


19 Nov. 43

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(106)

NATO 757

19 November 1943.

MEMORANDUM:

SUBJECT: Record of trial in the case of Private HENRY (NMI)
KUPERSMITH (32318808), Headquarters Company, 6th Port
Headquarters, Transportation Corps.

1. It was charged that accused wrongfully disposed of a pair of shoes of the value of about \$3.76, property of the United States furnished and intended for the military service thereof by giving them to Private Mohrbach, and that he wrongfully converted to his own use a list of articles of the value of about \$27.15, property of the United States furnished and intended for the military service thereof. He was found guilty as charged with the exception that four sand bags, among the list of articles converted by him, were found to have "a total value of \$1.00 instead of \$8.84", and was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year. The reviewing authority approved the sentence but suspended the execution of the dishonorable discharge, and designated the Disciplinary Training Center, Atlantic Base Section, as the place of confinement.

The record of trial has been examined in the Branch Office of The Judge Advocate General, with the North African Theater of Operations, and there found not legally sufficient to support the findings and the sentence.

2. Private Mohrbach testified that on 15 May 1943, accused asked him if he wanted a pair of shoes, and "being in need of a pair" he took them. He thought better of it later on and turned them into the supply room (R. 11). Accused admitted giving the shoes to Mohrbach but said he asked him to turn them into the supply room for him (R. 13). He could not turn them in himself "because they never believe" him, and would accuse him "of taking it from somewhere" (R. 15).

While there was no direct evidence as to the ownership of the shoes, the circumstances clearly support an inference that they were property of the United States furnished and intended for the military service thereof. The gift of the shoes to Mohrbach, who stated he was "in need of a pair", reasonably implies that the shoes were of regulation type and the kind he was then wearing as an enlisted man; and the testimony of accused that he told Mohrbach to turn them in to the supply room constitutes a significant admission on his part that they were government owned, of a kind issued, maintained and received by the supply agency. The fact that Mohrbach turned them over to the supply sergeant signifies that he also was aware that the shoes were of that kind; that is government issue. While the record contains no evidence of their condition or value, they were produced before the court for inspection and it could properly find that they had some value (See Dig. Op. JAG, 1912-40, sec. 451 (42)). Accused manifestly had no right to dispose of the property in any way other than by turning it in to the proper custodian. It must be concluded that there was sub-

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stantial evidence in support of the court's findings, and that the act was one of wrongful disposition within the purview of the 94th Article of War.

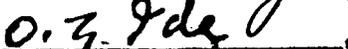
3. Accused was found in possession of certain articles of property in excess of the authorized issue under the Table of Basic Allowances, which could not have been issued to him "with authority" (R. 7,8,10). He had failed to display these articles at the time of an inspection; after he had stated that the articles on display were all he possessed, the additional articles were found among his possessions. They were "military articles" (R. 8), "regular issued property" (R. 7), and included four sand bags of a stipulated value of one dollar (R. 19), which had been issued to the company for the purposes of barricades and which the men were not supposed to have in their possession (R. 18). Accused testified that some of the articles had been given to him by soldiers in his outfit, some he found on his bunk, the barracks bags had been given him by the supply sergeant, the four sand bags were "lying around", and the pillow cases he didn't know anything about (R. 13). On cross-examination he admitted that he had heard of the Table of Basic Allowances, and that he understood a certain amount of military equipment was issued to each man, and that of issue property he was only allowed to have what was issued to him. He testified that he had had things issued to him by the supply sergeant, but that "some of the stuff was not exactly issued with a record, such as the unclaimed barracks bags" (R. 14). The first sergeant testified that barracks bags or surplus property could not be drawn in his organization unless the men were charged with them (R. 17).

The charge involves the conversion of property belonging to the United States, furnished and intended for the military service thereof. The conduct of all parties concerned and the theory of the case as presented in court manifestly exclude the possibility of dispute whether the articles were government owned. But irrespective of other items, the sand bags were clearly shown to be so owned and there is evidence that accused had no right to have them. They alone would suffice to support the findings under this specification. The accused's initial denial that he possessed articles other than those on display, the testimony that the articles found were property of regular issue and within the Table of Basic Allowances, and included "military articles", such as three "barracks bags, four pillow cases, 1 towel, Huck, three flashlights, two headnets", are significant circumstances, justifying an inference of conversion to his own use.

It is not for the Board of Review to weigh evidence and where, as in this case, the inferences are substantially sufficient the findings of the court cannot be disturbed.

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

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

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

(109)

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

Board of Review

NATO 759

UNITED STATES

v.

Private CLIFTON E. THOMPSON
(34178245), Detachment Company
C, 611th Quartermaster Battalion
(Bakery).

MEDITERRANEAN BASE SECTION

Trial by G.C.M., convened at
Oran, Algeria, 28 August 1943.
Dishonorable discharge and
confinement for ten years.
United States Disciplinary
Barracks, Fort Leavenworth,
Kansas.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charges and Specifications:
CHARGE I: Violation of the 64th Article of War.

Specification 1: In that Private Clifton E. Thompson, Detachment Company "C", Six Hundred and Eleventh Quartermaster Battalion (Bakery), did, at Mostaganem, Algeria, on or about 1 August 1943 lift up a weapon, to wit a rifle, against First Lieutenant Josiah L. Moser Jr., his superior officer, who was then in execution of his office.

Specification 2: In that Private Clifton E. Thompson, Detachment Company "C", Six Hundred and Eleventh Quartermaster Battalion (Bakery), having received a lawful command from Captain Edward L. Ryba, his superior officer, to give up his weapon, to wit a rifle, did at Mostaganem, Algeria, on or about 1 August 1943, wilfully disobey the same.

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NATO 000759

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

Specification: In that Private Clifton E. Thompson, Detachment Company "C", Six Hundred and Eleventh Quartermaster Battalion (Bakery), having received a lawful order from Technician Fourth Grade Lennart H. Width, a non-commissioned officer who was then in the execution of his office, to get on a truck, did at Mostaganem, Algeria, on or about 1 August 1943, wilfully disobey the same.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that at about 2200 hours on 1 August 1943, accused and a "Sergeant Foot" were seen in Mostaganem. Accused was carrying a rifle and Foot, a "tommy-gun" (R. 9,10). Technician Fourth Grade Lennart H. Width, Company A, 907th Ordnance Company, a provisional military policeman on duty and wearing an "MP" brassard (R. 8,9), asked accused why he had the rifle and he replied that a guard had been attacked and he was carrying it for protection. About that time other military policemen arrived in a truck. Foot was relieved of the tommy-gun and directed to get into the truck (R. 4,5,9). Sergeant Width then turned to accused and said, "We want you to get into the truck, also" (R. 5), whereupon, as he testified, the accused

"stepped back one or two feet and lowered his rifle down into the pit of my stomach, and told me to 'stand back' or 'get back', and says, 'all the rest of you MP's get in that truck', and then he says, 'Foot, come out of that truck.' " (R. 5).

Foot remained in the truck (R. 7) and accused went away (R. 13). Another witness testified that Sergeant Width asked accused for his rifle and "told him to get into the truck that he wanted to take him to Headquarters for questioning" (R. 12) and still another that, when accused stepped back and pointed his rifle at Sergeant Width, he said "get back or I will kill you" (R. 10).

Later the same night Captain Edward L. Ryba, a military police captain, accompanied by a military police lieutenant, went to accused's company area in Mostaganem, Algeria, to "quell some trouble" (Ex. A,1). When Captain Ryba arrived there was "considerable milling around" and, with the aid of his flashlight, he saw a colored soldier about six feet in height and weighing around two hundred pounds, dressed in fatigue clothes, holding a service rifle at port position (Ex. A,1,2; Ex. B,1). The captain announced himself as "Captain Ryba from the military police" and thereupon ordered

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this soldier "to give up your rifle". The soldier refused and said, "don't come any closer big boy or I will let you have it" and ordered the captain to extinguish his flashlight (Ex. A,2). To identify himself the captain turned the flashlight on his face and collar insignia (Ex. A,2, B,2). The order was repeated and not complied with (Ex. A,2). The soldier then disappeared in the darkness (Ex. A,2).

Immediately thereafter the commanding officer of the company to which accused was assigned, Lieutenant Josiah L. Moser, Jr., Company C, 611th Quartermaster Battalion (Bakery), approached Captain Ryba and, after discussing the matter with him, shouted in the general direction in which the soldier had disappeared, "Thompson, I'm coming in to see you" (Ex. B,2). The incident described was observed and corroborated by two witnesses who positively identified accused as the soldier to whom Captain Ryba gave the command (R. 6,10). Captain Ryba and the lieutenant who accompanied him were the only military police officers in the area at the time (Ex. B,3). Neither the captain nor the military police lieutenant who accompanied him could identify the soldier to whom the order was given (Ex. A,3, B,3).

Accused had gone to his tent and was heard to say that he was "not coming out for anyone under any circumstances" (R. 13,14). Lieutenant Moser testified that he then called out to the accused that he was coming in to talk with him (R. 13) and that accused replied "alright, come in if you will come in alone without anything in your hands" (R. 14). He entered, sat down and in a discussion that followed, learned that accused had grievances against the military police and was adamant in his determination that no one was going to take him (R. 14). Lieutenant Moser testified that "when I approached the tent his rifle was at a ready position...in the direction of me as I was approaching", but from the time he first saw accused until he left the tent, the accused "just had it (rifle) in his possession, that is all, but it was not pointed at me". (R. 14).

Accused elected to remain silent and offered no witnesses.

4. With reference to Specification 1, Charge I, the evidence shows that Lieutenant Moser, apprised of the unruly conduct of accused, approached the latter's tent and announced that he was about to enter it. The accused expressed no objections provided he came alone and without anything in his hands. As the lieutenant approached, the accused held his rifle in a "ready position", in the direction of the officer, but during the ensuing discussion, as Lieutenant Moser testified, "he just had it in his possession, that is all, but it was not pointed at me". To come within the intendment of this charge, the act of lifting up a weapon must amount to an assault, as by "raising or brandishing of the same minaciously in the presence of the superior and at him" (Winthrop's, reprint, p. 570). In this essential respect, the evidence clearly falls short of the required proof, for here no physical attempt or menace of violence was directed toward the officer.

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To the contrary the evidence compels the conclusion that the position of accused when first seen by the officer was manifestly no different from that in which he had placed himself before his appearance and that at no time did the accused change his position or make any menacing move or gesture. There is no evidence upon which a finding of guilty can be supported with respect to this Specification.

This view is consistent with a holding of the Board of Review upon a similar state of facts, as follows:

"Accused was found guilty of lifting up a weapon against his superior officer, in violation of A. W. 64. There was evidence that accused's captain came upon accused keeping a number of soldiers at bay by holding a loaded service rifle at 'low port' in a menacing manner. The captain, who was about 25 yards from the accused, stepped in front of the group, thus placing himself in the line of fire of the rifle as accused was holding it, and ordered accused to surrender the rifle. Accused remarked that if he fired he would take the captain with him, but did not move his position or rifle. The captain repeated the order, whereupon accused unloaded the rifle and threw it to the ground. Held: The record does not support the findings. To constitute 'lifting up' a weapon within the meaning of A. W. 64 there must be some physical attempt or menace of violence. Mere words are not enough. In the instant case there was no evidence that accused made any menacing move or gesture toward the captain. C. M. 229343 (1943)" (Bull. JAG, January 1943, Vol. II, No. 1, sec. 422 (1)).

There is ample evidence to support the findings of guilty of Specification 2, Charge I, for at the time and place alleged, upon being ordered by Captain Ryba, his superior officer, to give up his rifle the accused then and there deliberately and willfully disobeyed such command. By way of aggravation accused said "don't come any closer big boy or I will let you have it". The captain had gone to accused's company area to quell a disorder and there found accused holding a rifle. The elements of the offense charged are fully established.

As to Charge II and its Specification, the evidence shows that at the place and time alleged Technician Fourth Grade Lennart H. Width, a provisional military policeman on duty and wearing an "MP" brassard, saw accused and a "Sgt. Foot" in Mostaganem, the former armed with a rifle and the latter with a "tommy-gun". Width relieved Foot of the "Tommy Gun" and had him get into a truck in which a group of military policemen had just arrived. He then said to accused "We want you to get into the truck, also" (R. 5). Private Warren W. Dippong, 9th Anti-Aircraft Air Warning Group, testified that Width "asked him

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for his rifle and told him to get into the truck that he wanted to take him to Headquarters for questioning" (R. 12). Instead of complying, accused menaced Width and the other military police with his rifle and went away. The requirements as to proof are that accused received a certain order from a non-commissioned officer as alleged, that such order was given by the latter in the execution of his office and that accused willfully disobeyed the command (MCM, 1928, par. 135b). Technicians are non-commissioned officers within the purview of this Article of War (W.D. Cir. No. 204; 24 June 1942, IV, 3) and in the situation presented, Width was clearly in the execution of his duties, authorizedly done by military usage. The remaining question is whether the words employed by Width constituted an order under this Article of War. The decision rests upon evidentiary statements that "We want you to get into the truck, also" and "told him to get into the truck" and in their relationship to the attendant circumstances. While the words attributable to Width by one witness appear to fall short of the usual conception of an order, no reasonable contention can be advanced that under the circumstances it was not so intended and that it was not fully understood to be such by accused. His parting remark, "Get back on the truck or I'll kill you" significantly denotes an awareness on the part of accused of the commanding purport of Width's words and at the same time demonstrates his deliberate defiance thereto. The form in which an order is expressed is immaterial "provided that the substance amounts to a positive mandate" (Winthrop's, reprint, p. 574). The situation which confronted Width, with accused with a rifle holding at bay some fifteen military policemen, was attended with serious possibilities and incidentally justified words of a less peremptory nature than those which otherwise would have been expected. Moreover a witness could testify that Width "told him to get into the truck". It must be concluded that under all the circumstances the accused fully understood that he was given an order and that his refusal to obey was deliberate as well as willful. The offense is therefore established.

5. Two witnesses for the prosecution testified by deposition. This being a capital case within the purview of Article of War 25, the prosecution could properly introduce the depositions only by express consent of the defense made or presented in court (MCM, 1928, par. 119a). It is noted that each deposition contains an express agreement between the trial judge advocate, accused and defense counsel to the effect the deposition may be read on the trial of the case subject to such objection as the rules of evidence might justify. However, when the depositions were offered on the trial the defense in each instance specifically announced that it had no objection. The consent was sufficient to render them admissible in evidence.

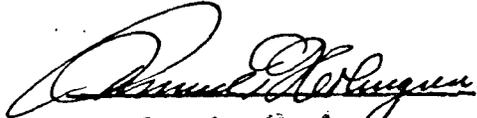
6. Accused is twenty-five years old. He was inducted into the Army 29 January 1942. No prior service is shown.

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7. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 1, Charge I, legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder and of Charge II and its Specification, and legally sufficient to support the sentence.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

NATO 759 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army,
28 October 1943.

TO: Commanding General, Mediterranean Base Section, APO 600, U. S. Army.

1. In the case of Private Clifton E. Thompson (34178245), Detachment Company C, 611th Quartermaster Battalion (Bakery), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1, Charge I, legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder and of Charge II and its Specification, and legally sufficient to support the sentence, which holding is hereby approved. Upon disapproval of the finding of guilty of Specification 1, Charge I, you will have authority to order execution of the sentence.

2. Attention is invited to the provisions of Circular 193, Headquarters, North African Theater of Operations, 27 September 1943, directing that effective 1 October 1943, commanding officers exercising general court-martial jurisdiction within this theater, when designating a disciplinary barracks in the United States as the place of confinement for general prisoners, will designate as the place of confinement: Eastern Branch, United States Disciplinary Barracks, Beekman, New York.

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

(NATO 759).



HUBERT D. HOOVER
Colonel, J.A.G.D.

Assistant Judge Advocate General

NATO

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

Specification: In that Private Godfred (nmi) Ruff, Company "G", 66th Armored Regiment did, near Castellamare, Sicily, on or about 8 August 1943, with intent to do him bodily harm, commit an assault upon Corporal Joseph W. Smith, Company "G", 66th Armored Regiment, by pointing at him a dangerous weapon, to wit, a cal. 45 revolver, and by saying to him "I'll blow your brains out", or words to that effect.

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

3. The evidence shows that on 8 August 1943, the accused was a member of a guard detail whose mission it was to guard a bridge in the rear of the combat area between Castellamare and Balestrate, Sicily. It was a railroad bridge over which trains frequently passed carrying gas, oil and military supplies for the Allied forces. The guard was "supposed to protect" the bridge "from being blown up", to enforce blackouts and to enforce "curfew on the highway that ran parallel to the bridge" (R. 6,9). Accused was posted on duty as a guard (R. 6,8) at 1400 hours and entered upon his duties as guard at that time (R. 7). His tour of duty was variously described as "Four hours on and eight hours off" (R. 8), and "From three o'clock to six o'clock..." (R. 10) and "we went on for three hours". One witness testified the accused was late in arriving at his post, arriving "somewhere around four o'clock". The guard was not formally posted by a noncommissioned officer, the guards "simply went up and relieved the other two on the bridge". The sergeant was "always in the vicinity" (R. 9). The sergeant of the guard testified that he posted accused (R. 7).

When accused arrived he had apparently been drinking heavily. He later left the post telling Corporal Joseph W. Smith, of the same organization who was on duty with accused, that he was going for a drink (R. 10). He was gone about "one-half or three-quarters of an hour" (R. 15). He had not been relieved from his post by proper authority (R. 7,10). When he came back "he was in pretty bad shape...he was drunk...He seemed to be practically out of his head" (R. 7,10). "I don't think he could think straight...I don't think he could navigate"... "He was intoxicated... His eyes were glassy"... "he staggered around" (R. 7,11). A girl came down the highway on a bicycle and accused walked out to the highway bridge, "stuck out his hand" and apparently frightened her. She turned around and went back. Smith then asked accused why he had done that. Accused

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"blew up" and drew a .45 caliber revolver, pointed it at Smith and threatened to kill him (R. 10). The revolver was loaded (R. 11). "He said that what he had done was none of my business and said he would blow my brains out". His voice was "very unfriendly" and he appeared to mean "just what he said about blowing my brains out" (R. 10). Smith considered himself in danger (R. 10,11). Accused later put his gun back in his holster but continued "talking back and forth". The sergeant heard the conversation and came up and took accused's gun and relieved him from guard (R. 7,11).

Accused elected to remain silent. A defense witness who was a member of the guard detail testified that it was customary for a guard when he wanted to urinate "to just walk about two yards or so and urinate in the weeds but if you had to go to the latrine you would have to ask for relief". If a guard had to leave for just a "minute or so" he would "tell the other-guard". At night they would get a relief (R. 13).

The court recalled the sergeant of the guard who testified that the "general orders applied on that post" that he had instructed the men on guard that "when their time was up to holler down" and he would see that the next relief was "sent up" (R. 14).

4. It thus appears from the uncontradicted evidence that at the place and time alleged in Specification 1 of Charge I, accused, having been posted as a member of a special guard, left his post before he was regularly relieved; that after an absence of a half to three-quarters of an hour, he returned to his post and was found drunk upon it, as is alleged in Specification 2 of Charge I; and after his return, that he became incensed at Corporal Joseph W. Smith, drew a .45 caliber loaded revolver, pointed it at Smith and threatened to kill him, as is alleged in the Specification of Charge II. Accused was a member of a guard detail which had been charged with the important responsibility of guarding a railroad trestle over which trains carrying military supplies were frequently passing. He left this detail and abandoned his post without authority and before he was regularly relieved and returned subsequently in a drunken condition and undertook to resume his duties. He accosted a girl who approached along the road and frightened her away. When Smith asked him why he had accosted the girl, he pointed a loaded revolver at Smith and in a belligerent, unfriendly manner, declared as if he meant what he said that he would blow Smith's "brains out". Accused was clearly shown to have been guilty of the offenses charged.

Whether he was too drunk to entertain the specific intent to do him bodily harm when accused drew his pistol on Smith was a question for the court's determination. While the evidence showed accused was heavily intoxicated, it is reasonably inferable from his conduct and actions that he did consciously intend to do Smith bodily harm when he committed the assault upon him. Accused was sufficiently in possession of his faculties to resent Smith's asking why he had frightened the girl, to draw and point his revolver at Smith and to declare that he would kill him. This conduct

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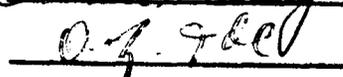
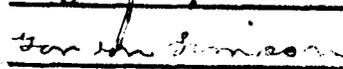
(118)

did not indicate a condition of mind bereft of reason but to the contrary, showed a malign and purposeful design. The requisite intent was satisfactorily established (MCM, 1928, par. 1491; Dig. Op. JAG, 1912-40, sec. 451 (10)).

5. The misbehavior of accused as a member of the guard detail was charged under Article of War 96. In both the specifications under Charge I, he was described as "a member of a special guard" and as having been duly posted as such. These allegations do not aver that accused was a sentinel. No maximum punishment is listed for the offenses laid here under Charge I. Recourse to closely related offenses must be had to determine the maximum permissible punishment. The offense involved in leaving his duty as a special guard before being regularly relieved (Specification 1, Charge I), not being charged as the offense of a sentinel, is most closely related to the offense of absence without leave from guard, in violation of Article of War 61, for which there is at present no maximum punishment listed (MCM, 1928, par. 104c; Sec. 1, Bull. 57, W.D., 19 November 1942). The offense involved in being found drunk on duty as a member of a special guard (Specification 2, Charge I), not being charged as the offense of a sentinel, is most closely related to that of being found drunk on guard in violation of Article of War 85, for which a maximum punishment of dishonorable discharge, total forfeitures and confinement at hard labor for six months is listed. Confinement at hard labor for five years is authorized upon conviction of the offense of assault with intent to do bodily harm with a dangerous weapon charged in the Specification and Charge II (MCM, 1928, par. 104c). There being no maximum punishment listed for conviction of the offense alleged in Specification 1, Charge I, or for any closely related offense, the sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for nine years, as imposed by the court and approved by the reviewing authority, is legal.

6. Accused is 33 years old. He was inducted into the Army of the United States 17 January 1942, at Fort Snelling, Minnesota. He had no prior service.

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

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

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

Board of Review .

NATO 778

UNITED STATES)

SEVENTH ARMY)

v.)

Trial by G.C.M., convened at
Palermo, Sicily, 14 August
1943.
Dismissal.)

Lieutenant Colonel JOSEPH W.
TALLENT (O-266255), 175th
Engineers (General Service).)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

Specification: In that LIEUTENANT COLONEL JOSEPH W. TALLENT, 175th Engineers (GS), was, in the vicinity of Bizerte, Tunisia, on or about 2330 June 28, 1943, drunk and conspicuously disorderly in camp, to wit, area occupied by 175th Engineers (GS).

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

Specification: In that LIEUTENANT COLONEL JOSEPH W. TALLENT, 175th Engineers (GS), did, in the vicinity of Bizerte, Tunisia, on or about 2330 June 28, 1943, with intent to do him bodily harm, commit an assault upon CAPTAIN ROBERT M. FRIDY, 175th Engineers (GS), by striking him on the face and head with a dangerous weapon, to wit, a .45 caliber pistol.

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He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on the evening of 28 June 1943, accused, Colonel John H. Trescot, Captain Robert A. Lincoln, and Captain Robert M. Fridy, all of the 175th Engineers (General Service), which was stationed near Bizerte, Tunisia, attended a dance, riding in a command car driven by an enlisted man. At about 2315 hours, they left the dance. As Colonel Trescot approached the car when the group was about to depart, he heard accused, who was sitting on the front seat on the right side, say, "you son of a bitch, I'll beat hell out of you" (R. 6,7,8,37). Colonel Trescot walked up to the car and nothing more was said when he was recognized. He, Captain Lincoln and Captain Fridy then got in the rear of the car, Colonel Trescot sitting on the left, Captain Fridy in the middle and Captain Lincoln on the right (R. 8,37). The car had gone about three hundred yards when Colonel Trescot remarked "Why is everyone so quiet?" Accused responded "That son of a bitch Fridy is drunk", or words to that effect (R. 8). Colonel Trescot told accused

"I don't think you should accuse anybody else of being drunk" (R. 8).

Colonel Trescot testified that following this statement

"Colonel Tallent cursed me and said he'd been waiting for this opportunity. He didn't say what opportunity. Then he attempted to rise out of (R. 8) the seat. There was a scuffle, and Captain Lincoln grabbed Colonel Tallent, and Captain Fridy grabbed me... The car went 50 yards, and Captain Lincoln had the driver stop. There was quite a bit of cursing on the part of Colonel Tallent, using the words 'son of a bitch' and 'bastard' quite profusely...He was drunk...Everything quieted down till we got to our bivouac area, when Colonel Tallent and Captain Fridy started cursing again...The car was stopped and Colonel Tallent got out of the front seat. He didn't say a word, and went off in the direction of his tent (R. 9)...It wasn't over five minutes (later) ...Captain Fridy and myself were urinating by an olive tree near my quarters. Captain Lincoln was standing ten feet or so away from us. Some one walked up - it was about eleven-thirty, and slightly dark - this party walked up and called Captain

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Lincoln. I recognized it as Colonel Tallent's voice...Captain Lincoln answered, 'Here'...He called Captain Fridy, and Captain Fridy said 'Here.' Then Colonel Tallent walked over to Captain Fridy and said, 'Do you want to make anything out of it now?' Captain Fridy was still urinating and answered, 'If you want to make anything out of it, it suits me.' Then Colonel Tallent lunged at Captain Fridy and struck him...Captain Fridy's back was toward Colonel Tallent (R. 10)...The blow sounded as if Colonel Tallent had hit Captain Fridy with something...Captain Fridy turned and grabbed Colonel Tallent and grappled with him and both fell, Colonel Tallent on top. I went over and put my arms around Colonel Tallent and attempted to catch his hands, to see what he'd hit Captain Fridy with. My hand grabbed a pistol barrel...I called Captain Lincoln to help take the gun away... Captain Lincoln took the gun and we got Colonel Tallent off of Captain Fridy...We then walked over toward my trailer, a distance of twelve to fifteen feet. While we were standing there, I had told someone to get a doctor for Captain Fridy to see if he was hurt. By that time, Major Miller walked up and made the remark, 'What's all the excitement?'... Colonel Tallent said, 'What's it to you, you son of a bitch?' and hit him. Major Miller threw him to the ground (R. 11)...Colonel Tallent started yelling after someone to take Major Miller off of him. Captain Battley came up and I think he took Major Miller off of Colonel Tallent...Colonel Tallent accused Captain Battley...of saying Major Miller was a cock sucker. Captain Battley jumped on Colonel Tallent then" (R. 12).

Major Alexander H. Miller, Captain William R. Battley and Captain Banks H. Bell, all of 175th Engineers(General Service), had heard the disturbance near Colonel Trescot's quarters and had heard someone say "He has a gun"; they went over to see what was the matter (R. 39,40,43, 47,48). It was then that accused tried to strike Major Miller who avoided the blow (R. 40,44,48), threw him to the ground and pinioned him there. Major Michael E. Doyle of the same regiment, who had not gone to the dance and had just retired, heard accused call "Mike, come out here quick if you're a friend of mine". He went out and observed accused stretched out and Major Miller on top of him holding his hands against the ground (R. 56). Accused complained that Major Miller was beating him. Captains Bell and Battley told Major Doyle accused was not getting hurt, "that he was just being held down" and Major Doyle then refused to assist accused who became abusive toward him, cursing and saying "God damned son of a bitch, cocksucker" (R. 44,57). Captain Battley said to accused "Joe, if I make him get up, will you quiet down?" and accused

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replied, "Battley, you god damned lying son of a bitch, you told me yourself you saw him suck a prick" (R. 44). Captain Battley testified that

"I told Major Miller to get up and asked Colonel Tallent to get up, and he didn't make a move, so I reached his shirt and pulled him up and hit him twice in the face" (R. 44).

Major Miller "grabbed" Captain Battley when he hit accused (R. 46).

The weapon Captain Lincoln took away from accused was an unloaded .45 calibre issue automatic pistol. Accused had it against Captain Fridy's stomach when it was taken from him (R. 31,33,52). At the direction of Colonel Trescot, Captain Lincoln went to accused's tent and there found and took into his possession another pistol (R. 35).

There was "quite a bit of a disturbance and loud talking" (R. 45). Soldiers were bivouacked twenty-five to thirty yards from the officers quarters and "there were a number of enlisted men all around the cut-skirts of the bivouac" at the time (R. 44); they could be heard talking from a semi-circle into which they were grouped some thirty to forty yards away from the scene (R. 47).

The enlisted man driving the command car back from the dance testified that when Colonel Trescot had suggested that Captain Fridy was not "any more drunk than some people around here", accused retorted "I'm not drunk. If you say I'm drunk, you're a god damned liar", and that Colonel Trescot then told him, "You've been drinking for two days now, you've got to stop it and get down to business" (R. 38).

Accused was assisted from the place of the disturbance to the "aid tent" by a medical officer who noticed some abrasions and a little blood about his face. When seen by this officer the next day, his face was "quite swollen about the chin and there were numerous abrasions about the nose and chin". The medical officer expressed the opinion that injuries of the type accused had sustained might "possibly" have so affected him that he would not be in full possession of his physical processes (R. 21). At the medical tent, accused was given a sedative to "quiet him down...He didn't show any undue excitement but he was not very calm". The medical officer testified that accused's "state of mind was similar to the state of mind a person would have after a fist fight" (R. 22).

After the affray, the medical officer also treated Captain Fridy who had three lacerations on the head, the largest was about three-quarters of an inch long. Another was between one-half and three-quarters of an inch long and the third "very small, probably about a quarter of an inch" (R. 18). Captain Fridy complained considerably about

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his injuries, "said he was terribly hurt about the head" but the officer examining did not "find so much of an injury there". The wounds were made by a "blunt instrument" (R. 23).

Varying opinions were expressed by witnesses as to the sobriety of accused on the night of the difficulty. Colonel Trescot described him as drunk (R. 9,15,16,25). Captain Lincoln thought that accused, though he had been drinking, was in "reasonable control of his mental and physical faculties to perform military services" (R. 31,32). The soldier who drove the group to and from the dance testified accused was under the influence of intoxicating liquor (R. 39). Major Miller said he was drunk (R. 41). Accused was under the influence of liquor, in the opinion of Captain Bell, who testified "I don't think he knew what he was doing" (R. 49). Major Doyle testified that accused was "plenty good and drunk" (R. 58). Captain Kasper Coffman, 175th Engineers (General Service), a medical officer, saw accused at the dance and described him as being "fairly joyeuous" but in sufficient control of his mental and physical faculties to perform "his full military duties" (R. 84). Another medical officer testified that accused was not intoxicated when he observed him at and after the dance (R. 19,23). Two other officers testified that on occasions when accused was drinking he was jovial and pleasant (R. 81,83,84). One of these officers saw accused at the dance where he appeared to be "all right"; this officer believed accused was "in possession of his mental and physical faculties to the extent that he was able to perform his full military duties" (R. 83). Ordinarily when he was drinking, accused was not pugnacious or truculent (R. 33,42,45,50,55,81).

Captain Lincoln testified he considered Colonel Trescot drunk the night of the dance (R. 36). The driver of the command car said Colonel Trescot did not appear to be drinking (R. 39). Captain Coffman saw Colonel Trescot at the dance where he appeared "very much of a gentleman" (R. 88). Colonel Trescot testified he had two drinks during the dance and that he was not drunk (R. 15).

Accused testified that late in the afternoon of 28 June 1943, he was invited by Colonel Trescot to have a drink but declined; that he had supper, and as he was returning to his quarters, he passed Colonel Trescot's trailer where the invitation to drink was renewed and this time accepted. They had three drinks. Accused was asked to ride to the dance with Colonel Trescot. Accused testified that

"Several minutes after we got there, we went up and had a drink, possibly two or three, I don't remember exactly. Later about, to the best of my knowledge, nine or nine-thirty, he (Colonel Trescot) came to me and said he would have to leave the dance for awhile. He was pretty well along. I asked him where he was going, and he said, 'To the Officers' quarters to lie down for awhile.' I didn't see him any more until

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just before the dance was over. He came back...Before we went to the car in the evening just before the dance ended, somebody said Captain Fridy was getting out of hand and started a fight. I went back in and got Captain Fridy and asked him to go along with me, and then we walked to the car. That was just before we left in the car. I asked him to get in, he was pretty drunk and talking a lot. He said, 'I'm not going to get in the car till I lick that son of a bitch.' I got into the car and sat down...Well, we left the hospital and rode down for about two or three hundred yards toward the bivouac area. Colonel made the remark, 'Why is everyone so quiet?' I made the remark, 'I suppose Captain Fridy is thinking about the rotation of Officers, about going home soon.' Then Colonel Trescot said to me, 'Colonel Tallent, you're drunk. You ought to keep your mouth shut.' I said, 'I'm not drunk, I don't think. It's a case of the pot calling the kettle black.' When I said that, he hit me. I was sitting on the seat on my side talking to him when he hit me with his fist. It surprised me at the time, I wasn't expecting anything like that. I said, 'Colonel, I had been expecting you to do this for a long time,' and I swung back and hit him. When I did that, Captain Fridy either grabbed me or the Colonel. I had a partial plate which fell out of my mouth and out of the car, or it fell in the car on the floor. Then someone, I'm not sure whether it was Captain Fridy or the Colonel started again, and I got kicked in the face and went out. I don't - - After that, I don't remember what happened. I don't even remember going back to the area...I have a hazy recollection of being in a scuffle with Captain Fridy. Then I don't remember anything more till Captain Israel was working over me. I asked what happened, and Captain Israel said, 'Keep still and I'll take care of you,' and all of a sudden I remembered having been in the scuffle with Captain Fridy" (R. 67,68,69).

Accused did not consider he was sufficiently under the influence of intoxicating liquor during the evening to be incapable of performing his "full military duties" (R. 69).

On cross-examination, accused testified that he had one drink before supper, one with the meal (R. 69), two at Colonel Trescot's trailer and three at the dance. He was drinking brandy, cognac and vermouth. The drinks of brandy and cognac were "regular jigger size" (R. 70,71). He testified it was Colonel Trescot who struck and kicked him in the face (R. 73). Asked what happened, after he was kicked,

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accused testified

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"The first time, I think Captain Fridy, I'm not sure, hit me...I was struck by Captain Fridy. Then I struck at Colonel Trescot, and he kicked me. That's the last I remember" (R. 74).

Accused claimed to have been kicked in the face twice, the first time on the upper lip, breaking a dental bridge, and the second time at the base of the nose on the left side (R. 74,75). He denied having a .45 calibre pistol that evening (R. 76).

At the dance, Captain Coffman observed Captain Fridy having "some words" with an officer and tried to quell the disorder but Captain Fridy threatened to assault him too. Captain Coffman testified that when Captain Fridy is drinking he "wants to whip everybody else if he can" (R. 85). Accused was "in good spirits and jovial" during the dance. When Captain Coffman saw him later at the first aid station, he was boisterous, difficult to handle and complained of pain. Accused "was raving" (R. 87). Captain Coffman testified the injury accused received on the jaw could have caused him to "black out" temporarily (R. 86) and he would not attribute the change in the condition of accused to drinking (R. 88); however, it was a possibility that "another drink or two could have had the same effect" (R. 89).

There had been some "friction" among the staff of the regiment (R. 79). Accused was Colonel Trescot's executive officer but "his viewpoints or suggestions were normally not considered". This situation had existed some time, at least since November, 1942 (R. 80). However, accused had been promoted from major to lieutenant colonel two or three months before the trial and Colonel Trescot was his commanding officer at the time (R. 82).

4. It thus appears from the evidence that at the place and time alleged in the Specification of Charge I, accused was conspicuously drunk and disorderly and that at the place and time alleged in the Specification of Charge II, he struck Captain Robert M. Fridy over the head with a .45 calibre automatic pistol. He had been drinking since the late afternoon of the day he committed those offenses and while some witnesses did not consider him drunk at the dance that evening, there is substantial evidence from which the court might reasonably conclude that he was heavily intoxicated when he and his companions started to leave. His insulting and provocative language toward Captain Fridy, the brawl in which he subsequently engaged in the car, his act in going to his tent at the bivouac area to procure a pistol for use as a bludgeon, his renewal of the affray by approaching Captain Fridy from the rear and striking him over the head with the pistol, his immoderate and obscene language which followed this fight, his insulting accusations concerning other officers of the command, and his ribald and boisterous conduct in general, demonstrate clearly that accused was conspicuously drunk and disorderly as alleged. In aggravation of this misconduct,

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these disgraceful disturbances occurred in the presence and hearing of both officers and enlisted men of accused's regiment. Accused contended that he was struck and kicked in the face in the brawl in the car, that he lapsed into unconsciousness as a result of these injuries and that, except very vaguely, he remembered nothing of what happened upon his return to the bivouac area. The court did not give credence to this claim but concluded and accordingly found that accused's misconduct resulted from his drunkenness and not from the injuries he had received. In this conclusion, the court was supported by substantial evidence. Accused was properly found guilty as alleged in Charge I and its Specification.

Whether accused was sufficiently in possession of his faculties to entertain the specific intent to do him bodily harm when he assaulted Captain Fridy, was also an issue for the court's determination. This intent may be inferred from the circumstances surrounding the assault, the nature of the weapon used and the character of the wounds inflicted. The court was fully warranted in concluding accused deliberately entertained the specific intent to do him bodily harm when he struck Captain Fridy over the head with a pistol, that the pistol so used was a dangerous weapon, and that accused was guilty as alleged in Charge II and its Specification (Dig. Op. JAG, 1912-40, sec. 451 (10)).

5. When the prosecution rested, the defense announced that accused desired to testify under oath but "would not want to place the accused on the stand until after the testimony of Captain Fridy can be presented to the court..." (R. 60). A postponement was then granted to enable the prosecution and defense to secure the testimony of Captain Fridy, either by personal attendance at the trial or by deposition (R. 60,61,62). After an adjournment of fourteen days, the court reconvened (R. 63). The trial judge advocate explained in detail the efforts which had been unsuccessfully made to locate Captain Fridy and announced that both the prosecution and defense wished to proceed with the trial without the presence of Captain Fridy. Copies of radiograms which had been exchanged in the fruitless endeavor to find the captain were introduced. There was no showing made to the court as to what Captain Fridy would testify which would be favorable to accused in the development of his defense. (R. 64,65, Ex. 1 to 8, incl.). The question of continuance is one for the sound discretion of the court and this discretion appears to have been properly and wisely exercised in ordering, as it did, that the trial proceed (Dig. Op. JAG, 1912-40, sec. 377; MCM, 1928, par. 52).

When the court reconvened after adjournment, defense counsel and two members of the court who were present at the close of the previous session were absent because of illness. However, the assistant defense counsel, who had been at the trial during all previous sessions, was present. After a conference between accused and assistant defense counsel, accused, assistant defense counsel and the prosecution announced their willingness to proceed in the absence of defense counsel (R. 63,64).

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The absent members of the court did not reduce its membership below five and all those present had attended all previous sessions. There was no error or prejudice to accused in proceeding with the trial before the court as thus constituted (Winthrop's, reprint, p. 457; A.W. 37).

Upon cross-examining accused, the prosecution asked him if he had a weapon at the place and time of the disturbance. This question was objected to by the defense as not being proper cross-examination since the matter about which the question inquired had not been brought out upon direct examination. This objection was overruled and properly so. Accused had testified as to his version of the disturbance. The scope of cross-examination rests within the sound discretion of the court and greater latitude may be properly allowed in cross-examination of accused (MCM, 1928, par. 121b).

6. Accused is 40 2/12 years old. He enlisted in the 109th Cavalry, North Carolina National Guard at Asheville, North Carolina, 10 October 1920 and was discharged from that enlistment to accept an appointment as second lieutenant, presumably in the Cavalry, 31 March 1926. He was assigned to the 106th Engineers, North Carolina National Guard 1 April 1928 and entered Federal Service, 16 September 1940. He was assigned to the 175th Engineers (General Service) 16 February 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. Dismissal is authorized upon conviction of violation of Articles of War 93 and 96. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

Donald D. Huggins, Judge Advocate.
O. G. F. de, Judge Advocate.
Jameson Harrison, Judge Advocate.

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NATO 778, 1st Ind.
26 October 1943 (Continued).

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

(NATO 778).



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

(Sentence ordered executed. GCMO 43, NATO, 26 Oct 1943)



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

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

Board of Review

NATO 779

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

) EASTERN BASE SECTION
)
)

v.

) Trial by G.C.M., convened at
) APO 763, U. S. Army, 14
) September 1943.

Private LEON K. CLARK
(34111749) and Private First
Class CHARLES J. MASSIE
(35493988), both of Company
K, 27th Quartermaster
Regiment (Truck).

) Dishonorable discharge and
) confinement for life.
) United States Penitentiary,
) Lewisburg, Pennsylvania.
)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

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

Specification: In that Privates Leon K. Clark, and Charles J. Massie, both of Company "K", 27th Quartermaster Regiment, (Trk) acting jointly and in pursuance of a common intent, did, at Mateur, Tunisia on or about June 23, 1943 forcibly and feloniously, against her will, have carnal knowledge of Hana Bent Mabrouk.

CHARGE II: Violation of the 93d Article of War.

Specification: In that Privates Leon K. Clark, and Charles

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J. Massie, Both of Company "K" 27th Quartermaster Regiment (Trk) acting jointly and in pursuance of a common intent, did, at Mateur, Tunisia, on or about June 24, 1943, with intent to do them bodily harm, commit an assault upon Brahim Ben Hassin and Mansour Ben Mohamed, by shooting Brahim Ben Hassin in the thigh and Mansour Ben Mohamed in the hand with a dangerous weapon, to wit: a rifle.

Each accused pleaded not guilty to the Charges and Specifications. Each was found guilty of Charge I and its Specification. As to the Specification of Charge II, each was found guilty except the words "June 24th" and "a rifle", substituting therefor the words "June 23rd" and "a revolver"; of the excepted words, not guilty, of the substituted words, guilty; and as to Charge II, guilty. Evidence of previous convictions was introduced as follows: as to Clark, two convictions by special court-martial, one for absence without leave and being drunk in uniform in a public place in violation of Article of War 96 and the other for absence without leave in violation of Article of War 61; as to Massie, one conviction by special court-martial for larceny in violation of Article of War 93. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and to be hanged by the neck until dead, all members of the court present concurring in the sentences. The reviewing authority approved the sentences and forwarded the record of trial under the provisions of Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, as to each accused, confirmed the sentence, but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. He designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that between about 2200 and 2400 hours, on the night of 23 June 1943, three colored American soldiers drove in an American Army truck to a group of Arab houses near the Caid's home at Henoahir Bou Mekhila, about seven kilometers from Mateur, Tunisia. Two of them, one armed with a rifle and the other with a revolver, dismounted, seized one of the Caid's guards and took him at the point of a revolver to the nearby houses, from which some of the women started "running away" (R. 9,10,13, 14,15,17,22). These soldiers had stopped their truck on the road not far from the village and started "shooting at the people" who ran, "scattering here and there" (R. 11). Brahim Ben Hassin did not run away but "came close to the truck to see" what was going on (R. 11). He saw the soldiers taking a young married woman named Hana Bent Mabrouk with them (R. 9,30). As they were taking her away, "they" shot him in the thigh with a revolver at close range (R. 11,12). Hana had tried to flee, but the soldiers caught her and took her by force (R. 15,23). As they were putting her in the truck, Mansour Ben Mohamed went up to one of the soldiers and said "Please comrade, please why you want to take the woman with you", and the soldier

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shot him in the left hand, right forearm, and right leg with the revolver (R. 19,20). Hana was crying, screaming, and saying, "I'm going to die" as she was forced into the truck (R. 11,18,19).

Hana testified that "the one without the beard took me by force on a truck"; that she "cried and tried but it was no use" (R. 25); that they took her toward Michaud, Tunisia, stopped the truck, put her on the ground, removed her clothes and each of the three soldiers had sexual intercourse with her twice (R. 26,27,28,30). She also testified that she did not consent but was in fear of her life; that the soldiers pointed the rifle at her, hit her on the eye with the weapon and hit her "on the shoulders also" (R. 26,27,30); that they did not give her any money (R. 27). She testified that the act of sexual intercourse hurt her (R. 30) and that there was actual penetration (R. 26). At the trial, she pointed out accused as two of the three soldiers who had assaulted her, testifying that Clark had had a beard but had shaved it off, and identifying Massie as the man who put her on the truck (R. 27,28). She testified that during the assaults it "wasn't very dark" and she could see the faces of the soldiers by their flashlights (R. 30). On cross-examination, she testified "A day after the night I identified them from a three line of soldiers, and two days later, I knew them again at the Caid's house" (R. 29).

The soldiers returned to the village with Hana about midnight, fired their weapons again and demanded some other women. They left at about 0030 hours (R. 24).

Accused had been at the village during the day of 23 June 1943, and had exchanged clothes for olive oil, eggs, and chickens (R. 10,16,20). One of the Arab men testified that when they came during the day they asked for "zig, zig" and "when we gave them eggs, they went away" (R. 10). They had come to his house "three times, always asking for women" (R. 9). When they returned that night the "one with the beard" started firing his rifle (R. 15). Another witness recognized the soldiers who seized Hana as the ones who had been at the village during the day because "all their voices were the same voices" (R. 11). Although it was dark, the soldiers had their flashlights "all over the place", and it was possible to see them and to observe that one of them had a beard (R. 24).

On the morning of the trial and after he had been notified that he would be tried that day, accused Clark removed his "goatee" (R. 6), which he had been wearing since about the middle of June (R. 7,8).

A witness for the defense, a noncommissioned officer, testified that a day or so after the assaults he took accused to the Arab village. While they were there a colored soldier with a "goatee" (not Clark or Massie), came to the scene. Witness questioned the "Arab girl" and others but none identified this soldier as an assailant (R. 33). The two accused were, however, both identified as assailants. Witness described the identification as follows:

"We first pulled up there. Massie and Clark were

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left in the jeep. The two Captains my partner and I got out and approached the Arabs. While we started to speak to the Arabs, the girl and one of the other Arabs pointed out to I don't recall just which one it was, but insisted, that is him, that is him" (R. 35).

The witness testified further that the identification was not made in response to a request but was "spontaneous", and made before the Arabs knew why accused had been brought over (R. 35). This witness also testified that about a week after the assaults, accused were placed in a formation of about 75 colored soldiers, and "these Arab witnesses" including the assaulted woman, "individually identified Massie and Clark" (R. 34). The witnesses were tested by taking "out one or two of the fellows...to make it a little difficult for them", and the last Arab who tried to identify the offenders "only found one" (R. 34,47). An officer who was present when the Arabs identified accused testified, in rebuttal, that the identification by the woman was "instantaneous" and unhesitating (R. 47,49). This witness also testified that the accuracy of the identification was tested by removing the two accused from the formation whereupon an officer present called in one of the Arabs and "walked with him, and he just walked up the first row and down the second row and come out and shook his head and shrugged his shoulders and couldn't understand it" (R. 47). The formation included five or six men who had goatees and beards (R. 49).

Both accused elected to testify under oath and both told substantially the same story in regard to their movements on the night of 23 June 1943 (R. 37,38,43,44). The substance of their testimony was that after unloading a ration truck which Massie was driving they went to Mateur "trying to get something to drink or some women" (R. 37). Being unsuccessful in finding either at Mateur they drove to Ferryville and tried to go in the houses of prostitution there, but military police would not let them so they continued without success to try to get some wine (R. 37,43). They returned to the bivouac area "real late in the night"; Clark could not say what time it was (R. 38). Clark testified that they entered Ferryville at about 2200 or 2230 hours (R. 39). Massie testified that they left Mateur at about 2130 or 2200 hours (R. 43). Each accused denied having seen the prosecution witnesses and each testified that he did not have sexual relations with anyone that night (R. 38,44). Clark explained that he had shaved his goatee ten minutes before he came to court because he knew it was not "permissible in the Army to wear a beard of any length" (R. 39). He testified further that the Arab watchman who said he had stopped accused at the village the night of the assaults could not have seen him there because he was not at the village; that

"you'd have to go directly by our bivouac area, and the Major had issued orders if any trucks go out that way, they were supposed to be stopped by the guard, so we couldn't have gone that way, we

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stayed this side of the area all the time" (R. 40).

Clark testified that he did not have a pistol along with him, but Massie had a rifle (R. 40), and that there were only two of them in the truck (R. 41). He related an occurrence in which he said some Arabs, claiming to have been "raped by a man that had a beard...picked a first sergeant and a fellow by the name of Simmons", which fact he stated could "be vouched for by Lieutenant Johnson" (R. 42). Massie testified that it took the Arabs "about an hour and a half" to make the identification at the formation (R. 45). Asked if he could prove where he was between 2100 hours at night and 0200 the following morning, he answered that he could prove where he was "down along about ten, about eleven thirty" (R. 46). Both accused testified that their defense counsel had failed to assist them in locating a sergeant who had seen them on the night in question on the-way to Ferryville (R. 39,46).

First Lieutenant William R. Johnson, 27th Quartermaster Regiment (Truck), testified in rebuttal regarding the incident of a first sergeant having been identified by an Arab as one of the guilty persons in connection with these offenses, as related by Clark in his testimony. Lieutenant Johnson testified that the incident involved the claim by an Arab that some money had been stolen, and "our First Sergeant was standing by, and this Arab suddenly said 'He's the man'" (R. 53). He also testified that there had never been a guard stationed along the road between the bivouac area and the Arab village charged with the duty of preventing trucks from going toward the village (R. 51). This officer, upon cross-examination, was asked by the defense about the "reputation of these men in the company". He testified it was "not good" (R. 32).

4. It thus appears from substantial evidence that near the place and at the time alleged each of the two accused forcibly and without her consent had sexual intercourse with the woman, Hana Bent Mabrouk. All the elements of rape as alleged in Charge I and its Specification were fully established (MCM, 1928, pars. 148b,149m; CM NATO 384, Middleton-Burney).

It was also clearly shown that while the two accused were engaged in the unlawful enterprise one of them fired a revolver at the two Arab men described in the Specification, Charge II. The question as to which one fired the shots is of no consequence. The circumstances show that the assaults were accomplished in the course of a common venture in which each accused aided the other. Each was responsible in law for the acts of the other and both were guilty of the assaults as principals (18 U.S.C. 550; CM NATO 385, Speed).

Accused denied guilt and sought to prove alibis. They were, however, unequivocally identified by the assaulted woman and other witnesses. Their stories as to their movements on the night of 23 June 1943, did not purport circumstantially to account for their whereabouts after 2230 hours. They did not return to camp until about 0200 hours the following morning. The court was fully justified in rejecting the alibis and accepting as

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accurate the identifications. Accused suggested that a witness who had seen them enroute to Ferryville should have been called, but this would have availed them nothing, for, according to their own testimony they were enroute to Ferryville not later than 2230 hours and they did not certainly appear at the Arab village until about 2400 hours.

5. Although two persons cannot be jointly guilty of a single joint rape, because by the very nature of the act individual action is necessary, all persons present aiding and abetting another in the commission of rape are guilty as principals and punishable equally with the actual perpetrator of the crime (52 C.J. 1036; NATO 385, Speed; NATO 646, Simpson et al). The joinder of the two accused was not therefore fatal error. Despite any appropriate criticism that it was bad pleading to charge the accused jointly as was done in this case, it is manifest that the allegations of the Specification taken in conjunction with the evidence fully support the position that each of the accused separately raped the woman. Since it clearly appears that one or the other of them could have been charged and found guilty as a principal for being an aider and abettor, his conviction thereunder would seem no less proper where proof shows him as the actual perpetrator of a separate and distinct rape, as well as an aider and abettor. Circumstances of a common venture and intent serve, moreover, to support the Specification. In view of these considerations, the irregularity in pleading, if such it was, cannot be held to have injuriously affected the substantial rights of the accused (Dig. Op. JAG, 1912-40, sec. 416 (17)). And there is authority for the view that two or more persons may be jointly indicted and convicted of rape on a count which charges them jointly and not separately with the offense (People v. Misial, 349, Ill. 516, 182 N.E. 608).

6. The charge sheet states that accused Clark is 28 years old. He was inducted into the Army 18 April 1941. The charge sheet states that accused Massie is 24 years old. He was inducted into the Army 2 October 1942. Neither had any prior service.

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

Richard H. Rogers, Judge Advocate.

O. J. Ide, Judge Advocate.

George Simpson, Judge Advocate.

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

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

Board of Review

NATO 779

UNITED STATES)

EASTERN BASE SECTION)

v.)

Trial by G.C.M., convened at
APO 763, U. S. Army, 14
September 1943.)

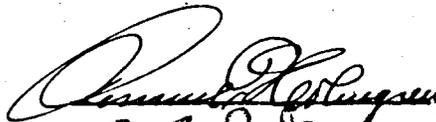
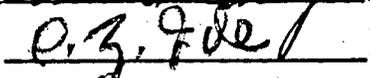
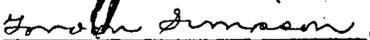
Private LEON K. CLARK
(34111749) and Private First
Class CHARLES J. MASSIE
(35493988), both of Com-
pany K, 27th Quartermaster
Regiment (Truck).)

Dishonorable discharge and
confinement for life.
United States Penitentiary,
Lewisburg, Pennsylvania.)

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

The record of trial in the case of the soldiers named above has
been examined and is held by the Board of Review to be legally suffi-
cient to support the sentences.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

NATO 779

1st Ind.

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

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

1. In the case of Private Leon K. Clark (34111749) and Private First
Class Charles J. Massie (35493988), both of Company K, 27th Quartermaster
Regiment (Truck), attention is invited to the foregoing holding by the

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CONFIDENTIAL

NATO 779, 1st Ind.

15 November 1943 (Continued)

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 execution of the sentences.

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

(NATO 779).



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

(Sentences ordered executed. GCMO 47, NATO, 15 Nov 1943)

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

(139)

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

Board of Review

NATO 780

UNITED STATES)

FIRST ARMORED DIVISION)

v.)

Trial by G.C.M., convened at
Ste Barbe Du Tlelat, Algeria,
17 September 1943.)

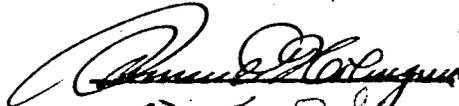
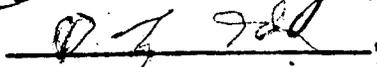
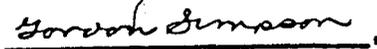
Second Lieutenant LEONARD C.
RITTER (O-885711), Headquarters
and Headquarters Company, 3d
Battalion, First Armored
Regiment.)

Fine of \$70.00 per month for
six months.)

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

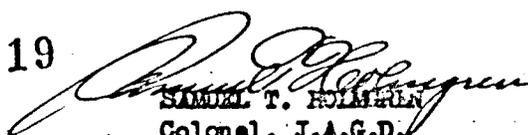
 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

Branch Office, JAG, NATOUSA, Board of Review, 4 November 1943.
TO: The Assistant Judge Advocate General, NATOUSA.

For his information.

269319

Noted
H.A.H.


SAMUEL T. HOLMGREN
Colonel, J.A.G.D.
Chairman, Board of Review

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4 November 1943

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NATO 780

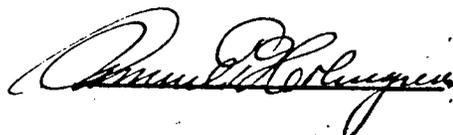
MEMORANDUM:

SUBJECT: Record of trial in the case of Second Lieutenant LEONARD C. RITTER (O-885711), Headquarters and Headquarters Company, 3d Battalion, First Armored Regiment.

1. Accused was found guilty of wrongfully partaking of an intoxicating beverage while on duty as a special military police officer (Specification 1) and in neglect of his duties, wrongfully allowing members of his guard to partake of intoxicating beverages while on duty (Specification 2), in violation of Article of War 96.

2. There is no evidence that accused allowed any members of his guard to drink intoxicants while on duty and it is not thought the record of trial sustains the finding of guilty under Specification 2. But as to Specification 1, there is substantial evidence from which it might be reasonably concluded that accused had been wrongfully partaking of intoxicants on duty as found. He was a special military police officer in charge of a detail of soldiers who were patrolling the roads to suppress speeding (R. 4). It was in time of war and these duties were being performed in a theater of military operations. The Provost Marshal of the area saw him about five hours after accused had gone on duty and observed that he had partaken of enough intoxicants to make it "noticeable on him". The Provost Marshal was certain accused "had been drinking" (R. 7). He told accused he had seen some of accused's men and was sure they had been drinking and ordered him to take them back to camp (R. 5). The court was justified in concluding under all the circumstances that accused wrongfully partook of intoxicating beverage on duty. Under customary and established military standards the conduct of an officer situated as was accused with the special duty of maintaining good order should have been exemplary in every way, presenting a fitting pattern and model for his subordinates to follow and offering a dignified presence and demeanor to civilians and others with whom he was to deal in the discharge of his duties. His ability to measure up to these standards was manifestly impaired by drinking. The adverse effects in his case became, in fact, noticeable. The court was not in error in determining that this conduct on the part of accused was wrongful and impinged hurtfully upon good order and military discipline. The findings of guilty of the Charge and Specification 2 must be sustained. The record of trial is legally sufficient to support the sentence (to be "fined" \$70.00 a month for six months) as approved and ordered executed by the reviewing authority.

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 Judge Advocate.

_____, Judge Advocate.

 Judge Advocate.

CONFIDENTIAL

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

(141)

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

Board of Review

NATO 797

UNITED STATES	)	MEDITERRANEAN BASE SECTION
)	
v.	)	Trial by G.C.M., convened at
	)	Oran, Algeria, 24 August 1943.
Private RUSSELL T. LAWSON	)	Dishonorable discharge and
(34112380), Headquarters and	)	confinement for life.
Service Company, 402nd	)	United States Penitentiary,
Engineers Battalion.	)	Atlanta, Georgia.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Russell T. Lawson, Headquarters & Service Company, 402nd Engineers Battalion did, at or near Sainte Barbe, Algeria, on or about 5 July 1943, forcibly and feloniously, against her will, have carnal knowledge of Madame Anais Roca.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction for violating standing orders by entering off-limits area in violation of Article of War 96, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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3. The evidence shows that on the evening of 5 July 1943, Madame "Anaise Roca," age about fifty years, had been visiting her husband who was sick in the town of Sainte Barbe, Algeria, and about 2130 hours left for her home three kilometers away, riding alone in a "two wheeled-carriage, a cariol" (R. 4,5,13,17). On the journey homeward she had reached a point not far from "Mr. Renaud's farm" when she was accosted by accused (R. 5). She testified:

"The man got on the vehicle, took hold of the reins, and lifted up my dress. The man failed in respecting me and he said, 'Fucky fucky' and 'zig-zig'. So he got on me and I resisted and pushed him away. I said, 'Aren't you ashamed of yourself. I am going to tell the Captain.' I said that in French. The soldier said, 'Captain no good' and did these gestures over my head...I resisted and he squeezed my arms and said, 'I will abuse you.' Afterwards he took hold of the reins and directed the horse into the field. I was still resisting and the accused said, 'If you don't let me free', meaning 'let me abuse you', 'I will keep you here until tomorrow morning'. Then he said 'a terre', meaning 'to the ground'."

Witness held onto the carriage with her hands while

"the accused, was trying to bring me to the ground. He threw me on the seat and I was resisting all the time and he was squeezing me. Then he threw me on the seat and also the case which was in back of the seat, and then he got on me. Before that I had yelled for help. So I was all trembling and all black and blue, so the accused abused me. The accused violated me...I was half dead when he was doing that, the first time with his fatigue clothes on. Then he took me and threw me on the seat and then put down his fatigue clothes...He just took off his fatigue clothes and just had a white underwear top on. Then he abused me again, violated me again. So when he took off his fatigues his pocket book fell down and I grabbed the pocket book and kept it, saying, 'At least I will have something to recognize the soldier on', and I put it in the box in back of the seat. Then he violated me as much as he wanted...I remember twice, sir, and then after that as much as he wanted. I was half dead and I was trembling and I don't recall after that. After he was done he got down, put on his fatigue clothes, put the reins on the horse and gave me the reins. He directed the horse in the same direction in which he had seen me leave. So the horse took me directly home. Then as quick as I could I climbed the stairs at home and knocked on the door...My daughter saw that I was all black and blue and she asked me what had happened and I told her that an American had attacked me" (R. 5,6,7).

Madame Roca identified the dress she was wearing at the time; she testified that there were no rents in the dress before accused attacked her and that he was responsible for the dress being torn (R. 7). She related how seven colored soldiers were brought to her house where she was still sick "a few days after" and in response to a request that she indicate the one who attacked her, she pointed out accused. She had never seen accused before 5 July 1943 (R. 8,9). She testified she never consented to accused having sexual intercourse with her and that he penetrated her person in attacking her (R. 9). She said her daughter and her employer carried her in the "same wagon" to Saint Lucien on 6 or 7 July to see a doctor, but failing to see one they took her back home; that she was too sick to "get up" the day following the attack (R. 9,10). When she reached home after the assault, she handed the pocket book which had fallen out of accused's pocket to her daughter (R. 8) who testified there was "not even a penny" in it (R. 12).

A medical officer examined Madame Roca at her home on 7 July 1943. He testified that he

"found that she had multiple bruises and abrasions on the back, principally on the right side, extending from the shoulder blade down to her 10th rib posteriorly. She also had multiple bruises and abrasions on both arms and forearms. These bruises and abrasions were from the size of your palm to the size of a quarter. They extended from here down to here (indicating from the shoulder to the wrist)...She also had bruises and abrasions on the right thigh, right upper thigh. Also bruises on the left leg about half way between her ankle and her knee" (R. 14).

For the defense, a soldier of accused's battalion testified he saw Madame Roca in her wagon in the camp area on 6 July. On direct examination he fixed the time at 1135 hours but on cross-examination, he said it was 2335 hours and that at that time "she accused one of our men of the crime" (R. 16,17,18). Three other privates, also members of accused's battalion, testified they each had had sexual intercourse with Madame Roca and each had paid her the sum of one hundred francs (R. 22,27,31). Madame Roca was recalled by the prosecution, each of the soldiers who claimed to have had sexual intercourse with her were brought into the court room and she testified she had never seen any of them before (R. 47,48).

Accused testified that on July 5, 1943, he went to Sainte Barbe to a ball game. Returning he stopped and drank some wine, later went to his tent, and still later walked down the road. He testified:

"So on my way back I seen a buggy and a horse coming down the road. When the horse and the buggy got close to me I recognized a woman being in the buggy...So when she got up alongside of me she stopped and so she said 'Fucky fucky'. I said 'Oui' or something. I don't know how to

talk French. After the buggy stopped and she said that, I got up in the buggy and we went on down the road. I imagine we went about a third of a half a mile...And so she got on down the road a piece and she pulled out on one side, kind of on one side of the road. It was off the road. I would say about five feet off the road, maybe ten. And so she pulled up her dress. She didn't get out of the buggy. I don't know how come she didn't get out of the buggy. I reckon she was in such a hurry. So she pulled up her dress and when she pulled up her dress I unbuttoned my coveralls and pulled them down. My dick wouldn't get hard so she took and done that (witness indicating), jacked me off, what I call it, until it got hard. So when it got hard I put my rubber on and I laid down there and she laid down there in the seat and I had intercourse with her. But while I was having this intercourse, the horse, he had his head down eating. So I reckon the horse made a step up. You know how a horse does when it is eating. He will move up. He moved up further. I never stopped. I never stopped fucking. I just got the line and said 'whoa' and the horse stopped. I kept on until I finished. Well, when I got up, when I finished, I got out of the buggy, put my breeches up, put my coveralls on up to my shoulders, and went around and put the bridle on the horse and led the horse out to the road and I came on back to the camp. Before I came back to camp, sir, I had my pocket book on this side in my pocket and it might have dropped out, or she took it out, one. I don't know which. But it got out and I had five hundred francs in the pocket book...I didn't pay her anything. Only because I didn't have anything but a five hundred franc note and she didn't have no change and I wasn't aiming to give her no five hundred francs...I have had intercourse with her, I would say about two or three times before" (R. 35,36).

On cross-examination accused admitted having made a voluntary statement to the investigating officer 7 July 1943 in which he said:

"I estermate that I drunk all together about a quart and I came on to the camp and layed down and just about a half a hour I began to feel dizzy and so I got up and took a walk down the road just to catch some air so I went down the road a pretty good piece and after while I saw a buggy coming down the road and there was a woman in there and so she stop and I talk a while and so I got in the buggy and we started down the road and I ask her for some zigg-zigg and she said something but I thought that she said yes because I did not understand French and so she stop the buggy but she would not get out so I didn't have any trouble with her...I pull down my britches and she played with my dick until it got hard and she stood up in the seat so when it got hard she layed back in the seat so she finish before I got them and

she want to get up so I just held her down until I finish" (R. 42).

He testified having told an officer of the battalion when he was paid on 6 July 1943, that he did not have his pay card because someone had stolen his pocket book while he was asleep. He told the officer this story because "I didn't want him to know that I had been messing with this woman". When he finally told the investigating officer he had had intercourse with Madame Roca, he claimed he had previously known her sexually "Three or four or four or five" times (R. 44).

In the interviews during the investigation of 7 July 1943, accused first stated he went to his tent about 1830 or 1900 hours on 5 July, and stayed in the tent the rest of the night (R. 53). After signing the statement on 7 July, and as he was leaving, "he stated that if he hadn't been drinking it would never have happened" (R. 51).

It was stipulated that the Chief of the Gendarmerie of Sainte Barbe, if called as a witness by the prosecution, would testify that

"to the best of my knowledge Madame Roca is a woman of good reputation, honest and she has never had a record of being a prostitute or a woman of bad character" (R. 54).

4. It thus appears from the evidence that at the place and time alleged accused forcibly and against her will had unlawful carnal knowledge of Madame Anaise Roca. In his testimony he admitted the act of intercourse but denied it was accomplished by force and without her consent. Before the court, however, were his inconsistent and contradictory versions of the incident. He had at first denied having left his tent during the evening when the alleged offense occurred and had concealed for a time the facts surrounding the loss of his pocket book. He later admitted in a written statement of having had intercourse with Madame Roca but claiming that she voluntarily submitted and that when she tried to free herself he held her down until he had completed the act. On the other hand, the woman testified the acts were committed by force and without her consent. Her testimony, with all the other facts and circumstances, amply justified the findings of the court in these particulars. The woman resisted the force applied by accused to the full extent of her ability. When examined by a doctor, numerous bruises and abrasions were found on her back, arms and legs. The court was fully warranted in finding accused guilty of rape as alleged (MCM, 1928, par. 148b; Winthrop's, reprint, p. 677,678).

5. The daughter of Madame Roca was permitted to testify without objection that when her mother came home the night the offense was committed, she "told me that she had been attacked by a negro" (R. 12). This evidence was properly admitted as showing a prompt complaint (52 C.J. 1063, 1064, 1065).

The investigating officer was permitted without objection to testify

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that on 7 July 1943, Madame Roca identified accused as her assailant from among a group of seven soldiers (R. 55). The admissibility of proof, hearsay in nature, that the prosecutrix had previously identified accused as her assailant has been questioned (CM 187116, Martinovitch). But the identity of accused as the soldier who had had sexual intercourse with Madame Roca at the place and time alleged was not questioned at the trial. She had already testified that she had made an earlier identification (R. 8) and the defense had had full opportunity to cross-examine her thereon. The accused could not have been harmed by the introduction of this evidence.

Defense counsel asked the investigating officer if the sergeant of the guard reported "about the woman in the cart being in the area around midnight or shortly before midnight of July 6th" (R. 57). Apart from a doubt as to the materiality of the evidence, the question called for an answer which would have been hearsay. The court properly sustained the prosecution's objection to this testimony.

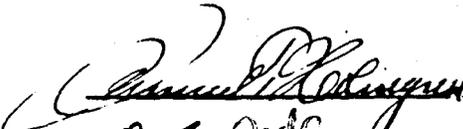
To show probability of consent, the general reputation of the prosecutrix for immorality and unchastity and her general immoral habits and character may be shown. But the great weight of authority requires the prosecutrix' want of chastity to be shown by evidence of the general reputation in that regard and not by proof of specific acts. It follows that the testimony of the three soldiers concerning specific acts of intercourse with prosecutrix should not ordinarily have been admitted (52 C.J. 1080, 1091). However, Madame Roca had already testified in answer to a specific question on cross-examination that never had she had sexual intercourse with any colored American soldier "during the month of June up to July 5th" (R. 10). The testimony of the three soldiers concerning the alleged-acts of immorality was thereby rendered admissible for purposes of impeachment (Underhill's Criminal Evidence, Fourth Edition, p. 1279).

The stipulation as to the testimony of the Chief of the Gendarmerie of Sainte Barbe that Madame Roca "is a woman of good reputation, honest and she has never had a record of being a prostitute or a woman of bad character" was faulty, in that it was not expressly limited to a statement of the woman's general reputation for virtue and chastity. Her general reputation in those respects was admissible to rebut the evidence of the alleged specific acts of immorality on her part, and it is assumed that the court received the stipulated testimony as limited to such general reputation. In any case, the proof of guilt is so compelling that the substantial rights of accused could not have been prejudicially affected (AW 37).

6. Accused is twenty-four years old. He was inducted into the Army of the United States 14 May 1941. He had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally

sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

 Judge Advocate.
Q. J. F. de Judge Advocate.
_____ Judge Advocate.



CONFIDENTIAL

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

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APO 534, U. S. Army.
8 November 1943.

Board of Review

NATO 800

UNITED STATES)	MEDITERRANEAN BASE SECTION
)	
v.	)	Trial by G.C.M., convened at
	)	Oran, Algeria, 9 September
Private WILLIS D. COLVIN	)	1943.
(35034777), First Replacement	)	Dishonorable discharge and
Depot.	)	confinement for twenty years.
	)	United States Penitentiary,
	)	Terre Haute, Indiana.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

Specification: In that Private Willis D. Colvin, First Replacement Depot, did, at a place on National Highway Number Four, at or near Margueritte, Algeria, on or about 2 May 1943, with intent to commit a felony, viz. murder, commit an assault upon a person unknown, by wilfully and feloniously shooting the said unknown person with a rifle.

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

Specification: In that Private Willis D. Colvin, First Replacement Depot, having received a lawful command from his superior officer, Captain Wenton D. Melton, F.A., on or about 1 May 1943, not to discharge his

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his rifle except in case of military necessity, or words to that effect, did, at or near Margueritte, Algeria, on or about 2 May 1943, wrongfully fail to obey the same.

He pleaded not guilty to the Charges and Specifications. He was found guilty of the Specification, Charge I, except the word "shooting", substituting therefor the words "shooting at", of the excepted word, not guilty, of the substituted words, guilty, guilty of Charge I and guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty (20) years. The reviewing authority approved the sentence, designated the United States Penitentiary, Terre Haute, Indiana, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on or about 1 May 1943 (R. 11,14), a truck convoy left Canistel on an ammunition detail (R. 5). Before the convoy started, the convoy commander, referred to in the testimony as "Captain Melton", addressed a formation of the men (R. 6,11,15) and gave strict orders that there would be no discharging of firearms (R. 6,15) and no drinking on the convoy. Accused was present at the formation (R. 6). Accused was an assistant driver (R. 5) and was riding in the rear of a two and one-half ton covered truck (R. 6,8,18). At about 1400 hours (R. 9) on 2 May 1943, near Margueritte, Algeria, the convoy passed an Arab who was riding on a burro on the same side of the road as the convoy and going in the opposite direction (R. 7,12,20). As the truck in which accused was riding passed the Arab, accused was seen to "raise his rifle to his shoulder and take careful aim and discharge the rifle". He fired twice at the Arab. The Arab was approximately thirty-five feet from accused at the time. The Arab fell off the burro "and laid on the ground...he didn't move". Accused was seen to fire three more shots (R. 7). Approximately fifteen minutes later the convoy stopped. Accused got out of the back of the truck and said "he got three out of five...he didn't like Arabs" (R. 8,15,23). A soldier testified that he asked accused "what did he shoot for, and he just started to laugh and I took the rifle away from him, unloaded it and put it in the front of the truck" (R. 8).

The evidence further shows that the convoy had stopped for lunch "around noon time", or 1300 hours, when accused was seen to drink some wine (R. 9,16,17,18,20,21) and "point a gun at a young Arab kid" (R. 9). He pushed or kicked an Arab through a gate and declared that he did not like Arabs "and would kill every one he saw, or something to that effect" (R. 19,21). At that time a soldier took accused's rifle away from him, unloaded it and put the shells in the glove compartment of the truck and the rifle in the back of the truck (R. 19). His condition at lunch time was variously described as: "he wasn't drunk" (R. 9), "well under the influence of liquor" (R. 9), "he was doped, not drunk" (R. 21). When the convoy started accused "tried two or three times" and then got into the rear of the truck (R. 19,21,23) without help (R. 23).

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About ten minutes after the shooting accused was seen to be vomiting (R. 10). When the truck stopped about fifteen minutes after the shooting (R. 8) accused got out of the truck without difficulty. His condition at that time was described by one witness as "sober" (R. 11). He stood still, witnesses had no trouble understanding what he had to say (R. 16,24) and there was nothing unusual about his features or general appearance. Another witness testified that when speaking about the shooting accused "gave a laugh...that was sloppy and unusual", and that he seemed to be "slightly drunk...or tight" (R. 16). This time also he got back into the truck without help (R. 23).

Accused elected to remain silent (R. 24,25).

4. It thus appears from uncontradicted evidence that at the place and time alleged accused unlawfully fired his rifle at an unidentified Arab, taking careful aim and firing twice while the Arab was at a distance of some thirty-five feet. Three other shots were fired but the evidence does not show whether they were fired at the Arab or at random. Accused had recently expressed his dislike for Arabs generally, had declared his intention of killing "every one he saw", and had demonstrated his animosity by kicking one. His action in shooting at the unoffending Arab was wanton and evidenced a deliberate effort to carry into execution his previously expressed threat. After the shooting, accused boasted that he "got three out of five" and reiterated his dislike for Arabs. That he entertained the specific intent to murder, that is, to kill with malice aforethought, is implicit in these facts. The court was warranted in concluding that, although he had been drinking, he had sufficient control of his faculties to entertain the specific intent to murder when he fired. Although the Arab fell to the ground the evidence does not show whether any of the bullets struck him. This did not alter the character of the offense and there was no impropriety in finding accused guilty of shooting at, rather than shooting, the Arab as had been alleged. The findings of the court in respect to accused's guilt under Charge I and its Specification were proper and fully supported by the evidence (MM, 1928, par. 1491).

The name of the commanding officer of the convoy, from which accused fired his weapon, was only shown by the proof to have been "Captain Melton", while his name was alleged in the Specification, Charge II, as "Captain Wenton D. Melton, F. A.". Failure to establish the christian name and initials of Captain Melton was of no material consequence. It was shown that Captain Melton was accused's superior officer, that he gave the order prohibiting the unnecessary discharge of firearms during the convoy's journey, which was plain and unequivocal and must certainly have been understood by accused who was present when it was given. Accused needlessly, wrongfully and in disregard of the order, fired his rifle five times from the moving convoy. He was properly found guilty of failure to obey as alleged in Charge II and its Specification.

5. Proof was offered that accused said as he got out of the truck from which he had shot at the Arab that "he got three out of five". Defense counsel objected on the ground that accused was charged with having

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assaulted "a person unknown--not four or five persons unknown". The law member properly overruled this objection. The statement was an admission and was material on the question of accused's animus and intent.

6. The name of the victim of the assault was alleged to be unknown. No proof of identity was submitted to the court. The following, from the review of the staff judge advocate, is pertinent:

"The failure to allege in the specification the name of the person assaulted was not error under the facts of this case. The accused did not object to the specification as being insufficient and it does not appear that the failure to allege the name of the assaulted party in any way prejudiced the accused in presenting his defense. It has been held that it is proper to charge the commission of an offense upon a person unknown where the identity of the participant was not known and was not susceptible of satisfactory proof. Section 451 (63), Dig. Ops., JAG, 1912-1940. The evidence in this case showed that none of the trucks in the convoy stopped at the time of the alleged assault and that consequently no effort was made to obtain the name of the assaulted party. It was practically impossible to obtain proof of the name of the assaulted party. The Inspector General, NATOUSA, prior to the filing of charges in this case, made an investigation in which the name of the alleged assaulted party was given, but a careful examination of the report of this investigation reveals that there was absolutely no testimony adduced at said investigation establishing the identity of the assaulted party. The report does not describe the name of any witness who could establish by legally competent evidence that a certain named person was the assaulted person. Under such circumstances it would have been unreasonable as well as impracticable to hold the accused in custody pending more diligent efforts to obtain information which the Inspector General of NATOUSA had not obtained or furnished after a very diligent investigation."

The incident is sufficiently identified by the pleading and the evidence to enable the accused to plead the judgment in this proceedings in bar of any future prosecution for the particular assault at the time and place alleged.

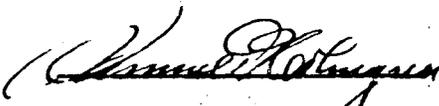
7. The charge sheet shows that accused is twenty-five years old. He was inducted into the Army 30 June 1941. He had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to sustain the findings and the sentence. Penitentiary confinement is authorized for the offense of assault with intent to commit murder,

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recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 455, Title 18, United States Code.

 Judge Advocate.
_____, Judge Advocate.
_____, Judge Advocate.

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

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

Board of Review

NATO 805

UNITED STATES)

FIRST ARMORED DIVISION)

v.)

Trial by G.C.M., convened at
Ste Barbe Du Tielat, Algeria,
17 September 1943.)

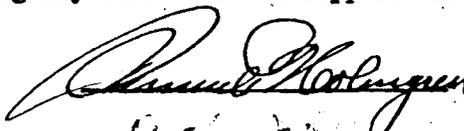
Second Lieutenant DALE C.)
MUTTER (O-885709), Headquarters)
and Headquarters Company, 3d)
Battalion, First Armored)
Regiment.)

Fine of \$70.00 per month for
six months.)

HOLDING by the BOARD OF REVIEW

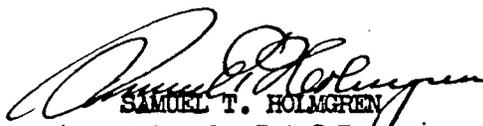
Holmgren, Ide and Simpson, Judge Advocates.

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

 Judge Advocate.
_____, Judge Advocate.
_____, Judge Advocate.

Branch Office, JAG, NATOUSA, Board of Review, 4 November 1943.
TO: The Assistant Judge Advocate General, NATOUSA.

For his information.


SAMUEL T. HOLMGREN
Colonel, J.A.G.D.
Chairman, Board of Review

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4 November 1943

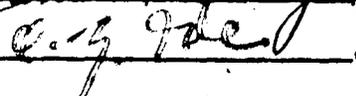
NATO 805

MEMORANDUM:

SUBJECT: Record of trial in the case of Second Lieutenant DALE C. MUTTER (O-885709), Headquarters and Headquarters Company, 3d Battalion, First Armored Regiment.

1. Accused was found guilty of wrongfully allowing, in neglect of his duties, members of his guard to partake of intoxicating beverages while on duty (Specification 1) and wrongfully partaking of intoxicating beverages while on duty as a special military police officer (Specification 2).

2. There is no evidence that accused allowed any members of his guard to drink intoxicants while on duty and it is not thought the record of trial sustains the finding of guilty under Specification 1. But as to Specification 2, there is substantial evidence from which it might be reasonably concluded that accused had been wrongfully drinking intoxicants on duty as found. He was a special military police officer in charge of a detail of eight guards (R. 4,6,10,14). It was in time of war and the detail was on duty in a theater of military operations. The sergeant of the guard under the command of accused testified that between five and six hours after accused had gone on duty, he had enough intoxicants to be "feeling good" and when asked if he could tell accused was drunk, the sergeant replied "you might" (R. 8,9). The court was justified in concluding under these circumstances that accused wrongfully partook of intoxicating beverages on duty. Under customary and established military standards the conduct of an officer situated as was accused with the special duty of maintaining good order should have been exemplary in every way, presenting a fitting pattern and model for his subordinates to follow and offering a dignified presence and demeanor to civilians and others with whom he was to deal in the discharge of his duties. His ability to measure up to these standards was manifestly impaired by drinking. The adverse effects in his case became, in fact, noticeable. The court was not in error in determining that this conduct on the part of accused was wrongful and impinged hurtfully upon good order and military discipline. The findings of guilty of the Charge and Specification 2 must be sustained. The record of trial is legally sufficient to support the sentence (to be "fined" \$70.00 a month for six months) as approved and ordered executed by the reviewing authority.

 Judge Advocate.
 Judge Advocate.
_____. Judge Advocate.

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

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APO 534, U. S. Army,
22 October 1943.

Board of Review

NATO 811

UNITED STATES)	36TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	APO #36, U. S. Army, 1 October
Private First Class HARRY E.	)	1943.
SCHWARTZ, JR. (34077177), 3d	)	Dishonorable discharge and
Battalion Headquarters Company,	)	confinement for ten years.
143d Infantry.	)	Federal Reformatory, El Reno,
	)	Oklahoma.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

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

War Department letter dated February 26, 1941 (A.G. (2-6-41) E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement in a Federal reformatory only when confinement in a penitentiary is authorized by law (CM 220093, Unckel). Penitentiary confinement is not authorized in this case inasmuch as the offense of which accused was convicted, running away from his

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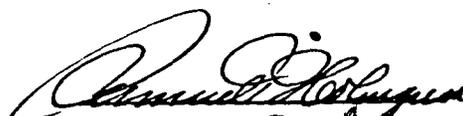
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company then engaged with the enemy, in violation of Article of War 75, is not an offense of a civil nature and so punishable by penitentiary confinement for more than one year by any statute of the United States of general application in the continental United States, or by the law of the District of Columbia (AW 42; Dig. Op. JAG, 1912-40, sec. 399 (5); MCM, 1928, par. 90).

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

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

NATO 811

1st Ind.

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

TO: Commanding General, 36th Infantry Division, APO #36, U. S. Army.

1. In the case of Private First Class Harry E. Schwartz, Jr. (34077177), 3d Battalion Headquarters Company, 143d Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years in a place other than a penitentiary, Federal correctional institution or reformatory, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution or reformatory, you will have authority under the provisions of Article of War 50½ to order execution of the sentence.

2. In order that accused may for the time being remain in a status in which he will be available for future military service if the Government should desire to utilize him for such service and in order that he may not certainly escape possible future hazardous duty in the Army, it is recommended that the execution of that part of the sentence adjudging dishonorable discharge be suspended until the soldier's release from confinement.

3. After publication of the general court-martial order in this case, nine copies thereof should be forwarded to this office with the

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NATO 811, 1st Ind.
22 October 1943 (Continued).

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foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

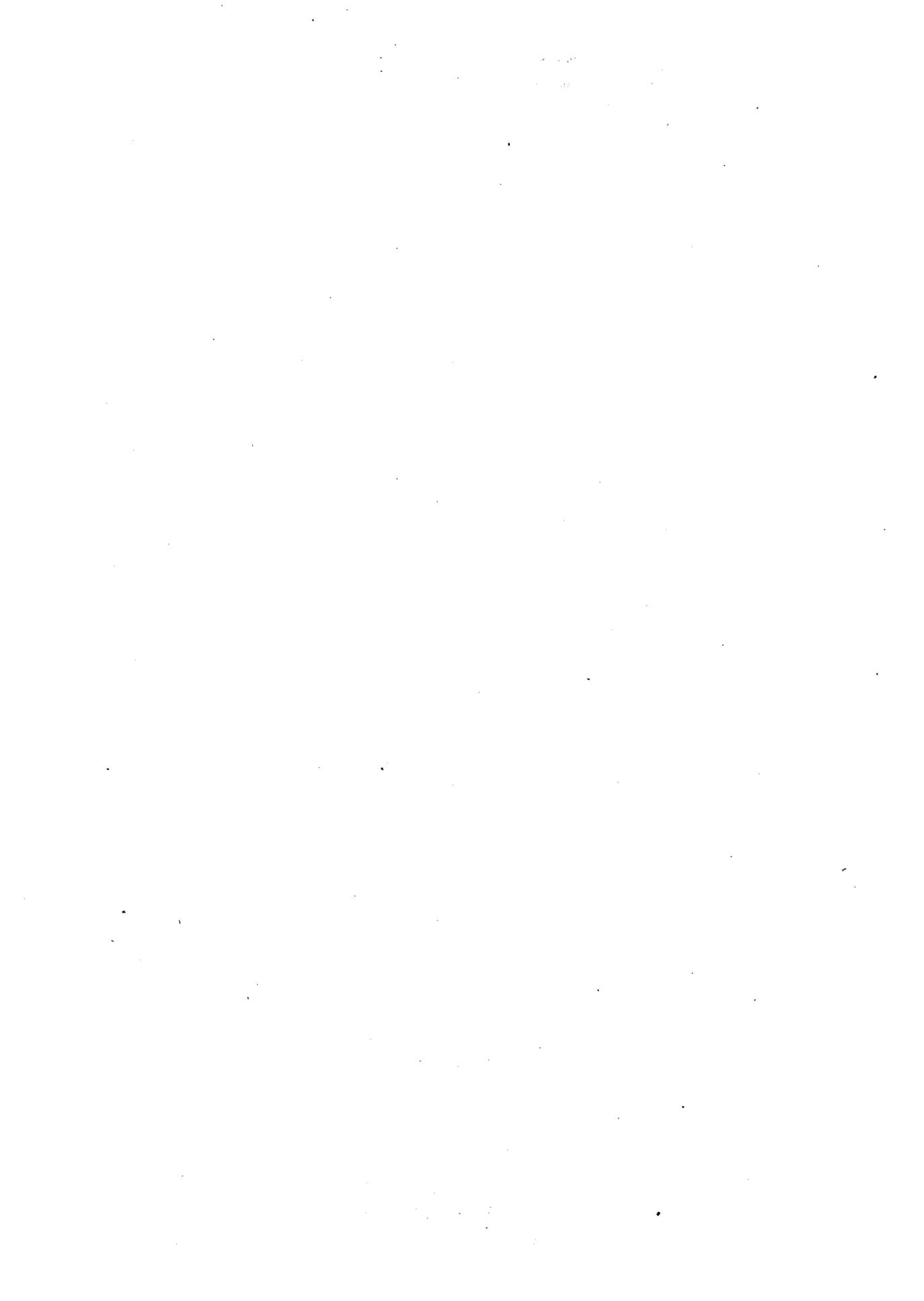
(NATO 811).



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

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Specification 2: In that Private Claude Holcomb, 2500 Qm Truck Co. having received a lawful command from Philip W. Marsh, 2nd Lt. 195th M. P. Co., his superior officer, to hand over his weapon, did at East Bizerte, Tunisia, on or about 6 September 1943, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of two previous convictions by special court-martial was introduced, one for larceny in violation of Article of War 93, and one for assault with a dangerous weapon in violation of Article of War 96. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for fifteen years, three-fourths of the members of the court present concurring in the sentence. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 6 September 1943, Second Lieutenant Philip W. Marsh, 195th Military Police Company (Zone of Interior), was "checking roads and places that were placed off limits to see that no soldiers entered them". He was dressed in khaki, carried side-arms, wore a Military Police brassard and his insignia of rank and service (R. 4,5,11). While performing these duties he observed accused and some other soldiers near a native wine shop on a hill above the staging area in East Bizerte, Tunisia. This place was "off limits". Several of the soldiers including accused had carbines (R. 5,6). Lieutenant Marsh testified

"I also notified the soldiers that it was against the regulations to carry weapons away from their area unless they were on guard. I asked Private Holcomb if he has been informed of this fact, and he told me that his company commander told him to carry his weapon with him at all times, so I turned my back to Private Holcomb. I was talking to some other soldiers there, and I heard the shot fired in back of me, so I turned around. Upon investigation I found that the shot was fired from Private Holcomb's carbine, so another soldier removed the clip and handed it to me. I passed the clip over to his Sergeant from his outfit and told him to take the clip back and turn it in to the supply sergeant; so then I searched Holcomb to see if he had any more ammunition. I failed to find any, so I turned around and I was busy getting the rest of the men away from the Arab area, and Holcomb was walking down the road with his Sergeant going back to his outfit. I noticed that Holcomb placed a clip of ammunition in his gun, so I told Holcomb to stop and come back and hand me the gun. He refused to do it, so I approached him. I reached around to take his gun from him. When I did so Holcomb stuck the muzzle of the gun into the left side of my chest. I grabbed the gun and fell to the ground with Holcomb beneath me. Sergeant Langmack recovered Holcomb's weapon" (R. 5).

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Lieutenant Marsh testified further that when this trouble first arose, accused said "he would take me over in the field and whip my ass for me" (R. 6).

The shot fired by accused was accidentally discharged when a non-commissioned officer attempted to take the clip out of his rifle (R. 11). When accused secured more ammunition and reloaded his rifle, he did not "put it on safe" (R. 12).

Accused did not stand at attention or display any military courtesy toward Lieutenant Marsh and "had some smart remarks to make". After being disarmed, he refused to get up from the ground and Lieutenant Marsh forced him to his feet. This resulted in another fight in which the lieutenant "was able to get the best of Holcomb after taking a little bit of punishment". While the fight was going on, accused tried unsuccessfully to take Lieutenant Marsh's pistol out of its holster (R. 12).

Accused had been drinking when the difficulty arose. His canteen was full of wine (R. 8). While he was not staggering, he appeared to be under the influence of alcohol (R. 10). A sergeant who was with Lieutenant Marsh, testified accused

"was under the influence of intoxicating beverages. He handled himself alright, but he wasn't, I'd say he was over stimulated...He knew what he was doing. He handled himself well. Any man that had been under the weather, wouldn't be able to fight as well as this man did...He was in a stimulated condition...mentally as well as physically, yes, sir. He could talk as well as any sober soldier could talk...Most of his talking was followed by a lot of waving of the arms and jerking his head...He was steady on his feet" (R. 14,15).

For the defense, a sergeant who was with accused at the time of the disturbance, testified that the latter was "pretty well drunk", that he couldn't talk right and was "not too good" on his feet. This sergeant did not hear accused say he would "whip the Lieutenant's ass" (R. 16,17).

Accused elected to remain silent (R. 19).

4. It thus appeared from the evidence that at the place and time alleged accused behaved himself with disrespect toward Second Lieutenant Philip W. Marsh, 195th Military Police Company, his superior officer, by saying to him in substance that he would whip his ass; that he lifted up a weapon against Lieutenant Marsh who was then in the execution of his office by placing the muzzle of his loaded rifle against the lieutenant's chest; and that accused willfully disobeyed an order by Lieutenant Marsh to hand over his weapon.

Except for one sergeant who was present and testified he did not hear accused say to Lieutenant Marsh that he would "whip his ass", the misconduct of accused in the particulars alleged in the charges and specifications

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is established by uncontradicted evidence. There was evidence that accused had been drinking before he committed the offenses of which he was found guilty. To find him guilty of willfully disobeying the lawful command of his superior officer, it was necessary that the proof show accused capable of entertaining the specific intent involved in willfull disobedience (Bull. JAG, Vol. I, No. 3, August 1942, sec. 422 (5)). It was also necessary, in support of the charges, to prove that he was capable of recognizing the officer as such. However, there is evidence that accused handled himself "alright", talked "as well as any sober soldier could talk" and was "steady on his feet". The court was fully warranted in finding accused was sober enough to be capable of entertaining the specific intent and knowledge involved in the charges. His entire course of conduct during the commission of the offenses charged showed him to have been rather a wanton and lawless character than a soldier too much under the influence of intoxicants to know and appreciate the gravity and import of his misconduct. He was properly found guilty as alleged in the charges and specifications (MCM, 1928, par. 133, 134a and 134b).

5. The defense called a sergeant as a witness who testified on direct examination to the state of accused's intoxication and that he did not hear accused say he would whip Lieutenant Marsh's ass. On examination by the court this witness was asked if he saw accused "throw the lieutenant" down. Defense counsel objected on the ground that the question was leading and the matter inquired about was beyond the scope of the direct examination. It was quite proper to test the witness' knowledge and the accuracy of his memory in the manner pursued by the court. The question was leading but no harm to accused resulted. His substantial rights were not injuriously affected.

6. The charge sheet shows that accused is 23 5/12 years old. He was inducted into the Army of the United States 24 December 1941 at Richmond, Virginia. He had no prior service.

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

Donald K. Colquhoun, Judge Advocate.
W. J. F. Lee, Judge Advocate.
Harold W. Johnson, Judge Advocate.

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

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

Board of Review

NATO 830

UNITED STATES)

v.)

Private ANTHONY J. COOKE)
(36292781), Company F, 357th)
Engineer General Service)
Regiment.)

EASTERN BASE SECTION)

Trial by G.C.M., convened at)
APO 763, U. S. Army, 28 July)
1943.)
Dishonorable discharge and)
confinement for ten years.)
Federal Reformatory, Chilli-)
cothe, Ohio.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Anthony J. Cooke, Company "F", 357th Engineer General Service Regiment, did at Tes Kraia, Tunisia, on or about 1 July 1943, with intent to commit a felony, viz, rape, commit an assault upon Kaimisa Ben Mohamed Asine, by willfully and feloniously striking the said Kaimisa Ben Mohamed Ben Asine on the right eye with his fist.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for fifteen years. The reviewing authority approved the sentence but reduced the term of confinement to ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place

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of confinement and forwarded the record of trial for action under Article of War 50¹.

3. The evidence shows that about 2300 hours 1 July 1943, near Tes Kraia, Tunisia, First Lieutenant Arthur R. Heisch, 357th Engineer Regiment (GS), heard some "crys from these Arabs coming down through the fields" and went out to investigate. He could not understand the Arabs but was able "to interpret that they were afraid of some soldiers that were down in their hut with their women causing the women some harm" (R. 4,5,10). A relief of the guard was called out and thrown around the hut which Lieutenant Heisch entered. He testified

"the first thing I saw was Private Cooke with this girl laying on the so called bed just a matter of boards and blankets there. He was there struggling with this girl. I ordered him up and out of the hut and placed him under arrest. Upon further examination of the hut, we found these two loaded weapons, sub-machine gun and a rifle. The rifle belonged to Private Cooke" (R. 5).

He testified further that as he entered the hut accused was "half over" the girl and that she was struggling to "get up" and "trying to cry out"; and that her right eye, which he examined with the aid of a flashlight, was "black and blue where it shown someone may have hit her" (R. 5,6).

Accused and two other colored soldiers had gone to Kaimisa Bent Mohamed Asine's hut on the night in question and he and one of his companions had forced their way inside where accused seized Kaimisa and the other soldier seized her sister. Kaimisa testified that accused took her hand, started hitting her on the face with his open hand, threw her on the floor and "demanded bad things"; that accused "lifted up" her clothes and tried to get on top of her and she cried and screamed and "managed between the wall and some object in the house to keep away from him" (R. 10,11,14). She was afraid that she would be raped (R. 13). The soldiers frightened the men away with the rifle, closed the door and would not allow them to enter the gourbie (hut) (R. 12,13).

A soldier who drove accused to the stockade about an hour after he was arrested testified that accused then told him that he and "Sergeant Murray went down to have a little fun and Sergeant Murray had his fun first, and then he was supposed to have his fun, and Sergeant Murray was supposed to be watching for Private Cook and Sergeant Murray comes back in and goes out through the top of the house" (R. 7,8). This soldier explained he meant by the term "having fun", having "intercourse with a lady" (R. 9).

A noncommissioned officer who interviewed Kaimisa two or three days before the trial testified for the defense that when asked if accused raised her dress, Kaimisa replied "no" (R. 16).

Accused testified that he and another soldier went to the Arab village

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to get some wine, entered Kaimisa's hut where his companion had sexual intercourse with a woman who offered no resistance and accused felt like he "could do the same". He denied striking the girl and testified he did not raise her dress or unbutton his trousers; that he was hoping she would "give in", that was the only thing he was doing, just hoping (R. 19,20,21). Upon cross-examination, he testified that he and his companion were armed and frightened the Arab men away and that the woman his companion assaulted screamed (R. 21,22).

4. It thus appears from the evidence that at the place and time alleged accused assaulted Kaimisa Bent Mohamed Asine, the person named in the Specification by striking her in the region of the right eye with his hand and that this assault was committed while accused was engaged in an effort, forcible and without her consent, to have carnal knowledge of her. He and his companion forced their way into the Arab gourbie, frightened the men away by menacing them with their weapons, his companion had sexual intercourse with Kaimisa's sister and accused seized, belabored and struggled with Kaimisa in an effort to compel her to submit to him. He struck her on the eye viciously enough to discolor it and except for her resistance, he would apparently have accomplished his purpose. All elements necessary to establish guilt of the crime of assault with intent to rape were satisfactorily proven and the court was fully warranted in finding accused guilty as charged (MCM, 1928, par. 1491).

5. Defense counsel objected to permitting the soldier who drove accused to the stockade to testify to the admission accused then made on the ground that the statement was not a part of the res gestae and there was no showing accused was "warned of his rights". The evidence was not proffered as a res gestae statement but to establish an admission against interest and as such it was properly admitted without any showing that it was voluntarily made (MCM, 1928, par. 114b).

6. The court sentenced accused to confinement at hard labor for fifteen years, but only two-thirds of the members present concurred. The concurrence of three-fourths of the members present is required in order to render a sentence to confinement for more than ten years legal (Article of War 43). However, the reviewing authority reduced the period of confinement to ten years, thereby curing this irregularity.

7. The charge sheet shows that accused is 21 years old. He was inducted into the Army of the United States 28 December 1942 at Fort Custer, Michigan. He had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of assault with intent to commit rape, recognized as an offense

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of a civil nature and so punishable by penitentiary confinement for more than one year by Section 455, Title 18, United States Code.

Paul H. Hughes Judge Advocate.
O. J. Fide Judge Advocate.
Gordon Simpson Judge Advocate.

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

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

Board of Review

NATO 861

UNITED STATES)

ATLANTIC BASE SECTION

v.)

Trial by G.C.M., convened at
Casablanca, French Morocco,
10 September 1943.

Private JOSEPH E. GUY
(34522625), Company C,
22d Quartermaster Truck
Regiment.)

Dishonorable discharge (sus-
pended) and confinement for
three years.
Disciplinary Training Center,
Atlantic Base Section.)

HOLDING by the BOARD OF REVIEW

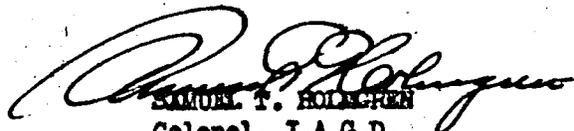
Holmgren, Ide and Simpson, Judge Advocates.

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

 Judge Advocate.
O. G. Ide, Judge Advocate.
Harold Simpson, Judge Advocate.

Branch Office, JAG, NATOUSA; Board of Review, 8 January 1944.
TO: The Assistant Judge Advocate General, NATOUSA.

For his information.


SAMUEL T. HOLMSPEN
Colonel, J.A.G.D.
Chairman, Board of Review

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CONFIDENTIAL

8 January 1944.

NATO 861

MEMORANDUM:

SUBJECT: Record of trial in the case of Private JOSEPH E. GUY (34522625), Company C, 22d Quartermaster Truck Regiment.

1. Accused was found guilty of unlawfully killing Sohrah Ben Mohamed by shooting her with a rifle.

2. Private Theodore Hayes, formerly of Company C, 22d Quartermaster Truck Regiment, testified that at the time alleged in the Specification he was a member of that company. Its bivouac area was "over across the railroad", in the vicinity of a small town named Ain Seba (R. 6). On 16 July 1943 Hayes, in company with Privates Arthur Brown and Arnett J. Holloway, both of Company C of the 22d Quartermaster Truck Regiment, "crossed the street and went over to this little French place where they sell vino" where "Holloway and Brown each bought a quart of vino, and they passed it around". Then they went into a field where Hayes said he would show them where "we usually have intercourse with some woman sometimes"***There was no woman there. So we returned to our bivouac area" (R. 7). Shortly "the rest of the fellows" went down the road to the railroad, Hayes following. "They" went across the railroad tracks, but Hayes stopped at that point, "talking to an Arab". About three minutes later Hayes saw Holloway, returning, "jump the railroad track and fall on the sand flat, and he jumped right up and kept running". Hayes ran back to the bivouac area where he saw accused whom he asked "what was wrong". Accused replied that "they was raising hell over there, they had some bricks and dirt and knives and everything". Hayes further testified that when he asked accused "whether all the boys had got out of there" accused said he thought all but Arthur Brown had. Hayes searched for Brown, but he was not in his area (R. 8). Hayes testified that then

"this fellow Joseph Guy said he would get his rifle, and I said I would get mine, I was going to see if we could find Brown, and I went for mine, and I got mine and while I was getting ready to put the ammunition in, Sergeant Van Story, he came out from the latrine while I was getting ready to put the ammunition in my rifle, and he asked what I was going to do with my rifle. I told him I was going to shoot up in the air and frighten the Arabs so Arthur Brown could get away, and he told me to give him my rifle before I got myself in trouble, and I told him I knew what I was doing, and at that time Joseph Guy passed by and he said, 'Come on, Hayes', and I turned and went

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out and caught up with him at the fence. We crossed the fence. I had five rounds of ammunition; I gave Joseph Guy two rounds, I kept three rounds for myself, and we went on toward the railroad, and just as we got to the railroad, Joseph Guy fired, and when he fired, well he turned around, and I turned around too, and he said, 'Go ahead and shoot, Hayes', and I turned around, put the rifle to my shoulder, got on my knees and fired two rounds in the air. Then we returned back to my bivouac area, and I met this fellow Marshall; I was talking with him, and after a while, about five minutes after I had been talking with him, I heard this noise, it sounded like someone was crying. So this fellow Marshall asked what was wrong over there. I told him I didn't know, and I looked for Guy, and he was with Holloway, and he asked me did I fire my rifle. I told him, 'Yes I did fire my rifle, but I know I didn't hit anyone because I fired two rounds in the air, and that is why***' (R. 8,9).

Only three shots were fired; five minutes passed before there was any crying and hollering (R. 14).

Hayes had been drinking quite a bit that evening but did not see accused do any drinking at all (R. 9). He did not believe accused "was drunk because he didn't act***" (R. 10).

Hayes first saw accused that evening between 2030 and 2100 hours "in the company" (R. 7), or "after he started across the tracks***after they went across the tracks". Hayes next saw accused in the bivouac area when accused said Brown was still across the railroad, "he said he would get his rifle, I would get mine, we were going over there to frighten the Arabs so Brown could get away". Accused "didn't say anything about killing, he was going to frighten" (R. 12).

Hayes testified that when they first got to the railroad "I seen a number of Arabs standing in front of the zoo", that he fired over their heads, and that he was not watching accused when he shot (R. 10). Hayes testified the trouble developed "over across the railroad in the zoo, by the zoo. This was over right across the street from our bivouac area***" (R. 11).

Mohamed Ben Mohamed, a witness for the prosecution, testified he was the guardian at the zoo, that about 2200 hours four negro soldiers appeared in the vicinity and asked the son of the deceased woman "to bring them some woman". Witness came upon the scene as the soldiers "grabbed the boy by the front of the throat and threatened him with harm if he didn't bring the woman" (R. 15). The soldiers then asked witness "to bring them a woman". He told them "there was no woman to be had there". One of the soldiers hit the witness "in the side of the head with a bottle". As he fell he cried out "Then several natives in the village came right to the

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scene. Then the negro soldiers ran off". Witness testified:

"About five minutes later the same four returned with a gun. They didn't return exactly the same. They were about 20,30 meters away by the railroad track, and they stayed right there with the gun and fired one shot. The crowd dispersed. A few minutes later they fired a second and a third shot. Then after they left I returned to the scene and found the woman lying dead there with a wound in the region of the throat" (R. 16).

Witness, asked, "do you know which of the shots for sure killed the woman", replied, "I don't know which one of them killed the woman" (R. 16). He testified further that at the time he was assaulted and later at the time of the actual shooting, he did not see accused (R. 21). Asked if he recognized "the colored soldier in this room as being one of the men involved that evening", witness replied "He wasn't there" (R. 17).

Technician Fourth Grade Ernest J. Unger, of the Provost Marshal Office, Atlantic Base Section, identified a statement that accused signed after having been advised of his rights under Article of War 24 and warned that it could be used against him (R. 22). The document was admitted in evidence as Exhibit 2. Therein accused told of being at the zoo, of some soldier being chased by an Arab with a knife. Then, he said:

"About 6 or 7 more Arabs came up and they all started throwing bricks and knives at us. We went on back across the tracks and then Hayes and I were sitting down talking before we went in and got the rifle. We started back after the Arabs and I did not have any ammunition. Hayes had 5 rounds that he said he had when he just came off guard. Hayes gave me 2 of them and he kept three. We then went to the railroad tracks and there was a bunch of Arab boys standing by the wall by the zoo. We hollered, 'ali' and then fired at them. We then came back and we cleaned our rifles. After that we heard people on the railroad tracks crying" (Pros. Ex. 2).

Arthur Brown, called by the defense, stated that while he was at the zoo with four others, including accused (R. 28), he saw a Moroccan "waving something and a soldier was in front of him***We started out to run, but I didn't see any more of Guy till I got back to my bivouac area". It was about 0130 or 0200 hours the next morning when he next saw accused (R. 29). At that time accused told witness "he had gone back looking for me", but said nothing about shooting a rifle (R. 30).

The following statement, translated from the French, was offered in evidence by the prosecution (R. 24; Pros. Ex. 3):

"We, the undersigned, Jean VINCENT, foot gendarme, and AMEUR MESSAOUDI, Algerien auxiliary, of the Brigade

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of Ain-es-Sebaa, testify that SOHRA BENT AHMED BEN AHMED, a Moroccan woman about 45 years old, living at the Zoo of Ain-es-Sebaa, was killed by a burst of fire by colored American soldiers on July 15, 1943.

(Proces-verbal (Report) No. 381, of the Brigade, July 15, 1943.

/s/ Amsur Messacoudi
/s/ Jean Vincent"

Defense announced "no objection" when the document was proffered, but asserted that it was incumbent on the prosecution to prove that it was a "death certificate" (R. 24). The court received it in evidence. The prosecution then requested that the court "take judicial notice of the law of French Morocco, which states that such a document***is a legal death certificate in this state" (R. 25).

3. It thus appears from the evidence that at the place and time alleged accused willfully fired his rifle at a group of Arabs and that shortly afterwards, an Arab woman was found dead at the scene. Three shots were fired, two of which were discharged in the air over the heads of the Arabs by accused's companion and the third was fired by accused, according to his own admission directly at the group of natives. Soon after the shooting, crying was heard from the scene where the Arabs had been gathered. The evidence further shows that after the soldiers left, a woman was found dead at the scene with a wound in the region of her throat. Although one witness testified accused was not present at the time of the shooting, he himself admitted that he was there. The court was warranted in concluding from these and the other circumstances in evidence that the woman was slain by the bullet fired by accused.

The identity of the woman who was slain was not established by any competent evidence. The document purporting to supply this proof was but the ex parte statement of two persons who did not appear to testify. The statement was not admitted as stipulated testimony but rather was offered and received in evidence as an official certificate made out in compliance with the Moroccan law of which the court was asked to take judicial notice. Courts do not take judicial notice of the laws of a foreign country (Underhill's Crim. Ev., 4th Ed., sec. 70; 23 C.J. 130,135). But even had the statement been shown to be an official one prepared in accordance with Moroccan law, the court would not have been authorized to accept it as an official writing since the laws of Morocco ex proprio vigore have no application here. It was not an official writing within the purview of the second paragraph of Paragraph 117a, of the Manual for Courts-Martial. Essentially, the statement is the hearsay assertion of persons not in the court and was not admissible (MM, 1928, par. 113,117a).

However, the omission of proof of the woman's name did not amount to a variance but more exactly is to be termed a failure of proof. There is

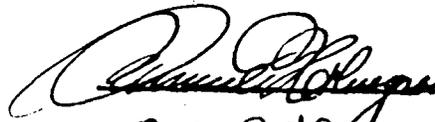
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apparent authority for the view that such a want of proof is fatal to the validity of a conviction (Smith v. State, 80 Fla. 710, 86 So. 640, cited in Wharton's Crim. Ev., 11th Ed., p. 1845). But a valid reason for the application of such a rule here is not easily perceived. As in the case of a variance, a want of proof of this character should only be held substantially injurious to accused and hence fatal to the validity of the conviction if the court were misled, or if some substantial injury was done to accused, such as that he was prevented from intelligently preparing and presenting his defense, or if he is exposed to the danger of a second trial on the same charge (Wharton's Crim. Ev., 11th Ed., p. 1082; Underhill's Crim. Ev., 4th Ed., p. 106). The transaction alleged in the Specification was the very one established by the evidence. It was of no moment to accused in preparing and presenting his defense that the woman who was killed was known as Sohrah Ben Mohamed or by some other name. It is not conceivable that the court was misled. Nor could accused be successfully prosecuted again for the killing of a woman at the place and time here alleged. The record of trial reflects all the facts upon which he was convicted and is available to demonstrate that he has been once tried for this crime if he should again be placed in jeopardy for the same offense (16 C.J. 264,265,266,286). It is concluded that no substantial right of accused was injuriously affected by this failure of proof (AW 37).

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

 Judge Advocate.
O. G. Zide, Judge Advocate.
Gordon Simpson, Judge Advocate.

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

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AGO 534, U. S. Army,
2 November 1943.

Board of Review

NATO 867

UNITED STATES)

FIRST ARMORED DIVISION)

v.)

Trial by G.C.M., convened at
AGO 251, 15 October 1943.)

Private MARCUS H. McCULLOUGH)
(20269111), Company B, 6th)
Armored Infantry.)

Dishonorable discharge and)
confinement for thirty years.)
Eastern Branch, United States)
Disciplinary Barracks, Beekman,)
New York.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

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

Specification: In that Private Marcus H. McCullough, Company "B", 6th Armored Infantry, did, without proper leave, absent himself from his organization at or near Beja, Tunisia, from about January 3, 1943, to about April 12, 1943.

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

Specification: In that Private Marcus H. McCullough, Company "B", 6th Armored Infantry, did, at or near Mateur, Tunisia, on or about May 2, 1943, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: actual combat with the enemy, and did remain absent in

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desertion until he was apprehended at or near Oran, Algeria, on or about September 5, 1943.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for thirty years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 3 January 1943, near Beja, Tunisia, accused absented himself from his company without leave and did not return until 12 April 1943, (R. 7,8; Ex. A). On 2 May 1943, accused again absented himself without leave from his company (R. 8,12,13; Ex. A) which was then about three-quarters of a mile from the enemy (R. 9,11) in the vicinity of Mateur, Tunisia. When he left on 2 May, accused said "he didn't feel good and was going back to the medics again" (R. 8). This unauthorized absence continued until 5 September 1943 (R. 10,11; Ex. A). According to one witness, accused's company was in actual combat on 2 May (R. 9); another testified that the company was then "less than a mile from the line", and while not then in actual combat, was preparing to "go in" (R. 11); a third witness testified that he believed the company was "in actual combat on April 30th instead of May 2nd" (R. 12).

Accused elected to remain silent.

4. It thus appears from the uncontradicted evidence together with his pleas of guilty that at the place and time alleged in the Specification of Charge I accused absented himself without leave from his command and that this absence, which continued for 98 days, was without authority from anyone competent to give him leave. He was properly found guilty as alleged in Charge I and its Specification (MCM, 1928, par. 132).

It further appears from uncontradicted evidence that at the place and time alleged in the Specification of Charge II, accused again absented himself without leave from his command and remained unauthorizedly absent for 126 days. When he left his company it was facing enemy elements less than a mile away and there is substantial evidence that it was in actual combat. The court was fully warranted in concluding under these circumstances that accused absented himself with the specific intent of avoiding the hazardous duty of engaging in combat with the enemy and that he was guilty as alleged in Charge II and its Specification (MCM, 1928, par. 130).

The only evidence of the place and manner of termination of the unauthorized absence alleged in the Specification of Charge II was a statement of accused's company commander who, in response to an inquiry if he knew where accused was apprehended, testified

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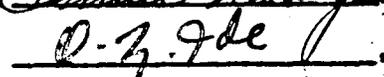
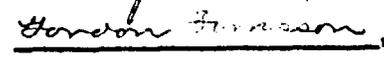
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"Yes sir in Oran he was picked up by the MPs before I had an opportunity to get him to the division" (R. 11).

This testimony was hearsay unless the captain was present at the place and time of the apprehension and there is no evidence to indicate whether this was the case. However, the manner and place of the termination of this unauthorized absence are of no controlling importance here where the gravamen of the offense charged is desertion with intent to avoid the hazardous duty of actual combat with the enemy. The substantial rights of accused were not prejudicially affected by the reception of this testimony (Dig. Op. JAG, 1912-40, sec. 416 (10)).

5. Accused is twenty-one years old. He enlisted in Company A, 10th Infantry, 10 December 1940. No prior service is shown.

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

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

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APO 534, U. S. Army,
10 November 1943.

Board of Review

NATO 870

UNITED STATES)

MEDITERRANEAN BASE SECTION

v.)

Trial by G.C.M., convened at
Oran, Algeria, 2 September
1943.

First Lieutenant JOHN R. GILL
(O-1100556), Company C, 92nd
Engineer Regiment (General
Service).)

Dismissal.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant John R. GILL,
Company C, 92nd Engineer Regiment, was, at or near
Mostaganem, Algeria, on or about 15 August 1943,
drunk and disorderly in camp.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on the evening of 15 August 1943, accused (a white officer), together with two other officers of his organization, attended a dance at the Officer's Club in Salamandre (R. 5).

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He was motor officer of Company C, 92d Engineer Regiment, and left the camp near Mostaganem, Algeria, in a company command car, arriving at the club about eight o'clock p. m. (R. 5). He sat at a table with other officers and during the evening drank one small glass of cognac and two glasses of "Blood and Sand" (R. 6), which is a punch made of red wine and "Triple Sec" (R. 5). The dance lasted until 11:30, and the three officers spent the evening talking and dancing (R. 6). Accused left the club about 11:45 with the other two officers and returned to the bivouac area in the command car (R. 6,7). Accused rode in the rear seat and dozed off until they arrived back at camp (R. 7). As they entered the bivouac area, they were challenged and passed by the sentinel; then the car was parked in the motor pool, which was built upon sand dunes (R. 16) of considerable depth (R. 15). As the officers left, one of them asked accused to go to bed; he mumbled a reply "as if he were half asleep", and the two officers went to their quarters, leaving accused in the car (R. 7).

The sentinel on Number 5 post, which included the motor pool, challenged and passed these officers (R. 7). Shortly thereafter he heard the noise of a car at the motor pool, returned and found accused sitting behind the steering wheel (R. 22). His shirt was unbuttoned and his tie was "just hanging down on his neck" (R. 23). Accused asked the sentinel if the gate was closed and the sentinel said he would find out (R. 22). The "gate" consisted of a half-inch cable stretched between two posts (R. 7). Accused then stepped out of the car, procured a key from an air compressor nearby, got back into the car and drove towards the gate. The guard stepped in front of the car and called "Halt" but accused did not stop, and drove against the cable, which became entangled in the bumper, and the car stopped. The sentinel asked accused why he had started the car and accused replied, "I thought you said the damn gate was open", and told the sentinel he was going to get his cap, which was missing (R. 22). The sentinel then asked him if he had a dispatch ticket and accused replied that he "didn't need a damn dispatch ticket, it was his own damn command car and own damn motor pool, and that he made his own damn dispatch ticket and signed it himself" (R. 22). The sentinel then told accused that his orders were to let no vehicles leave the motor pool after 6:00 p. m. without a dispatch ticket signed by the colonel (R. 22). Accused still insisted that he signed his own dispatch tickets, and the Corporal and Sergeant of the Guard and the Officer of the Day were called (R. 23). While the Sergeant of the Guard was gone to get the Officer of the Day, accused attempted to crank the car and the Corporal of the Guard removed the key (R. 23).

As the Sergeant returned with the Officer of the Day, accused said, "What is the matter around this damn place, can't a man drive his own vehicle in his own damn motor pool" (R. 11,23). The Officer of the Day explained that the sentinel could not let him take the car out without a dispatch ticket (R. 23) and suggested that accused go to bed and straighten things out in the morning (R. 11). Accused declined to leave, and explained that he was not trying to take the car out, he was trying to park it and had knocked the cable down trying to turn around (R. 11). He reached into the dash compartment to find the trip ticket, and handed the guard an envelope, but it did not contain the trip ticket (R. 11). While talking to

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the Officer of the Day, accused said, "If any son-of-a-bitch halted him in his own damn command car in his own motor pool you are liable to find them lying in the weeds there" (R. 23,26) and "that is what I say about you god-damned Ethiopians" (R. 23,26), and "the sooner I get out of this God-damn outfit the better I'll feel" (R. 13,26) and "no son-of-a-bitch is going to come in my motor pool and tell me what to do. I have been motor officer for 15 months and it is my own damn car and my own damn motor pool" (R. 26). The guard "challenged" accused to get out of the car (R. 12). Accused did get out and the Corporal of the Guard loaded his rifle (R. 12). Then accused argued further with the guard "and called them directly something to the effect they were 'God-damn Ethiopian bastards'" (R. 13). The Officer of the Day told accused he could park the vehicle if he wanted to and accused replied that "he wouldn't park the damn thing" (R. 23). Accused then left for his quarters, saying for "no son-of-a-bitch to touch" the car (R. 26). The Officer of the Day took the key out of the car and gave it to the sentinel (R. 13).

Accused then went to his tent, where he said to the officers, "What a hell of a pickle you have gotten me into" (R. 8). In the tent he got his flashlight, pistol holster and belt (R. 8) and returned to the car, where he was challenged by the sentinel and recognized (R. 23). He told the sentinel he was going to park the car and asked if he had any objections (R. 23). The sentinel gave accused the key and accused parked the car (R. 24). As he left, he had his hand on his holster (R. 14) and said, "That is where it is supposed to be and I will plug anyone that fools around with that command car" (R. 24). The sentinel said accused had a pistol in the scabbard (R. 23), but the Officer of the Day was present and did not see it (R. 13).

One of the officers who went with accused to the dance testified that from what he saw of accused "from the period I left him in the command car and his visits to our tent" he did not notice any distinct indication that he was intoxicated (R. 9). The Officer of the Day, the Corporal of the Guard, and the sentinel each testified that in his opinion accused was drunk. The sentinel, because he had his shirt open and because he was staggering (R. 24); the Corporal of the Guard, because of his loud talk and because he staggered when he left (R. 27); and the Officer of the Day because "he refused to go back to his tent, the manner in which he spoke, calling the guards God-damn Ethiopians, threatening the guard, refusing to respect the Officer of the Day in the execution of his duty, the faltering way in which he walked, and the disheveled manner of his very appearance" (R. 14).

Accused testified that he had gone to the dance at Salamandre and had drunk a one-ounce glass of cognac and two or three "Blood and Sands" while there (R. 29,32). He was dancing from "9:30 until the dance closed at 11:30" and did not again sit at the table with his friends (R. 29). When he got into the car to return to camp he "was wringing wet with perspiration" (R. 30). He loosened his tie, opened the top button of his shirt, and took off his hat and placed it on the back of the seat. He fell asleep in the car, and the officers drove back to camp, arriving at the motor pool at about 12:10 a. m. When the two officers left him he was looking

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for his hat in the car, and he told them he would be along in a few minutes (R. 30). He noticed that the car was not properly parked in the pool, and he, being the motor pool officer, was very strict about proper parking, so decided to park it correctly himself. He started the car, intending to run it to the gate, back up and park it. The car stalled in the sand. The sentinel came up and accused asked him if the gate were open, since he would "have to protrude the front" of the car through the gate to back it down the short road. The sentinel said "it was hooked" and accused told him to open it. The sentinel then "said something about" a trip ticket, and accused told him he "didn't need any trip ticket", as he was just putting the car where it belonged. He then started forward, and in so doing got too close to the cable, which slipped over the right front headlight and hood. The Corporal of the Guard arrived and accused explained what he was trying to do. Then he backed the car about 35 or 40 feet towards the end of the motor pool, when the Corporal of the Guard and a sentinel came running over and ordered him to halt. He did so and the Corporal of the Guard reached in and pulled out the key. This made accused "rather furious" and, talking to himself, he said, "I'll be a son-of-a-bitch when I've got to take my God-damn orders from a couple Ethiopians, why it's about time I got out of this outfit, I think I would be better off" (R. 30).

"the Sergeant of the Guard told the other two members of the guard that no officer could talk like that and get away with it. He said he was going to see that I was tried by court-martial if he had to get Hooper out of bed to do it, meaning the Colonel. The Corporal of the Guard loaded his rifle and the Sergeant told him he was going after the Officer of the Day. When the Corporal threw the bullet into the chamber of the rifle he told me if I dared get out of the car or tried to move the car he would fill me full of holes. Well, pretty soon the Officer of the Day came over and asked me what the trouble was. I explained to him the guards wouldn't let me park the car and he told me to park the car and go to bed and forget about it. He handed me the key and I thought it over a minute and said to myself maybe it will be better to leave it here, and as I jumped out of the car the Corporal of the Guard started to move his rifle towards me, didn't actually point it at me, and I went down to my tent. On my way down to my tent I realized that the car was in the way--we have a specific order in the regiment to get trucks out at 7:15 in the morning and it was right in the way of the trucks. So I went down to my tent, looked in the bed roll and got my flashlight, went to a small box I use as a foot locker and got my cap out, got a new bar and put it on my hat and turned around to go out the tent. On the way out Lieutenant MacDonald's cot was on the right hand side and I turned and noticed there was a pistol holster and belt there. I said to myself maybe they think I was talking awfully loud. I guess if they know I have a gun they won't want to fill me full of holes. So I put it on and started up the road toward the guard. On the way up I slapped it and discovered

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there was no pistol in it. The guard halted me, I told him who I was and he recognized me. I told him I wanted the keys to the car, I would like to put the vehicle away. He gave me the keys and I backed the car in place where it belonged, got out of the car and went to bed" (R. 30,31).

Accused testified that he was not drunk, but was angry (R. 31). He did not like the attitude of the guards. He gets angry very often; "lately it is getting to be a habit" (R. 34). He had been in Africa since February and had had "exactly 10 hours off". He had a serious automobile accident in England and was in the hospital "a length of time and haven't felt myself since that time" (R. 34). He did not call the guards "God-damn Ethiopian bastards" (R. 34); he did refer to them as Ethiopians, however (R. 35). What he actually said was, "I'll be a God-damn son-of-a-bitch if I have to take my damn orders from a couple God-damn Ethiopians. I think it's time to get out of the outfit and I'd be better off if I did" (R. 35), and this remark was not addressed to the colored guards but to himself (R. 34). He admitted saying "No son-of-a-bitch was going to fill me full of holes, if he did he would find himself sleeping in the weeds" (R. 35), but what he meant by it was that he had a right of self-defense and would protect himself with his hands (R. 35), if he were attacked by anyone. He did not comply with the request of the Officer of the Day to "forget about it and let it rest until morning" because he "thought it should be settled right there and then" (R. 36). Accused got out of the car, when the Corporal of the Guard pulled the bolt of his rifle, because he "didn't want to let him think I was afraid" (R. 39). He did not stagger, except in the sand (R. 39). He had been with colored troops for 15 months, but he did not know that they were to be referred to only as colored soldiers, not as negroes or Ethiopians (R. 38).

Four officers testified for the defense. One saw accused in his quarters about midnight, and in his opinion he was not drunk but "very angry" (R. 39,41). Another, who was present in the tent at the same time, had no definite opinion as to whether he was drunk or sober (R. 43). Major George W. Bennett, 92nd Engineer Regiment, testified that accused's reputation for military efficiency was "quite good" and he had never heard of his truth or veracity being questioned (R. 44). Another officer stated that accused's reputation for truth among the officers and men of his command was "very good", and that his reputation for military efficiency was "very satisfactory" (R. 45).

4. It thus appears from the evidence that at the time and place alleged accused, who had gone to a dance at Salamandre where he had drunk cognac and punch, returned to his battalion area around midnight, asleep in the back of a command car. Shortly thereafter a sentinel heard a noise in the motor pool, investigated, and found accused behind the steering wheel of the car, bareheaded, shirt collar unbuttoned and his tie hanging down his neck. Although called upon to halt, he persisted in driving the car until it was stopped by a steel cable forming a gate, and, when asked for a dispatch ticket, replied that he "didn't need a damn dispatch ticket, it was his own damn motor pool, and that he made his own damn dispatch

ticket and signed it himself". The Corporal and Sergeant of the Guard and the Officer of the Day were called. The Officer of the Day suggested that accused go to bed and straighten things in the morning, but accused refused, saying "no son-of-a-bitch is going to come in my motor pool and tell me what to do" and "if any son-of-a-bitch halted him in his own damned command car in his own motor pool you are liable to find them lying in the weeds there" and "that is what I say about you God-damn Ethiopians". He said he "wouldn't park the damn thing", "they were God-damn Ethiopian bastards", and went to his tent, returning shortly with a flashlight and wearing a cap, a pistol belt and a holster. After asking the sentinel if he had any objections, he parked the car and left, saying "That is where it is supposed to be and I will plug anyone who fools around with that command car".

The Officer of the Day, the sentinel and the Corporal of the Guard all testified that in their opinion accused was drunk, basing their opinion upon his loud talk and disheveled appearance, the fact that he staggered and refused to leave when directed to do so by the Officer of the Day.

Accused denied that he was drunk. He explained that he was only trying to park the car properly and it made him angry that a guard should interfere with him. He did not like the guard's attitude and his profanity was the result of his anger and not drunkenness. He did not direct his remarks about Ethiopians to the colored guards, but made the remarks to himself.

Accused was charged with being drunk and disorderly in camp, in violation of Article of War 96. Drunkenness is defined (MCM, 1928, par. 145) as any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties. Accused had several drinks at the dance and on the way home fell asleep in the car. When he arrived in camp his cap was missing, his shirt open and his tie loosened. He talked loud, staggered, and abused the colored sentinels with vile and obscene language. In the opinion of the Officer of the Day and two members of the guard he was drunk. Although there was testimony to the contrary, the court was fully justified in finding that accused was drunk.

His attempt to take the car out of the area without proper authority, his failure to halt when ordered to do so by the sentinel, and his refusal to go to bed and "straighten it out in the morning", when asked to do so by the Officer of the Day, coupled with loud and abusive talk and excessive profanity, constituted disorderly conduct.

Attached to the record of trial are letters from accused's commanding officer and other officers of his organization recommending clemency.

5. The charge sheet shows that accused is 35 years old. He was commissioned Second Lieutenant 10 June 1942, Officers' Candidate School, Fort Belvoir, Virginia. He had no prior service.

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

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

APO 534, U. S. Army,
10 November 1943.

Board of Review

NATO 870

UNITED STATES)

MEDITERRANEAN BASE SECTION

v.)

Trial by G.C.M., convened at
Oran, Algeria, 2 September
1943.

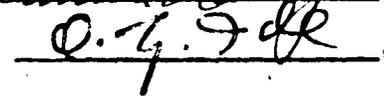
First Lieutenant JOHN R. GILL)
(O-1100556), Company C, 92nd)
Engineer Regiment (General)
Service).)

Dismissal.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

 Judge Advocate.
 Judge Advocate.
_____, Judge Advocate.

NATO 870

1st Ind.

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

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

1. In the case of First Lieutenant John R. Gill (O-1100556), Company C, 92nd Engineer Regiment (General Service), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

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NATO 870, 1st Ind.
10 November 1943 (Continued).

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

(NATO 870).



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

(Sentence ordered executed. GCMO 46, NATO, 10 Nov 1943)

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

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APO 534, U. S. Army,
19 November 1943.

Board of Review

NATO 899

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

v.)

Corporal J. D. BENTON
(34203907), Company I,
46th Quartermaster Regiment.)

EASTERN BASE SECTION)

Trial by G.C.M., convened at
Bizerte, Tunisia, 8 October
1943.)

Dishonorable discharge and
confinement for twenty-five
years.)

Eastern Branch, United States
Disciplinary Barracks, Beekman,
New York.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 64th Article of War.

Specification 1: In that Corporal J. D. Benton, Company "I" 46TH Quartermaster Regiment, did, on the Tunis-Mateur Road about three miles from Tunis, on or about 1900 hours 21 September 1943, offer violence against 2nd Lt. JOSEPH H. RUDD, a superior Officer, who was then in the execution of his office, in that he, the said Corporal J. D. Benton, did assault him with his fists and knock him down.

Specification 2: In that Corporal J. D. Benton, Company "I" 46TH Quartermaster Regiment, did, on the Tunis-Mateur Road about three miles from Tunis, on or about 1900 hours 21 September 1943, slap 2nd Lt. MILLICENT C. La VENIA, a superior Officer, who was then in the execution of her office, on the side of the face with his hand.

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He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for a period of twenty-five years, three fourths of the members of the court present concurring. The reviewing authority approved only so much of the finding of guilty of Specification 2 of the Charge "as finds the accused guilty of assault and battery on the person specified, in the manner specified, and at the time and place specified in violation of Article of War 96". He approved the sentence, designated Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 1900 hours on 21 September 1943 (R. 4,5), while it was still daylight (R. 8), Second Lieutenant Joseph H. Rudd, Medical Administrative Corps, and Second Lieutenant Millicent C. La Venia, Army Nurse Corps, both of the 74th Station Hospital, and two enlisted men (R. 4,5,6,9,13) were proceeding in a command car towards Mateur from Tunis, in Tunisia. They had reached a point on the highway between three and four miles from the city limits of Tunis when accused came out from the side of a truck which was parked off the road and "stuck out his right leg" toward the command car, obliging the driver to swerve the vehicle sharply to avoid striking him (R. 5,9,10,12). The car was brought to a stop and Lieutenant Rudd returned to accused to see what was wrong (R. 5,10). Another truck was parked nearby (R. 10).

When Lieutenant Rudd reached the scene, he found accused "arguing and fighting" with the driver of that vehicle and asked accused what was the trouble. Accused faced the lieutenant and replied "What business is it of yours, anyway?" The officer testified that while wrestling with this driver accused "became seemingly unconscious" and fell to the ground. The officer leaned over beside him and told him he was a medical officer. Accused replied "I don't want no Officer"; he then stood up and "was rather dazed" (R. 5,6). The enlisted men had given him some water and from a "semi conscious state" he "seemed to revive and got onto his feet" (R. 10). Lieutenant Rudd started back to the command car and as accused "walked up to his truck staggering", the officer went back to accused, asked him if he expected to drive, and also asked for his name and organization which accused refused to give. He assumed a "belligerent attitude" and as the officer "went up to another driver of a parked truck", accused approached him from the rear and struck him a glancing blow with his fist on the lower part of the jaw (R. 5,7,10). After striking this blow, accused locked his arms around the officer and both fell (R. 8). In the language of Lieutenant Rudd, accused "bore" him to the ground (R. 6). The blow was not accidental, "it seemed like he was serious and wanted to fight" (R. 7). Two enlisted men came to the officer's aid and held accused who, however, did not release the officer until another officer who chanced to be passing stopped his car and approached the scene (R. 6,10). The blow accused struck cut Lieutenant Rudd's lip and caused it to bleed (R. 11, 12). The officer testified that

"We all tried to get him under control but he refused to

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cooperate whatsoever...He then became abusive as to my rank, my age, and as to my execution of duty. He jeered my being an officer and made a few remarks pertaining to the presence of the nurse...He said, that I was nothing more than a cheap kid, and that I had no business to be an Officer, and that it was men like me that made this Army what it is today. He said he could see no reason why I held a commission..." (R. 6).

Lieutenant Rudd testified further that accused

"did however recognize me as an Officer. He...called me an Officer and on one occasion called me a Medical Officer...He referred to me as 'Doctor' once" (R. 6).

While accused was addressing his remarks to Lieutenant Rudd, Lieutenant La Venia told accused "to act like a soldier" and that he was striking an Army officer. Accused then became very abusive toward her. He "poked her freely" about her chest and shoulder and when she resented this he told her "I will slap you too", which he immediately did (R. 6, 10,11,13). Lieutenant La Venia testified that she talked to accused thinking "perhaps he would become reasonable". She testified

"He said something pertaining to his color and that he was as good as any man in the United States Army. It was strange him saying that as we hadn't questioned anything like that" (R. 11).

After slapping the nurse accused started fighting with other enlisted men present and a general scuffle ensued. The soldiers overpowered accused and tied him up (R. 14,15).

During the occurrence described Lieutenant Rudd was dressed in summer uniform and garrison cap, with the insignia of his rank and service on shirt and cap (R. 5,10). Lieutenant La Venia was wearing her blue Army Nurse Corps uniform and the insignia of her rank and service (R. 11).

As to the state of sobriety of accused, Lieutenant Rudd testified that accused's

"speech was rather understandable, I talked to him and he talked to me" (R. 6).

When he first saw accused, it was apparent he had been drinking for he was staggering (R. 7). Witness also testified:

"In my estimation he lacked muscular coordination but as to answering me he seemed to understand perfectly well. His speech was coherent" (R. 8).

Lieutenant La Venia testified that while she could not comprehend his actions, she could understand what accused was saying and that his speech

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was coherent and understandable (R. 11,12).

Accused testified that he went to Tunis on 21 September 1943, with a convoy of trucks; that as they were unloading, two staff sergeants came by with some whiskey and he bought two bottles; that he began drinking from one and put the other, which he never opened, in the cab of his truck; that after unloading, the convoy left, accused drove along about 25 miles an hour and as it approached a road intersection about a mile from Tunis, he stopped his truck, waved for the driver behind him to go on and that "from there I don't remember anything else...until after ten o'clock when I waked up in the stockade in Tunis the next morning" (R. 16,19,20,21). He said he did not remember meeting a nurse and a lieutenant nor seeing a command car (R. 16,17); that he and the staff sergeants drank together, "just about even" (R. 18); that he was "trying to be the last truck" because the lieutenant in charge of the detail had told him to bring up in the rear "so as we would not lose any truck in the convoy" (R. 19); that he did not remember being kicked; that "All I remember is that the next morning my eyes were swollen" (R. 21).

The captain who commanded accused's company, a lieutenant who was formerly his platoon leader, and another lieutenant, his present platoon leader, together with his first sergeant and a staff sergeant of his company, testified to accused's good reputation (R. 22,24,25,26,27). One of these witnesses described him as an exceptionally good worker (R. 25) and his company commander testified he was "the hardest worker I have seen" (R. 22); the staff sergeant testified that "as far as being a good worker, no man was as good as him in the third platoon" (R. 27). Two of these witnesses considered his military efficiency as satisfactory (R. 25,26).

4. As to Specification 1 of the Charge, it appears from the uncontradicted evidence that at the place and time alleged accused assaulted Second Lieutenant Joseph H. Rudd, Medical Administration Corps, his superior officer, by striking him in the face with his fist and by throwing him to the ground. When this assault occurred, Lieutenant Rudd was appropriately engaged in investigating the conduct of accused and in taking steps to quell a disorder among military personnel. Presently, when it appeared that accused was probably not in a fit condition to drive his truck, the officer inquired as to accused's intentions about driving and asked for accused's name and organization. Upon being refused this information, the officer started toward another truck driver who happened to be nearby and thereupon accused assailed the officer from the rear, striking him with his fist and also forcing him to the ground. Lieutenant Rudd was plainly in the execution of his office when he was attacked. It was not essential that his undertaking to quell the disturbance which accused was creating and to prevent him from driving an Army truck while partially under the influence of liquor should pertain to the lieutenant's special branch of service (Winthrop's, reprint, p. 571). The circumstances warranted the interposition of the officer, either because of the presence of a disorder within the meaning of the 68th Article of War or as an act authorized by military usage (MCM, 1928, par. 134).

Accused testified that he was so drunk that he did not remember what

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he had done. The evidence indicates that he was quite drunk. He recognized the officer as such, however, and talked coherently, and the court might reasonably conclude that accused was not too drunk to know and understand what he was doing when he attacked the officer and that accused acted intentionally and with conscious deliberation in making the assault. He was properly found guilty as alleged in Specification 1 of the Charge:

As to Specification 2 of the Charge, the reviewing authority approved only so much of the finding of guilty "as finds the accused guilty of assault and battery on the person specified, in the manner specified, and at the time and place specified in violation of Article of War 96". It appears from the uncontradicted evidence that at the place and time alleged accused wrongfully slapped Second Lieutenant Millicent C. La Venia, Army Nurse Corps, the person named in the Specification, in the face with his hand. The circumstances adverted to in the discussion under Specification 1 clearly demonstrate the intentional character of the assault. The finding of guilty of Specification 2, as approved by the reviewing authority, is fully supported.

5. The prosecution asked Lieutenant Rudd:

"Then at the time he (accused) hit you he knew you were an officer?"

Defense counsel objected because the question "calls for a conclusion". The objection was overruled and the witness answered the question in the affirmative (R. 6,7).

Lieutenant Rudd had detailed in his testimony numerous circumstances which supported the conclusion which he expressed. When he first approached accused, he advised the soldier he was an officer and accused replied that he did not want any officer. In the subsequent conversations between them, accused repeatedly demonstrated that he knew he was talking to a commissioned officer. Lieutenant La Venia called his attention to the fact that he was striking an officer. Lieutenant Rudd was attired in a regulation Army officer's uniform with appropriate insignia of rank and branch of service. It follows that his testimony that accused knew he was an officer, while in a sense the conclusion of the witness, was but the statement in another fashion of matters to which the lieutenant had already been testifying. The reception of this evidence did not injuriously affect any substantial right of accused (AW 37).

6. On direct examination accused replied in the negative when asked if he had ever been in trouble or tried by a court before (R. 17). On cross-examination, he was asked if he had ever been in court "back in the states" to which he replied that "I was a longshoreman in the states and we belonged to a group of men that got in some trouble about security" (R. 18). Defense counsel thereupon interjected that "The prosecution should confine the questions to this man's military career" (R. 18). The law member overruled the objection and upon asking the accused "How much

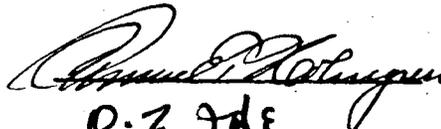
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time did you get", the latter replied "I didn't get any time, I got off" (R. 18). Though the matters inquired about could have had no competent bearing upon accused's guilt of the precise charge here involved, they were introduced in the first instance by the defense and were therefore properly subject to cross-examination. However, the answers disclosed no substantial inconsistency with the original testimony of witness and no harm can be conceived as having resulted from the reference to those matters.

7. The accused is 29 years old. He was inducted into the Army of the United States 25 April 1942, at Camp Blanding, Florida. He had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specification 1 thereunder and the findings of guilty of Specification 2 as approved by the reviewing authority, and the sentence.

 Judge Advocate.
O. J. J. E. , Judge Advocate.
_____, Judge Advocate.

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

APO 534, U. S. Army,
25 November 1943.

Board of Review

NATO 904

UNITED STATES)

EASTERN BASE SECTION

v.)

Trial by G.C.M., convened at
APO 763, U. S. Army, 7 October
1943.

Private WILLIAM D. KIMBRELL)
(34393207), Company D, 338th)
Engineer General Service)
Regiment.)

Dishonorable discharge and
confinement for life.
United States Penitentiary,
Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private William D. Kimbrell, Company "D", 338th Engineer General Service Regiment, did, at Djedeida, Tunisia on or about 2100 hours, 21 September 1943, forcibly and feloniously, against her will, have carnal knowledge of Melmi Bent Abdallah.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction, for being drunk in uniform in a public place in violation of Article of War 96, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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3. The evidence shows that at the time alleged accused was a member of a detail of five soldiers who operated a gasoline pump near Djedeida, Tunisia. They lived about a mile and a half from the main bivouac area of their organization, near an Arab hut (R. 33,39). At about 2145 hours on 21 September 1943, two American soldiers in blue fatigue clothing went to the Arab hut (R. 11,13,29). They had handkerchiefs over their faces (R. 27) and one was armed with a rifle and the other carried a revolver (R. 14,15,20,31). Salah Ben Brahim, the 23 year-old son of the woman described in the Specification (R. 15), was sleeping in front of the house on a bed of two old automobile seats (R. 22). He heard the soldiers approaching and called for his father; thereupon one of the soldiers hit him and tied his hands with a handkerchief (R. 11). One soldier pointed a rifle at him and "stood guard" over him while the other went inside the hut where Melmi Bent Abdellah, the victim, was asleep with her 14 year-old daughter, Elisha, and two small children (R. 12,19,24). The daughter ran away and hid (R. 18,24); the soldier pushed one child away and tried to push the other off but it stayed on the right arm of its mother (R. 18,25). Then he pushed aside the little clothing Melmi was wearing (R. 26), just a "piece of rag" (R. 25), and "screwed" her (R. 12,26). His penis penetrated her and she did not consent (R. 26); she testifying, "It was against my will. I am an old lady" (R. 29).

Melmi testified that she protested "for God's sake, for God's sake" (R. 25) and was "afraid to the point" where she was "absolutely dizzy" (R. 26). The soldier had a flashlight and a revolver and hit her on the nose (R. 12,26). He "finished" and "got up" and the other soldier came in immediately (R. 26,27). He had a rifle and he "did what the first one did with the exception of staying in longer", and then "went out" (R. 27). His penis penetrated her and she did not consent. She was "scared to death" and "couldn't do anything" (R. 27). She was "scared shivering scared" and said "Please, for God's sake. I'm just like your mother" (R. 30). She did not help either soldier; each spread her legs open and inserted his penis (R. 29,30). As each soldier was on top of her he placed his gun "right on my stomach" until he had finished (R. 31). She was "definitely scared to death" for her children and herself (R. 29). Melmi Bent Abdellah's son, Salah, testified that he saw both men "screw" his mother (R. 15) and "heard her cry in defending herself" (R. 18); he was "about two to three meter, right in front of the house" (R. 15) and could see everything that went on by the "old fashion oil lamp" in the hut (R. 18). She resisted both soldiers (R. 20) and "cried and cried" (R. 12). As they left, they backed away with the rifle pointing at Salah, untied his hands, hit him "again in order not-to holler for anybody", put a blanket on his face and a chair on top of it and hit him again (R. 12).

Salah did not identify accused but knew the one who had the flashlight in his hand; he could identify the other by his voice (R. 13). Melmi thought she would know one of the two soldiers who attacked her (R. 27), "because he had the flashlight near beside him" and she "looked

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at him clearly...he removed the handkerchief and put it on again" (R. 31). She indicated accused in a general manner, putting her hand on him and saying "I'm not definitely sure, but I think it's one of these two men. She thought that the soldier she touched (accused) was the first one who came in her house (R. 28).

Two soldiers who were on the oil pump detail with accused saw him and a Private Herald come into camp 21 September about 2200 hours, wearing fatigue clothes and both carrying rifles. Each said he had been up to an Arab hut and "screwed an Arab" and accused said "that no one was supposed to see or hear anything around there that night" (R. 35,36,39, 40,42). He didn't say or suggest what Arab hut it was (R. 42); the only other Arab huts nearby were across a river, which was a "little over knee deep" and there were no bridges (R. 38). Accused and Herald had been at camp about 2000 hours, gotten their rifles and held a "shooting match" nearby, shooting at tin cans (R. 38,40). They were "pretty well lit up" (R. 41).

A Military Police officer testified that on 23 September 1943, he questioned accused several times and at considerable length (R. 45). Accused's company commander was present (R. 49). Witness read to accused Article of War 24 (R. 45) and told him, among other things, that he need not make a statement and that anything he said could be used against him. No promises or threats were made (R. 51). Accused made statements to witness which the latter believed to be untrue (R. 45) but after he had been confronted with the statements of witnesses including "the Arabs" (R. 46) and had been told by his company commander that "the right thing to do was to tell us exactly what happened" (R. 45) he made and signed a written statement which was transcribed substantially in the words used by accused (R. 50). The company commander testified that he furnished some of the phraseology used in the signed statement but that accused read it and that "the sense of it was essentially the man's thoughts as he dictated them to me" (R. 55). After Private Joe R. Herald, Company D, 338th Engineer General Service Regiment, had testified for the defense that he had observed that the questioning of accused was greatly extended and conducted in a harsh manner (R. 58-60) the written statement of accused was received in evidence (R. 61). It was as follows:

"I have had the 24th Article of War read to me and I fully understand same. Signed Private William D. Kimbrell, ASN 34393207. Statement: On the night of September 21, 1943, Ison, Herald and I left camp at about 1900 hours and went up town to Djedeida where we had a few drinks and purchased some more wine which we consumed before arriving at the pumping station. We were all feeling the effects of the wine, and Herald and I had a shooting contest in a nearby field. We left the pumping station, taking our rifles with us, and arrived at the Arab hut about 2130 hours.

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Herald pointed his rifle at the Arab boy who was lying down down in front of the hut. We both had handkerchiefs tied over the lower part of our faces. I entered the hut. The woman made an exclamation and I violated her. There was no resistance on her part. I left the hut which Herald entered. In a few minutes Herald came out and we both returned to the pumping station and went to bed" (Ex. 5); (R. 61,62).

Accused testified that when he made the statement to the investigating officer he did not use the word "violated", but said "I screwed her" (R. 64,81). He also stated that he told the captain he "couldn't swear that Herald pointed the rifle because" he didn't see him; the captain "said that was alright" because Herald had said it (R. 64). Accused testified that he had been drinking from 1600 hours in the neighboring town of Djedeida with Herald and another soldier; when they got back to camp he and Herald shot at tin cans with rifles; neither had a pistol (R. 64,65). They decided to go back to town for another drink and as they passed the Arab hut they went in for some "vino" (R. 65). Accused threw his flashlight on the door and saw an "Arab woman sitting there kind of on the floor with her knees up". He walked in, leaned down and asked for "zig-zig" (R. 65).

"She said something, then leaned back, laid back, so I took that for okay, and I laid my rifle down, got down there and got ready and took my penis out and started to put it in, and she took a hold of it and guided it for me" (R. 65,66).

His rifle was slung on his shoulder (R. 65) and he did not threaten her with it or strike her (R. 66). She did not push him away (R. 68), she assisted in the intercourse and "was right with" him (R. 66). He saw the babies, lying on each side of her (R. 66). He stayed four or five minutes, then came out and told Herald "to go in and get him some 'zig, zig', it was okay" (R. 66,67,70). He didn't tie Salah with his handkerchief as Salah said, for he only had one and that was on his face. They had put the handkerchiefs on so they would not be recognized if someone came to see about the rifle shooting which he knew was wrong (R. 67). He waited outside for Herald, did not touch Salah, talk to him or hold his rifle on him (R. 67,68). Herald "finished" (R. 68) in about five minutes and they returned to camp; they were at the hut at most 25 minutes.

Accused testified that at camp he told the other soldiers he had "screwed" an Arab; he said it "out loud", "it wasn't a secret". He told them not to say anything as he did not want it to get back to the company; he knew he had "done wrong shooting the rifle" (R. 69). Accused also testified that at the company line-up the next day, the "Arabs" picked out Herald as one of the offenders, and also a Private Duncan (R. 69) but not him. He saw no bruises on the Arabs and he was not asked if he

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wished to ask them any questions(R. 69,70).

Upon cross-examination accused stated that, about 2100 hours, after the "little shooting match" (R. 70) he and Herald started for the Arab hut, putting their handkerchiefs on about a third of the way down (R. 70, 71), because they were afraid someone from their camp would come and see about the shooting (R. 77). He didn't know why one of them stayed outside the hut, he just thought he would "go on in and see if they had any vino" (R. 77). He did not know why he kept his mask on while having sexual intercourse; he "hadn't thought of it" (R. 77). It didn't slip off and it didn't get in his way; he "had completely forgotten about having it" (R. 80). He gave the Arab woman nothing. He had never been in the hut before (R. 78,79) and had never bought wine there (R. 79).

Private Herald testified for the defense that on the night in question he and accused left the pump station around 2000 hours, "hunting for some more vino" (R. 93). They put handkerchiefs over their faces because "we had a good job and we'd done the shooting, and we didn't want anyone to recognize us". When they reached the Arab hut, accused flashed his light inside and entered. He came out in about five minutes and said "I got some zig, zig. Go on in there and get you some. Everything is okay". Herald went in and found the Arab woman sitting on the pad "And she laid over for me and without any resistance at all, and I had taken my penis out, and she spread her legs for me and she put it in for me" (R. 93). He carried his rifle at sling arms (R. 93), and propped it at the corner of the hut (R. 93). He did not have a pistol, and did not "hold a gun on anybody" nor hit anybody (R. 94). He was in the hut for about five minutes, then returned to camp with accused. He did not remember his handkerchief falling down and getting caught while he was having intercourse (R. 94). He did not give the "old lady any money" and he had never been to the hut before and didn't know who was in it (R. 97). They took their "handkerchiefs off somewhere between the Arab hut and the pump" (R. 95).

4. There is thus direct and positive evidence that at the time and place alleged accused forcibly and without her consent had unlawful sexual intercourse with Melmi Bent Abdallah, the woman named in the Specification. At nine o'clock on a dark night, with a handkerchief covering his face and armed with a rifle, he entered an Arab hut where the woman was sleeping with her children, struck her and threatened her with the rifle, pushed aside her clothes, penetrated her genitals with his penis and completed the act of intercourse against her will, overcoming her resistance by force or by implied threats of force, and impervious to her protests and pleas. All the elements of rape as alleged in the Charge and its Specification were fully established by the evidence (MCM, 1928, par. 148b; CM NATO 386, Speed; CM NATO 779, Clark-Massie).

Accused admitted the act of sexual intercourse but denied that it was accomplished by force and without the woman's consent. The fact, however, that the two soldiers, armed with rifles and their faces covered

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with handkerchiefs, approached in the nighttime a house which they had never before entered negatives any theory of consent. Force, intimidation and physical violence are clearly demonstrated by all the attendant circumstances, including the physical restraint placed upon the woman's son as each in turn entered the hut and made the assault. There was an abundance of evidence that the act of intercourse was accomplished by force and without the woman's consent. The findings of guilty are amply supported by the evidence.

5. In support of an apparent contention by the defense that the charges were not investigated as required by Article of War 70, accused testified that he did not know the investigating officer (Major Forrest J. Whittemore, Field Artillery), that no major had visited him (R. 70) as investigating officer (R. 76) except to inquire as to his serial number (R. 82,83), and that accused had not prior to the trial been afforded an opportunity to interrogate the witnesses against him (R. 70). Herald testified for the defense substantially to the same effect (R. 91-93). Other witnesses for the defense, including officers on duty at the stockade where accused was confined prior to the trial, testified that insofar as they knew Major Whittemore had not interviewed accused at the stockade (R. 102,107,111,113,114).

Accompanying the record of trial is a report of investigation of the charges in the case of accused, purporting to be signed by Major Whittemore and dated 4 October 1943. Among other things, this report recites

"1. The charges herewith have been investigated, as directed by par. 35 a, MCM 1928. The accused was informed at the outset of; the offenses charged against him; the names of the accuser and of the witnesses; his right to cross-examine witnesses against him, if they are available, and to present anything he may desire in his own behalf, either in defense, or mitigation; his right to have the investigating officer examine available witnesses requested by him; and his right to remain silent or to make or submit a statement in any form and that if he did make such a statement it might be used against him.

2. The Summary of Evidence attached hereto includes all the substantial evidence I have been able to find, for and against the accused. Exhibit 1 to IO".

Copies of what purport to be signed statements of witnesses, including statements by Melmi Bent Abdallah and Salah Ben Brahim, dated 4 October 1943, are attached to the report.

Major Whittemore testified, as a witness for the court, in response to a question as to whether he had done the things certified to in the report of investigation, "Yes, sir, I feel that I did" (R. 84). He told accused of the statements of witnesses against him and believed that,

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as was his custom, he advised accused that he had a right to be confronted by the "Arab woman". He also testified in this connection that he did not specifically tell accused that he could question the Arab witnesses and, as he recalled, did not specially refer to the statements made by the Arabs (R. 87) except as he referred to the "accusers" (R. 88). Witness testified that the interview lasted ten or 15 minutes (R. 85). He could not recall exactly what he had said to accused but

"Well, as I say I generally use stock questions like first telling them what the statements are against them, and asking them if they wish to see the ones that made the statements" (R. 87).

Witness did not read the statements to accused but told accused "there were several statements made" by the "various men in their outfit". Witness interviewed the "Arab woman" after talking to accused (R. 87). On the morning of the trial, some days after the investigation, witness questioned accused concerning the latter's serial number (R. 84,85).

The testimony of the investigating officer fairly shows that he did in fact interview accused and did in fact make an investigation of the charges.

Article of War 70 provides, in pertinent part,

"No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused".

Paragraph 35a of the Manual for Courts-Martial, after repeating the specific requirements set forth in the statute, provides:

"Where the investigating officer makes known to the accused the substance of the testimony expected from a witness as ascertained by written statement of the witness, interview with the witness, or other similar means, and the accused states that he does not desire to cross-examine such witness, the witness need not be called even if available".

Under the Manual for Courts-Martial the requirements of the statute are fulfilled if the substance of the expected testimony of an available witness is made known to accused and he affirmatively waives his right to cross-examine that witness.

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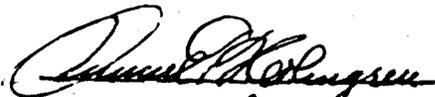
It does not satisfactorily appear in this case that there was a waiver by accused of his right to cross-examine the witnesses against him, particularly the Arab woman and her son. That part of the investigation involving the interview between the investigating officer and accused appears to have been at best perfunctory and a mere formality. It is doubtful whether accused was in fact afforded any real opportunity to challenge the veracity and accuracy of the key witnesses against him and to present to the investigating officer his defense of alleged consent by the injured woman. The inquiry appears to have been essentially an ex-parte one.

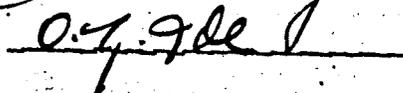
But regardless of the deficiencies in the investigation and the inaccuracies of the report of investigation, the Board of Review believes that there was a substantial compliance with the requirements of Article of War 70 and of paragraph 35a of the Manual for Courts-Martial in that there was a detailed inquiry into the facts surrounding the alleged offenses. The facts were fully developed and the only actual issue raised was as to whether the victim of the assault consented to the acts of accused. The testimony of the woman in this regard, as contained in the statement obtained by the investigating officer, was very positive. It is difficult to envisage any practical and real advantage which would have accrued to accused through confrontation and cross-examination of the witness. At the trial accused was afforded every opportunity to present his defense, the evidence of guilt was convincing and the Board of Review is of the opinion that the procedural deficiencies in the investigation did not injuriously affect the substantial rights of accused within the meaning of Article of War 37.

6. Accused and Herald, charged separately, were brought before the court for a common trial. At the arraignment defense counsel moved for a severance, which motion was granted and the court proceeded to the trial of this accused.

7. The charge sheet states that accused is 33 years old. He was inducted into the Army of the United States 1 October 1942. He had no prior service.

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

 Judge Advocate.

 Judge Advocate.

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

(203)

APO 534, U. S. Army,
24 November 1943.

Board of Review

NATO 910

UNITED STATES)

v.)

Private BURLIN (NMI) HUDGINS)
(34102532), Battery B, 141st)
Field Artillery Battalion.)

MEDITERRANEAN BASE SECTION)

) Trial by G.C.M., convened at
) Oran, Algeria, 7 October 1943.
) Dishonorable discharge and
) confinement for life.
) United States Penitentiary,
) Atlanta, Georgia.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Burlin Hudgins, Battery "B", 141st Field Artillery, did, at Oran, Algeria, on or about 26 September 1943, forcibly and feloniously, against her will, have carnal knowledge of Regeinne Linarez.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction, for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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3. The evidence shows that on the evening of 26 September 1943, between about 1900 or 2100 hours (R. 8), "Regine" Linares, a female child of the age of seven years (R. 6), was sitting on the sidewalk in front of her home, 7 Rue Chevreuil, Oran, Algeria with accused (R. 7,8). She testified that he talked to her but she did not understand him. She went with him to the "barrels" in a field near her house, and there, "mal eleve" - with bad upbringing, he put his penis into her, into "the thing" she used "to urinate" with, and "with his hands he put" it in her "behind" (R. 8,9). She was in the "barrels" for "a long time" and saw no one else there except a little girl, Christiane Tari (R. 9). She wore a pair of pants and a dress (R. 9). She tried to get away from the soldier; she lifted up her foot and he caught it. She "cried and yelled" but he would not let her go (R. 11).

Mademoiselle Angela Cocordano was at her home, Villa de Roses, 42 Boulevard Gauthier between 2100 and 2200 hours on the night in question when a lady came and asked her to search for her little daughter who had disappeared (R. 11). She procured a flashlight and left with a Yeoman Second Class, Odus C. Barrett, who was on shore patrol duty at the Villa (R. 12,14,15). They went about 500 yards from the villa, searched among some large barrels piled in a field and flashing the light, discovered accused and Regine Linares there (R. 12,15; Ex. G). Accused was sitting on the ground with his legs extended and the little girl was sitting in his lap; as soon as the light was flashed she got up (R. 12,15). Mademoiselle Cocordano noticed that accused had blood on the front of his pants (R. 13), and Barrett testified that accused's pants were down and "all of his privates was out" of his pants; "his penis and also his balls" were "hanging out" but could not say that accused had an erection (R. 16).

Regine walked back to the Villa de Roses with Mademoiselle Cocordano, carrying her panties in her hand, and was put to bed (R. 12). When Barrett returned to the villa, he examined her privates with his flashlight, and "it looked as if there was blood coming...as if she was bursting or something...like it was spread and...bleeding" (R. 16,17). A military policeman saw the little girl lying on the bed and noticed blood spots or some stain on her dress (R. 28). He testified that she seemed to be suffering: "she was lying there whimpering like kids do or making attempts to cry, and when they moved her she would whimper" (R. 28,29). A military police sergeant arrived at the villa about 2130 hours and "the lady inside" showed him the privates of "the little seven year old girl lying on the bed"; they "looked as if they had been torn a little bit and was real red". He also "observed stains on the tail of her dress" (R. 30).

Regine was taken by ambulance to the 7th Station Hospital (R. 33) where a medical officer examined her. His examination disclosed that "the vaginal opening...was patulous or wider open than is normal in a virginal female; that there was a small laceration on one of the walls of the vagina extending from just within the opening for approximately five-eighths of an inch in depth, that is in extent; that there was a small amount of sero-sanguinous or blood-tinged fluid within the vagina itself" (R. 22). This

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condition "was undoubtedly caused by some external trauma or injury of a nature sufficiently forceful to cause the laceration and subsequent bleeding" (R. 22,23). In his opinion, the "unusual width of the vaginal opening ...was caused by the admission of some external instrument" (R. 23).

An American officer took Regine home (R. 19). When she arrived there she hugged her mother, took her "by the neck" and said an "American brought me and hurt me" (R. 19,20). "Her face was pale and her eyes had black rings around them...her private parts" were "full of blood" so her mother "put a handkerchief there and the next morning it was full of blood" (R. 21).

When Yecman Barrett discovered the accused with the little girl across his lap, he "collared him" and "hit him" and said to him "Soldier, you are in bad shape". Accused mumbled something Barrett did not understand and then Barrett turned him over to two military policemen who took him to the Villa de Roses (R. 15,16). A military policeman arriving shortly thereafter saw accused standing there with the shore patrol and noticed that he had "blood on his pants" on both sides of the fly (R. 27,28). He testified that "His fly was open and about an inch of his penis was protruding through the fly" (R. 28). Witness took accused out to a truck, a two-and-a-half-ton GMC. Accused got on the back toward the rear end and was taken to the Criminal Investigation Department office. In witness' opinion accused was sober, because "he was able to walk and he seemed to have his wits about him" (R. 29). A military police sergeant also observed accused walk and get on the truck; in his opinion accused was not drunk for he walked straight and "handled himself very good" (R. 31).

Accused was taken to Military Police Headquarters and then to the Criminal Investigation Department office (R. 34). In the office he was examined, and his name and serial number taken from his dog tags by two officers, one a lieutenant of the Military Police, and the other a lieutenant of the Criminal Investigation Department (R. 32,35). Accused's trousers were open and the head of his penis was visible (R. 32,35); there were large stains of a brownish color around the fly part of the trousers themselves (R. 35). He "stood on his two feet" and answered questions for about twenty-five minutes very coherently. In the opinion of the military police officer accused was sober: "his eyes were not bloodshot...his face did not appear to be flushed" and no odor of liquor was smelled (R. 33).

Lieutenant Henry W. Duncklee, Corps of Military Police, the member of the Criminal Investigation Department, testified that he instructed accused to remove his trousers, "and he stood outside (the) office without holding on to anything stable, first on one leg and then on the other; then he removed his underclothing the same way" (R. 35). In this officer's opinion accused was not drunk:

"When ordered to remove the trousers, he was able to stand on both feet, bend over and remove those trousers without any support or by holding on to anybody in the room, and he then lifted up one foot standing on the other and removed one leg and then did it on the other side. He did

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this with the underdrawers also without any support whatsoever...then he walked from the office to the car walking without any support...and he did not stagger. He did not appear to be drunk" (R. 39).

He did not say much but what he said was clear; his facial appearance was good and his face did not seem to be flushed (R. 39).

A staff sergeant of the Criminal Investigation Department also saw accused remove his trousers and shorts, and gave him another pair. He testified that accused's actions while changing his pants and shorts convinced him accused was not drunk (R. 46,47). He observed accused's locomotion, "it was quite steady"; and he "wasn't what you would call flushed". There was no outward appearance that he had been drinking (R. 48).

After accused had been in the Criminal Investigation Department office approximately half an hour, he was taken to the 7th Station Hospital, where he was examined by a medical officer and blood for a test was taken (R. 23, 24,37). The next day blood purporting to be that of accused was tested "according to the procedure given in Simmons Manual for determination of alcohol...a standard laboratory method for the U. S. Army" (R. 49). The finding was "1.0 milligrams of alcohol per cc. of blood" which, according to paragraph 4, page 509, Simmons Manual, "indicated a condition he called 'decent and decorous'" (R. 49).

Accused was returned, after the blood test, to the Criminal Investigation Department office and turned over to the military police for the night. The next morning a chaplain talked to him in the office and accused said he wanted to make a statement. Lieutenant Duncklee "told him that he did not have to make a statement, but that it was his right to do so, and if he wanted to he could but he didn't have to make one if he didn't want to and he understood that thoroughly". He warned accused "of his rights under the 24th Article of War particularly" and that the statement might "be used against him or for him". Accused's statement, written and signed by him (R. 37) in the presence of Lieutenant Duncklee, was admitted in evidence. It reads as follows:

"27 September 1943. I, Burlin Hudgins, A.S.N. 34102532, Rank: Pvt, Organization: 141 F. A. Bn, having been warned of my rights under the 24th A.W., by _____, and without threats or promises, duress or coercion, and knowing that anything that I say may be used against me, do hereby make the following statement: I pvt Hudgins did while intoxicated forge my self on the said girl. I had been drinking since too o'clock, and mixing drinks, and it seem to run me crazy, I took the said girl behind some barrials, and remain there until I was arrested by said sa(i)lor" (Ex. J).

The trousers and shorts which accused removed in the Criminal Investigation Department were marked by Lieutenant Duncklee at that time,

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remained in the same condition under lock and key, were identified by him at the trial and were admitted in evidence as Prosecution's Exhibits "H" and "I", respectively (R. 35,36).

Regine Linares identified the pants she was wearing the night of 26 September and they were admitted in evidence as Prosecution's Exhibit "A" (R. 10). They were subsequently identified by Mademoiselle Cocordano (R. 12) and Barrett (R. 17) as the ones Regine was wearing.

Accused testified that he was 24 years old, had entered military service 22 April 1941 and had arrived in North Africa a little over a month before the trial (R. 40). On 26 September 1943, he left his battery area after dinner, went to Oran and drank wine in a bar until it was closed. Then he went with some colored soldiers and drank beer, cognac and more wine. They all agreed to go to an off-limits place and left and he did not remember if they "went to the house or not. The next thing I remember was the flashlight was in my face and they arrested me". The first time he remembered seeing Regine Linares was in an office. When the flashlight was thrown on him he was sitting on the ground near some barrels; he did not know on what street nor in what part of Oran it was, nor did he notice the condition of his clothing (R. 40). After he was arrested, he was taken to a truck, got on it, "and then went somewhere, I don't know where, and then they told me to get off and I got off". Then he was taken to some office and carried before an officer who asked him questions, "and some fellows there, one of the M.P.s went to slapping my face because I couldn't tell him what he was asking me". Then he was taken before Lieutenant Duncklee and he tried to answer his questions, "and there was another fellow sitting on the side and he got up and grabbed me by the arm and jerked me up and began to slap my face". He told the Lieutenant all he knew about leaving the beer joint and being picked up, and then took his trousers and shorts off (R. 41). Then he was taken to the military police jail where he spent the night and the next day he wrote out his statement (Pros. Ex. "J") in Lieutenant Duncklee's office (R. 41). He saw some sailors that night but did not know if they were shore patrols. He was told it was a sailor who flashed the light in his face (R. 43,44). Accused recalled going to the hospital and the sample of blood being taken from him. He had had nothing to eat at noon and did not recall leaving the last "beer joint", except that it was in the evening. He remembered getting on the truck without assistance and said once that he remembered getting off the truck and once that he did not remember getting off but "it had a big high body on it". To the best of his knowledge the military police who arrested him were white (R. 42), but he did not remember. He did not remember the policeman who struck him in the face, did not know if it was a private or a noncommissioned officer and would not know him again if he saw him, but he did know he was struck four or five times with an open hand. The second time he was struck was in Lieutenant Duncklee's office by a man wearing civilian clothes (R. 43).

In rebuttal, Lieutenant Duncklee and two enlisted men of the Criminal Investigation Department testified that at no time, either at Military Police Headquarters or at the Criminal Investigation office, did they or

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anyone, in or out of their organizations, in uniform or in civilian clothes, strike accused or in any way put a hand on him, either the night of 26 September or the morning of 27 September (R. 44-46).

4. It thus appears from uncontradicted evidence that at the time and place alleged accused had carnal knowledge of Regine Linares, a female child of seven years. Accomplishment of the carnal knowledge by force is clearly inferable from the testimony of the child and from the nature and extent of her injuries.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent". The crime of rape may be committed on a female of any age (MCM, 1928, par. 148b). At common law sexual intercourse with a female under ten years of age was punishable as rape, whether the act was accomplished against her will or not, or with or without her consent (52 C.J. 1010, sec. 15, note 43). A female under that age was considered incapable of consent (52 C.J. 1020, sec. 30; Winthrop's, reprint, p. 678) and her acquiescence in the act did not constitute consent (Wharton's Crim. Law, sec. 712; CM NATO 218, Kendrick; CM NATO 72, Paluszewski).

But irrespective of the legal presumption, the evidence is replete with facts and circumstances indicative of actual want of consent. The child did not directly testify that she did not consent, but nonconsent is plainly inferable from her testimony that she cried out and tried to go away, but was restrained; and from the injuries she suffered. Rape by force and without the female's consent, was established.

Accused testified that he was drunk and, in effect, that he did not recall what occurred. There was ample evidence, however, that he was not drunk.

5. The admissibility of the testimony pertaining to the significance of the blood test of the purported sample of accused's blood was questionable, since there was but slight evidence that the sample of blood tested was that of accused. In view of the other convincing evidence that accused was sober, it cannot be said that the substantial rights of the accused were injuriously affected by any possible error in this connection.

6. The court permitted the assaulted child, Regine Linares, seven years of age, to testify. Prior to her testifying she was questioned and the court decided, over an objection by the defense, that she was competent (R. 5-7). This was proper: "The competency of children as witnesses is not dependent upon their age, but upon their apparent sense and their understanding of the moral importance of telling the truth" (MCM, 1928, par. 120b). There appears to have been no abuse of discretion in this case.

7. Regine's mother was permitted, over objection by defense, to testify that the child said to her "An American brought me and hurt me" immediately after she was brought home. This was properly admitted, as a

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prompt complaint, for the purpose of corroborating the testimony of the prosecutrix relative to the corpus delicti (Bull. JAG, January 1943, par. 395 (22)).

8. The Specification charges the name of the child as "Regeinne Linarez"; the evidence establishes the name of the child as "Regine Linares" (R. 7). No issue was made of this on the trial and there is no showing that accused was in any way misled. The law does not regard the spelling of names so much as their sound. Extreme exactness in paraphrasing or rendering into English names foreign to that language is not required (45 C.J. 383; CM NATO 384, Middleton-Burney). These two names are sounded alike in the English language and the variance in the spelling is immaterial (CM NATO 416, Tucker).

9. The charge sheet shows that accused is 24 years of age. He was inducted into the Army 22 April 1941. He had no prior service.

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

 Judge Advocate.

O. J. F. De, Judge Advocate.

Yvonne L. ..., Judge Advocate.

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

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

Board of Review

NATO 915

UNITED STATES)

v.)

Privates EARL (NMI) CARTER)
(36391998) and FRANK (NMI))
GREER (38122485), both of)
1911th Ordnance Company)
(Aviation) (Ammunition).)

XII AIR FORCE SERVICE COMMAND

Trial by G.C.M., convened at Tunis,
Tunisia, 23 August 1943.

As to accused Carter: Dishonorable
discharge and confinement for
life.

U. S. Penitentiary, Lewisburg,
Pennsylvania.

As to accused Greer: Dishonorable
discharge, suspended, and confine-
ment for 20 years.

Disciplinary Training Center
Number 1.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

2. Accused were tried jointly upon separate Charges and Specifica-
tions as follows:

CARTER

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

Specification: In that Private Earl Carter, 1911th Ordnance
Company (Aviation) (Ammunition), did, on the Djedeida -
Tebourba road, Tunisia, on or about 2 August 1943, with
malice aforethought, willfully, deliberately, feloniously,
unlawfully, and with premeditation kill one Second Lieutenant
Charles E. Hoag, Company B, 817th Engineer Aviation Battalion,
a human being, by shooting him with a rifle.

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

Specification 1: In that Private Earl Carter, 1911th Ordnance Company (Aviation) (Ammunition), did, at or near El Bathan, Tunisia, on or about August 2, 1943, lift up a weapon, to wit a rifle against First Lieutenant Wallace G. Davis, Company B, 817th Engineer Aviation Battalion, his superior officer, who was then in the execution of his office.

Specification 2: In that Private Earl Carter, 1911th Ordnance Company (Aviation) (Ammunition), did, at or near El Bathan, Tunisia, on or about August 2, 1943, lift up a weapon, to wit a rifle against Second Lieutenant Charles E. Hoag, Company B, 817th Engineer Aviation Battalion, his superior officer, who was then in the execution of his office.

Specification 3: In that Private Earl Carter, 1911th Ordnance Company (Aviation) (Ammunition), did, on the Djedeida - Tebourba road, Tunisia, on or about August 2, 1943, lift up a weapon, to wit a rifle against First Lieutenant Wallace G. Davis, Company B, 817th Engineer Aviation Battalion, his superior officer, who was then in the execution of his office.

GREER

CHARGE: Violation of the 64th Article of War.

Specification 1: In that Private Frank Greer, 1911th Ordnance Company (Aviation) (Ammunition), did, at or near El Bathan, Tunisia, on or about 2 August 1943, lift up a weapon to wit a rifle against First Lieutenant Wallace G. Davis, Company B, 817th Engineer Aviation Battalion, his superior officer, who was then in the execution of his office.

Specification 2: In that Private Frank Greer, 1911th Ordnance Company (Aviation) (Ammunition), did, at or near El Bathan, Tunisia, on or about 2 August 1943, lift up a weapon to wit a rifle against Second Lieutenant Charles E. Hoag, Company B, 817th Engineer Aviation Battalion, his superior officer, who was then in the execution of his office.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

A common trial was directed by the convening authority, subject to objection by either accused. Before arraignment each accused expressly stated there was no objection to a common trial (R. 3).

Accused Carter pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay

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

Accused Greer pleaded not guilty to the Charge and Specifications. He was found guilty of Specifications 1 and 2, not guilty of Specifications 3 and 4, and guilty of the Charge. Evidence of one previous conviction for being drunk and disorderly in camp in violation of Article of War 96, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 40 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, reduced the period of confinement to 20 years, ordered the sentence as thus modified duly executed but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated Disciplinary Training Center Number 1 as the place of confinement. The proceedings were published in General Court-Martial Orders No. 10, Headquarters XII Air Force Service Command, 31 October 1943.

3. The evidence shows that at about 1700 hours on 2 August 1943, a weapons carrier traveling at a high rate of speed along the road between Djedeida and Tebourba, in Tunisia, struck and knocked down an Arab pedestrian. The vehicle ran off the road for a distance of some 50 feet and upon regaining the highway continued its course toward Tebourba. A soldier on duty near by was a witness to this occurrence and reported it to First Lieutenant Wallace G. Davis and Second Lieutenant Charles E. Hoag, both of Company B, 817th Engineers Aviation Battalion, who, traveling toward Djedeida, came by in a "jeep" about five minutes thereafter. With this soldier, the officers turned around and set out in pursuit of the weapons carrier. They entered Tebourba and not finding it there returned on the same route. When about three miles from that town, near El Bathan, the weapons carrier was identified facing the opposite direction waiting at a one way bridge for oncoming traffic (R. 7,8,17,18,32,33,93).

The officers got out of the jeep and Lieutenant Davis, the senior of the two officers, approached the driver of the weapons carrier, who later proved to be accused Carter, and told him he was under arrest (R. 8,23,24, 28,33,97). Carter retorted "you can't arrest me". "You haven't got anything on me". Lieutenant Davis replied, "Soldier, if you haven't done anything, nothing will happen to you" and thereupon ordered this accused to get out of the weapons carrier (R. 33,97). Carter said "You aren't going to take me anywhere" (R. 11) and he and the other accused, Greer, whose name was later ascertained, then simultaneously "grabbed for the Springfields in the back of the weapons carrier" (R. 33,35,97). Carter inserted a clip of cartridges and while saying "You won't take me anywhere", opened the bolt. Lieutenant Davis "grabbed the gun" and placed his left hand against the bolt (R. 9,20, 97) so "he couldn't shove the cartridge home" (R. 11,97,102,103). Carter had the rifle pointed toward Lieutenant Davis (R. 95,97,98,102). With the assistance of the soldier who had come with the officers, the rifle was

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wrested away from Carter (R. 9,33,34) and Lieutenant Davis removed the bolt from the rifle (R. 25,26). In the struggle the bolt got caught in Carter's trousers in such a way as to tear them (R. 9,34,36), causing him to exclaim "Look what you have done to my pants" (R. 34). Meanwhile, at the other side of the vehicle, Lieutenant Hoag seized and got possession of the rifle Greer had in his hands (R. 9,10,35,98). The rifle was "in the general direction of Lieutenant Hoag, who grabbed it by the barrel" (R. 17).

The bolts were taken from both rifles (R. 25). The accused demanded their rifles and, as one witness testified,

"Lieutenant Hoag said it was all right for them to take their rifles as we had the bolts. And then they jumped out of the weapons carrier, and wanted the bolts back. The officers wouldn't give them to them. One reached in the glove compartment of the jeep, and grabbed the first aid kit. He threw it out on the hood. While Lieutenant Davis was reaching for the first aid kit to put it back in the compartment, the other fellow retrieved the bolt out of Lieutenant Hoag's pocket. He got the bolt back, and started to put it in his Springfield. Private Carter called the officers some nasty words, and then Lieutenant Hoag saw him putting the bolt in the Springfield" (R. 34).

The accused did not submit to arrest (R. 33,34). Neither officer was armed (R. 10,11,22). Accused, when requested, refused to tell their names and organizations but finally wrote them on a piece of paper, Carter writing his name as "Earl Brown" (R. 10,29,30). A "Lieutenant Salisbury" was mentioned as their commanding officer (R. 10). The officers finally left because, without assistance, "there was no use trying to take these men in or get any further information from them" (R. 22,34). Lieutenant Davis reported the incident at the orderly room of accused's organization and to his own commanding officer (R. 23,28,30,107).

Later that day, at about 1930 or 1945 hours, Lieutenants Davis and Hoag, while enroute to Tunis, met the same weapons carrier at a place on the same highway about two miles from Djedeida. They recognized Carter as the driver, turned around and stopped the weapons carrier (R. 11,12,17,22,23). Also in the vehicle were Greer, two soldiers subsequently identified as Private Ernest Winston, 1911th Ordnance Aviation Ammunition Company, and Jeffrey Kearney, 2008th Quartermaster Company, and about four other persons (R. 12,47,48,63,102). Greer was seated next to Carter and Winston "behind Greer right up against the seat". There were two rifles in the vehicle (R. 66).

The officers, who were now armed with pistols, approached Carter in the driver's seat, where Lieutenant Davis again told them he was under arrest (R. 13,98). Carter started arguing as before and refused when asked by Lieutenant Davis to show his "dog tags" and when ordered to get out of the weapons carrier (R. 13,60,61,66,98). When the officer asked his name,

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Carter replied "they didn't need that that all he needed to get was the truck number" (R. 66) and when the request was repeated Carter told the officer "he didn't think he had to tell him" (R. 67). When ordered "to proceed to his camp" Carter answered "he wouldn't do that for a Brigadier General" (R. 82,83). They were "arguing back and forth" (R. 60) and at some time while this was going on, Carter "grabbed his rifle" in back of him (R. 13,98) and started "waving it about" (R. 60,67). Lieutenant Davis testified that Winston in the rear of the vehicle "grabbed it from him" (R. 13,98), while another witness testified it was Greer, sitting next to Carter, who took the rifle "away from him, and passed it to one of the boys in back who removed all the ammunition from the rifle" (R. 60). Still another witness recalled it was Winston who "took the bolt and cartridges out", testifying that Carter thereupon "started arguing with Winston, and said he wanted his rifle and bolt back" (R. 67). One testified that "there was kind of a wrestling between the driver and the man sitting beside him on the other seat" (R. 83). There is testimony that the rifle was returned to Carter "only after Carter had consented to go with the Lieutenant" (R. 67); and that following the "wrestling" between Carter and "the man sitting beside him on the other seat", "there was a fellow sitting beside the driver, and he handed the bolt and rifle back to him" (R. 83).

When Carter regained possession of the rifle, Lieutenant Hoag "unbuttoned his holster" and, with respect to Carter, "the argument started again as to whether he would go or not" (R. 67). Carter "shoved" the bolt into place and thereupon pointed the rifle at Lieutenant Davis (R. 83,84,85, 89). Lieutenant Davis, describing Carter's actions, testified that he held it "more or less in shooting fashion with the muzzle down holding it close to the front of his body" and "saying 'Everybody leave me alone', directing his statements to everybody. He said 'No one is going to take me anywhere'. He turned around during these statements" and was talking to "everybody" (R. 98). One witness testified that he saw Carter standing up in the driver's seat and heard him say, "Come and get me" (R. 88,89,91,92). Another witness did not see Carter standing when he had the rifle pointed at Lieutenant Davis (R. 87).

There is also testimony that Carter got "up and went in the back of the weapons carrier making statements trying to get out of it" and that "another man had gotten into the driver's seat of the vehicle" (R. 14) who said "he would drive them back to their organization" (R. 99). Lieutenant Davis remained on the left side of the weapons carrier "right by the driver's seat" (R. 14,25) while Lieutenant Hoag, when the argument was going on left his position beside Lieutenant Davis, passed in front of the vehicle to the opposite side and subsequently "along the right side toward the rear" (R. 14,15,62,66,96,99); he walked by the front about the time Carter was "wrestling" with the man who had his rifle (R. 83). One witness testified he went "around the back" of the weapons carrier (R. 68,69). Lieutenant Hoag was heard to ask Carter, "Did he know he was speaking to an officer?" and Winston "told Carter that he was speaking to an officer, and to say 'Sir'; or something to that effect" (R. 67,68). Lieutenant Davis testified that at the time when he went around the vehicle Lieutenant Hoag "definitely

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didn't have his gun out" (R. 24). Hoag appeared nervous (R. 68,72).

Lieutenant Davis, describing the occurrence that followed, testified that,

"I was talking to a man who had gotten into the driver's seat and I heard two shots almost simultaneously or practically together. I glanced around and saw this colored boy perhaps five feet from me and on the same side as myself and I saw him fall backwards into the road" (R. 15).

It was later disclosed that the "colored boy" referred to, was Jeffrey Kearney and that he was killed by a .45 caliber automatic pistol bullet which entered through the face and severed the spinal cord (R. 70,102, 104).

A witness who was riding in a truck which had stopped behind the weapons carrier testified,

"I noticed there was some kind of an argument going on. ***They were arguing back and forth, and suddenly the driver jumped up and pointed the gun at Lieutenant Davis. I don't know what he said. I noticed Lieutenant Hoag walking around the front of the weapons carrier, and coming toward our truck. When he did that, the colored fellow turned as if he was warned someone was behind him. The officer fired, and the colored fellow in the back of the truck fired. I looked, and the officer fell back" (R. 39).

This witness testified that as Lieutenant Hoag was

"backing around he went into a crouching position. When he was almost down to the end of the weapons carrier the colored boy with the gun was evidently warned by somebody, and he turned around, and pointed the rifle at Lt. Hoag. I looked at Lieutenant Hoag, and as I did I saw Lieutenant Hoag fire and the colored boy fired" (R. 40).

This witness saw that Carter pointed his rifle, from the waist, at Lieutenant Hoag, "pulled the trigger, and ran to the back of the truck" (R. 44), and testified that Carter had the rifle pointed at Lieutenant Hoag when the latter fired (R. 45).

A witness testified that Carter was "standing with his feet on the cushion" and waved his rifle "changing it from position to position" (R. 71, 73). This witness did not see Carter point it at anyone (R. 72). Another observed it pointed at Lieutenant Davis (R. 89) and by other testimony it was shown that as Lieutenant Hoag was going around in front of the weapons carrier to the other side,

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"The boy standing up followed him all around, and had it pointed at him all the time. Then he turned about, and pointed the rifle back at Lieutenant Davis over on the left hand side, and then turned back at Lieutenant Hoag. At that time the first shot was fired" (R. 60).

One witness heard the shot immediately after he "saw Hoag on the right side" (R. 89). A witness who was watching Lieutenant Hoag testified that as the argument was going on and Carter's gun was waving, the

"Lieutenant took his .45 from his holster and fired. As I looked around I saw Jeff who had already fallen on the road. I started to move back for cover, and I heard another gun go off, and I saw that the Lieutenant was lying on the side of the road in the weeds" (R. 68).

When Lieutenant Hoag "drew the gun he was at the rear wheel on the right seven feet from the front, and about one and a half feet from the rear wheel". This witness saw "his hand go down, and come up with the gun" (R. 72). He testified that the two shots were about a second or two apart (R. 68). Lieutenant Hoag, when he fired, held his gun "In his right hand. Shoulder high" and had it pointed "toward the front seat" (R. 70,72). It was the shot that struck Kearney (R. 70). Lieutenant Hoag, this witness testified, fired first (R. 71), as was the testimony of another (R. 42,43) who could not see the gun at the time it was fired (R. 43) nor how it was held (R. 44). One witness who was watching Lieutenant Hoag saw him "standing and then staggered and fell" after the second shot was fired (R. 72). After the shots were fired Carter was seen on the ground "running around with the gun in his hand saying 'Where's that other fellow'" (R. 39). He "turned and took a couple of steps" toward Lieutenant Davis (R. 21) with the rifle pointed in his "general direction" (R. 22,102). Lieutenant Davis testified he had

"ducked down in front of the weapons carrier and then in a second or two came out and moved in front of my jeep. When I got in front of the jeep I saw Private Carter down in the road on his feet and he had his rifle nearly at a Port position. He walked down the road and turned in my direction and when he turned he brought his rifle a little closer to me. I started hollering at him to get out of there. I didn't know that anybody else had been hit. I didn't want any more shooting up at this time. There were too many people around. At this time I heard somebody say, 'Don't shoot him'. I told Private Carter that I wouldn't shoot him and to get into the weapons carrier. They drove away in the weapons carrier" (R. 15).

Carter in the passenger seat "was standing in the front of the carrier looking over the jeep as he pointed at it with his gun" (R. 15,39).

Winston testified he was with accused in the truck with two "hitchhikers" (R. 48) and that the

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"two Lieutenants drove up in a jeep and said we were under arrest. He asked us our names and organization. The argument started. I told the Lieutenants to let us by as we wanted to see some of our boys. They said we were under arrest, and the argument started" (R. 48).

He testified that Carter finally agreed to go with "the big Lieutenant. He made like he was going to come out over the spare tire. He had taken one step back and was standing in the back of the weapons carrier". Carter reached for his rifle "when the Lieutenant reached for his pistol. The Lieutenant fired as Private Carter jumped". Winston heard two shots, "just a second apart; one right behind the other" (R. 49). He further testified that Carter "didn't have his rifle until the little Lieutenant started arguing and then he held the rifle at trail arms. He wanted Private Carter to step over the spare tire. That's when the Lieutenant fired and when I jumped off". Asked if he ever took the rifle away from Carter, Winston testified, "I reached for it but never did get it until they said let's go and Carter said he was going with him. He then picked up the rifle and started over the spare tire". When the shot was fired Carter had the rifle in his hands but "was fixing to get off" (R. 50). Winston testified further that when the shooting occurred Carter did not have his rifle in a position to use it, but at "that time he was at trail arms" (R. 52). And he also testified that "finally" Carter said he would go with the "little Lieutenant" and as he "was about to jump this big Lieutenant comes up and I saw his gun jump and also it was smoking" (R. 53).

The prosecution offered in evidence a written statement made by Winston on 4 August 1943, "for the purpose of impeaching the witness" who the trial judge advocate asserted was "unexpectedly hostile to the prosecution". The statement was admitted in evidence (R. 51,52; Ex. A). In it Winston had stated that when the officers told the soldiers they were under arrest,

"Carter got pretty hot and so I took his gun away from him and removed the bolt. Later when things started to cool down, I lay down the gun and bolt and Carter picked it up and loaded the gun, after putting the bolt back in. Then the big Lieutenant began to walk around to the opposite side of the truck or weapons carrier. At this time he did not have his pistol drawn. I continued to watch what was going on between the small Lieutenant and Carter. At this moment I heard a shot, and jumped to the ground to seek shelter. A few seconds later I heard another shot and there may have been a third, but I am not sure of the last one" (Ex. A).

Neither officer had been drinking (R. 20).

Some of the prosecution witnesses, one of whom was Winston, were asked whether they heard Greer say "Look out Earl" just before the shooting and also whether prior thereto they heard Lieutenant Hoag make the statement that "I'm going to kill that damm black negro". Each witness, including

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Winston, testified he did not hear either of those expressions (R. 19,42, 58,69).

One eyewitness besides Lieutenant Davis heard three shots fired in "close order" and another thought he heard a third shot but could not be sure (R. 60,83). Three others testified they heard only two shots fired (R. 40,49,68), while another testified he heard only one (R. 89).

When the accused had gone, Lieutenant Davis ordered the "colored boy who fell" taken to the hospital and then walking toward the edge of the road found Lieutenant Hoag lying in a ditch, "bleeding all over", his body "parallel to the road". Lieutenant Hoag's pistol, a .45 caliber, was lying about five or six feet from his back. The weapon was cocked. "On the grip, one side was broken; there was a piece still on the pistol" (R. 16,94,97). Subsequent examination of the pistol showed "evidence of powder flecks" and that it had four cartridges in the clip and one in the chamber (R. 107).

After the shooting, Captain George M. Kelly, Medical Section, 817th Engineer Aviation Battalion, performed an autopsy on the body of Lieutenant Hoag. He found a gunshot wound between the middle and index finger of the right hand (R. 74,77). On the left hand there were two wounds running laterally through the middle and ring finger. The wounds were apparently caused by a high velocity bullet. There was a small "well driven hole" in the back just above the ninth rib and a "jagged hole" in the front of the chest in the region of the third and fourth ribs (R. 75,80). Captain Kelly had practiced medicine in Pennsylvania near the coal fields from 1930 to 1942 and had occasion to observe many persons suffering from gunshot wounds, "definitely at least one every two weeks" (R. 76,77). He testified "There were at least two bullets that wounded Lieutenant Hoag" and that the wounds in the front and back of the body could have been caused by the same bullet (R. 77,78); that a typical wound "usually makes a much smaller entrance and a large exit" (R. 79). The bullet that hit the right hand could not have been the same as entered the chest for "if the bullet which wounded his right hand had gone through his body, it would have to completely change direction, as the bullet wound in his back came from the back". The wound in the back of the body was at a lower level than the one in front (R. 77, 78). In the officer's opinion, Lieutenant Hoag had been shot in the back (R. 80). He testified that "There were pieces of bone missing in each rib which were not driven out the back. It is evident the bullet came from the back" (R. 78). Captain Kelly testified that the cause of Lieutenant Hoag's death was the "gunshot wound of the right chest" (R. 76). While the autopsy was being performed, there was no smell of alcohol which can easily be detected in fresh blood (R. 105).

For the defense, it was shown that on the day of the homicide, Carter and Greer had been to Tunis for ice and had finished delivering it when they encountered the officers. They had taken their rifles along which was customary and not objectionable (R. 110,111,112). After the shooting, Carter went to his company commander and surrendered his rifle saying he had shot an officer. The weapon had been recently fired. Carter's company commander testified there were four cartridges in the magazine and none in the chamber

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(R. 112,114). He also testified that

"The clip was not in the gun. He gave me one rifle and one clip with four shells in it" (R. 112).

There are five cartridges in a full clip (R. 111). At his company area after the shooting, one of Carter's company officers observed that the soldier's trousers were torn at the crotch (R. 115) and his "undershirt was definitely marked on the right side". There was a "deep" bruise about a half inch wide and about three inches long underneath the garment, apparently near the crotch (R. 116).

Carter testified (R. 117) that late in the afternoon in question he was returning to his company area after delivering some ice to the "1963rd Company" and that he and Greer were "driving along" when Lieutenant Davis drove up, told them to "pull over", and said "soldier, you are under arrest". Carter testified:

"Then I said, 'What for sir?'. He said, 'For hitting an Arab.'. I said, 'I didn't hit any Arab.', 'You've probably got someone else mixed up with me.'. At that time the tall Lieutenant said, 'You'd better come with us.'. I said 'probably you got someone else in mind'. He said, 'Well, you'd better come down.'. Then I got out by stepping over the back of the seat, taking my rifle and jumping on down. Then he proceeded in front of the weapons carrier, and the tall Lieutenant was coming close along just a little ahead of me. When I got in front he turned around quick like, and takes the rifle from me. I didn't say anything, just walked toward the jeep. We were keeping along this way when he walks behind me, and strikes me in the side with the butt end of the rifle. I shrank back. He reached his hand out to grab me in the testicles. I squealed with pain, and he tore my pants. Lieutenant Davis walked around to the driver's side of the jeep and got into the driver's seat, and was accelerating the motor. Lieutenant Hoag, he drops the rifle and turns me loose. They, then, left in the jeep" (R. 118).

Carter testified further that he and Greer returned to their company area and reported the trouble to one of the company officers. After the interview, he and Greer left, intending to collect for ice they had delivered to another company. He testified

"I proceeded right on the same road on the way up as before. The jeep pulled around us on the road, and stopped me again. The same two officers came up to my vehicle. The little Lieutenant said, 'Well, I've got you agin. You're still speeding. Come on and go with me.'. I said, 'I still haven't done anything.'.

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He said, 'That's all, don't you know you are speaking to an officer'. I said, 'All right, sir, I'll go', and I stepped back in the seat, took my rifle and I was standing just behind the driver's seat. I said then, 'Am I still under arrest?'. Lieutenant Hoag had drifted out of the scene as Lieutenant Davis had my attention. After I was talking to him awhile, I had my rifle in my left hand with the muzzle pointing toward the front of the truck. I heard somebody shout, 'LOOK OUT EARL.' Just as I began to turn around I saw this colored boy fall. I am standing up and I heard the Lieutenant say, 'I'm going to kill that damned black nigger.'. I just squeezed the trigger real hard, and saw him falling, then he takes off about a step. He runs three or four paces to the back of the truck, then he fell in the ditch with his face up. The crowd scattered and I just jumped down off the weapons carrier. I said, 'Frank, crank the weapons carrier.'. I saw Lieutenant Davis taking aim in front of the jeep. Somebody yelled, 'Don't you shoot, and he won't.'. Then Lieutenant Davis says, 'Take him away.' 'If he doesn't shoot, I won't shoot.'. I got in the passenger seat, and Frank Greer drove right off." (R. 119,120).

He testified further that he did not at any time see Greer raise a weapon in a threatening manner against either officer (R. 120); that Lieutenant Hoag was "staggering a little" during the second altercation; that he "was insisting on my being under arrest" and "was the one making all the noise" (R. 125); that

"He didn't show he had been drinking outside of his weaving as he moved but if he hadn't he wouldn't have made those remarks" (R. 139).

He testified that he fired only one shot and upon being asked if he could possibly have fired a second shot, replied, "I couldn't remember. I wasn't myself, and if the shot was fired, I don't know" (R. 126,137). He further testified that it was after Lieutenant Hoag had fired his pistol that the latter said "I'll kill that damned black negro" (R. 134).

His company commander testified that Carter's reputation for peace and good order was "very good" (R. 110).

Greer elected to remain silent (R. 139).

4. The evidence thus shows, in reference to the Specification, Charge I, as to accused Carter, that the latter at the place and time alleged shot with a rifle and killed Second Lieutenant Charles E. Hoag, the person named therein. Upon the testimony of several eyewitnesses, whose accounts of the occurrence disclose minor differences assignable to natural variableness

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in human perception, it is clearly established that at the time of the fatal shooting accused was resisting and defying Lieutenant Davis and the deceased who, for good cause, had ordered him into arrest. Accused knew and was chargeable with knowledge of the authority and purpose with which these officers were acting. On a prior occasion that day they had been repelled by accused's aggressive resistance and reprehensible conduct and it was by coincidence they met later on the highway when the officers, then armed, proceeded again to arrest him. As before, accused resisted and with words of defiance seized and minaciously waved his rifle. It was momentarily taken away from him by another soldier. But he regained its possession and immediately reasserted his determination to resist and, with threats and intensified aggressiveness, alternately pointed the rifle at the two officers. It was during this latest exhibition of violence and just as accused on or near the driver's seat had turned and pointed his rifle at Lieutenant Hoag, that the shots were fired. There is testimony that the officer fired first.

The shots were described as being close together or practically simultaneous. A shot from Lieutenant Hoag's pistol killed a colored soldier who was standing at the rear of the truck. Two shots were apparently fired by accused; a bullet struck Lieutenant Hoag in both hands and broke the handle of his pistol and a bullet entered his back, passed through his body and out his right chest. The significance of these circumstances was a matter for the court to evaluate, considering such evidence as that at or about the time of the shooting, Lieutenant Hoag was seen moving along the right side of the truck in a crouching position and that a bullet from accused's rifle hit Lieutenant Hoag's pistol. But irrespective of separate evidentiary facts and conceding Lieutenant Hoag in point of time fired the first shot, the conclusion is inescapable that in that moment which immediately preceded the shooting, made ominous solely by accused's minacious conduct, the situation was conceivably one wherein Lieutenant Hoag was faced with a grave and apparently imminent danger. This is confirmed by the spontaneity with which the fatal shot was fired. The act of accused was wanton and vicious and the homicide was murder as found by the court. A malicious intent was manifest by accused's offensive manner and persistent defiance. Moreover malice is inferable from accused's violent use of a dangerous weapon and from his willful and aggressive opposition to an officer lawfully engaged in the duty of effectuating his arrest and keeping the peace (MCM, 1928, par. 148a).

The testimony of Winston, who was properly confronted with inconsistent statements made in the pre-trial investigation, was to the effect that accused had agreed to go along with the officers, had his rifle at trail arms and was preparing to get out of the vehicle when Lieutenant Hoag drew and fired his pistol. It was within the province of the court to reject in whole or in part the testimony of this witness, especially where his credibility had been questioned and the other evidence reasonably demonstrated the improbability of such an hypothesis. Significantly, moreover, it was not advanced by accused in his own testimony.

Accused admitted the killing but claims it was done in self-defense.

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According to his version, he was standing in the rear of the weapons carrier with his rifle in his left hand, the muzzle pointing toward the front of the truck, when someone suddenly shouted "Look out Earl", which directed his attention to Lieutenant Hoag on the other side of the vehicle. He claims that at this juncture, Lieutenant Hoag fired and declared he was going to kill "that damned black nigger", and that he, accused, thereupon "squeezed the trigger real hard" and felled the officer. That Lieutenant Hoag so threatened accused is without even a hint in other testimony in the case and it is of considerable significance that, though specifically asked, no witness heard the words "Look out Earl" or any such statement as accused attributed to the deceased. A theory of self-defense is here manifestly unavailing. That right can only be recognized when the homicide was brought about without fault of the slayer. As aptly stated "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" (MCM, 1928, par. 148a). The accused was here the aggressor and markedly so in the use of deadly weapons. Furthermore, a plea of self-defense is not available to one who in the course of a lawful arrest properly attempted kills the officer attempting to arrest him (30 C.J. 77, sec. 257). For his open defiance of lawful authority and his previous and presently occurring offenses, it became the bounden duty of these officers to accomplish the arrest, a duty which increased in direct proportion to the flagrancy of accused's misconduct. Faced with an aggravated disorder and with overt acts manifestly intended to create and foster collective insubordination, involving at least accused's companion, the officers would have been derelict in their duty had they abandoned the scene to the will of such a flagitious offender. Retreat for an officer under such circumstances is neither required by law nor comfortable with common sense. While the officers were thus warranted in using any force necessary to overcome accused's resistance, Lieutenant Hoag, when threatened with death or serious bodily harm, was eminently within his rights to meet force with force. His force proved to be ineffectual, though what he did, under the circumstances, was reasonably within the necessary performance of duty. Accordingly, where as here deceased was proceeding in a proper and lawful manner, it must follow as a further answer to accused's plea of self-defense that "one who in resisting a lawful arrest intentionally kills a person seeking to arrest him is guilty of murder" (29 C.J. 1093, sec. 68).

The record amply supports, as well, the charges that at the place and time alleged accused lifted up a rifle against First Lieutenant Wallace G. Davis and Second Lieutenant Charles E. Hoag (Specifications 1 and 2, Charge II, as to Carter). Instead of submitting to lawful arrest, accused reached for and seized his rifle, inserted a clip of ammunition, opened the bolt and just as he was about to shove forward a cartridge Lieutenant Davis succeeded in wresting the rifle from him. Lieutenant Hoag was present and the accused's act in reaching for and lifting up his rifle amounted to an assault also upon that officer. The exhibition of intended violence was direct and inclusive as to both officers. This was a "lifting up" of a weapon within the meaning of Article of War 64 and each was manifestly accused's superior officer and was then in the execution of his office (MCM, 1928, par. 134a; Winthrop's, reprint, p. 570).

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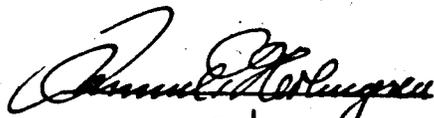
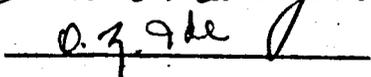
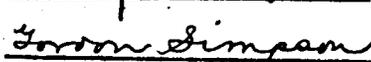
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The evidence likewise shows, with respect to Specification 3, Charge II, as to Carter, that the latter lifted up a weapon against First Lieutenant Wallace G. Davis, who was his superior officer and was then in the execution of his office within the purview of Article of War 64. On this second occasion accused seized, brandished and pointed his rifle at the officer and simultaneously uttered threats and words of defiance. His acts constituted an assault as charged (MCM, 1928, par. 134a; Winthrop's, reprint, p. 570).

5. As to accused Greer, the evidence supports the findings of guilty of his having lifted up a weapon against both First Lieutenant Wallace G. Davis and Second Lieutenant Charles E. Hoag (Specifications 1 and 2 of the Charge). These Specifications have reference to the incident near El Bathan and are based upon the same circumstances as involve his companion, Carter. When the officers arrived at the truck, both he and Carter reached for and seized their rifles and obviously intended to use them in their purpose to resist arrest. While the rifle in the hands of Greer was seized by Lieutenant Hoag and the one in the hands of Carter by Lieutenant Davis, there was that simultaneous concerted action on the part of both accused that made Greer's act an assault against both officers. All elements of the offense charged were in each instance fully established (MCM, 1928, par. 134a; Winthrop's, reprint, p. 570).

6. The charge sheet as to Carter shows that he is about 23 years old. He was inducted into the Army on 6 July 1942 and had no prior service. Accused Greer is about 25 years old. He was inducted into the Army 7 July 1942 and had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as to each accused and the sentences. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Life imprisonment is authorized upon conviction of violation of Article of War 64. Penitentiary confinement is authorized by Article of War 42 for the offense of murder, here involved as to Carter, 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.
 Judge Advocate.
 Judge Advocate.

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

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APO 534, U. S. Army,
14 December 1943.

Board of Review

NATO 934

UNITED STATES)

v.)

Private JOE R. HERALD
(35445400), Company D,
338th Engineer General
Service Regiment.)

EASTERN BASE SECTION)

) Trial by G.C.M., convened at
) Bizerte, Tunisia, 9 October
) 1943.
) Dishonorable discharge and
) confinement for life.
) United States Penitentiary,
) Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Joe R. Herald, Company "D",
338th Engineer General Service Regiment, did, at
Djedeida, Tunisia on or about 2100 hours, 21 September
1943, forcibly and feloniously, against her will,
have Carnal knowledge of Melmi Bent Abdellah.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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3. The evidence shows that at the time alleged accused, with one Private William D. Kimbrell and two other soldiers of Company D, 338th Engineer General Service Regiment, was on a gas pump detail near Djedeida, Tunisia (R. 5,22). They lived about a mile to a mile and a half from the bivouac area of their company (R. 22,42,43), near an Arab hut. There were other Arab dwellings on the other side of a river (R. 6,20).

At about 2145 hours on 21 September 1943, two American soldiers wearing fatigue clothes and white handkerchiefs over their faces (R. 8,28), came to the Arab hut (R. 5,6). Both were armed, one with a rifle and the other with a "revolver" (R. 6,15,27,29). Selah Ben Brahim, the 23 year old son of the woman described in the Specification, was sleeping on an improvised bed about three and one-half feet directly in front of the door (R. 6,10,11). The soldiers hit him and tied his hands with a handkerchief. One of them stood guard over him with a rifle, while the other with a revolver went inside the hut (R. 6,7,9) where Melmi Bent Abdellah, the victim, was lying on the floor with two children in her arms (R. 7,12,24). An old fashioned oil lamp was burning inside (R. 7). Selah testified he could see inside of the hut and saw that the soldier pushed his mother, pulled a child away from her, "played with her tits", hit her in the face and "screwed" her (R. 6,7,12). When the first soldier had finished and gone out, Melmi attempted to escape from the hut with her two children again in her arms, but the second soldier forced her inside at the point of his rifle, knocked her down, moved the children aside and "screwed" her. Melmi resisted each of the soldiers; she pushed and pleaded with them, saying, "please, please" and "please for God's sake" (R. 7,13). Selah was hit by the soldier on guard every time he moved and could not go to his mother's assistance (R. 13). Selah identified accused as the soldier who had tied his hands and as the one who carried a rifle and entered the hut last. He took the handkerchief off his face when he tied Selah. He had also identified accused in a line-up of soldiers at the camp the second day after the incident (R. 8,14,16).

Melmi Bent Abdellah testified that the first soldier came in with a revolver, pulled the children aside,

"pushed me in, hit me on the face, played with my tits (breasts) and screwed me while the other soldier came and did the same thing as I pleaded with them and was trembling" (R. 25).

She "closed" her legs and pleaded "please, please, for God's sake leave me". She was in fear of her life (R. 26). She did not "holler" as she knew her son was tied and she was afraid they would kill him or her husband. She kept one baby on her arm while she was being assaulted. After the first soldier had attacked her she arose, grasped her two children in her arms and got outside of the hut where the second soldier forced her back, "pushing me at the point of a rifle". She identified accused as the soldier who came in with the rifle (R. 25,26,27). He put the gun on her stomach where it remained as he forcibly penetrated her genitals with his penis. She testified she did not help him insert his penis or cooperate in any way and

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that, "My face was on fire, I was very dizzy, I didn't do it...He did all that by force" (R. 26,27).

Two of the soldiers on the oil pump detail testified they saw accused and Kimbrell at about 2200 hours on 21 September 1943, that they had rifles and that they said they had "screwed an Arab" (R. 17,18,21). They had been drinking and had previously fired their rifles. They said "you are not supposed to see or hear anything". Neither of them was seen with a pistol (R. 18,22,24).

Accused, on 23 September 1943, after having been questioned at some length by an investigating officer and in the presence of his company commander, made and signed a written statement which was admitted in evidence over objection by defense (R. 30,36). There was testimony that Article of War 24 was explained and read to accused, that no promises or threats were made and that the statement was dictated by accused and transcribed substantially in the words employed by him (R. 33,34,35,36,40). The statement reads in part as follows:

"On the night of September 21, 1943, after supper Kimbrell, Ison and I stopped at a wine shop in Djedeida; had some drinks at the bar, and started for the pumping station with about 2 quarts of wine which we drank on our way. We got back to the pumping station about 2000 hours. Shortly after we arrived Pvt. Kimbrell and I had a shooting match - shooting at a tin can in an adjacent field. We then started off down the road with our rifles and arrived at an Arab house about 2130 hours. I was drunk at the time and not quite realizing what I was doing, I pointed my rifle at the Arab boy in front of the hut. We each tied a han(d)kerchief over the lower part of our faces. Pvt. Kimbrell entered the hut, and I heard the woman yell. In a few minutes Pvt. Kimbrell returned to the outside of the hut and stood guard over the boy while I entered the hut. I violated the Arab woman but there was no resistance. In fact, she assisted me in the act. We returned to the pumping station about 2215 hours and went to bed" (Pros. Ex. A).

Accused testified that on the evening of 21 September 1943, he and Kimbrell had several drinks of wine before mess and thereafter had a "shooting match" at a can. They were "feeling high" and started out looking for more wine (R. 45). They tied handkerchiefs over their faces so they would not be recognized as they were afraid that the shooting would be investigated. They had their rifles with them. When they arrived at the Arab hut, Kimbrell flashed his light in the door, talked to someone and entered. He came out in about five minutes (R. 46) and said to accused "come in and get you some 'zig-zig', everything is okay". Accused "popped" his rifle against the corner of the hut and entered. A woman was sitting on "a place where she laid on" and he asked her for "zig-zig". She

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"just laid over and I had taken out my penis and she opened her legs apart and put my penis in and helped me do it" (R. 47).

She did not try to push him away. She had no babies in her arms but there "could have been one laying to her side or two". Accused stayed with the woman about five minutes, came out, got his rifle and he and Kimbrell returned to camp. Neither he nor Kimbrell had a pistol (R. 47). There was a boy or a woman lying in the yard. He heard "the boy" say a few words. He did not hit, abuse or tie up anyone (R. 48) and did not see Kimbrell, who was with him the entire evening, hit or tie anyone. He testified that when he made the statement to the investigating officer he did not use the word "violated", but thought he said "screwed her" (R. 50, 51).

Kimbrell testified as a defense witness. His testimony substantially corroborated that of accused (R. 56-60).

4. It thus appears from the evidence that at the time and place alleged accused forcibly and without her consent had unlawful sexual intercourse with Melmi Bent Abdellah, the woman named in the specification. With a companion accused went to this woman's home at night, both being armed and with handkerchiefs tied over their faces. They struck her son and held him in restraint while each successively entered the hut, forced aside infant children and thereupon, overcoming the woman's resistance and impervious to her protests and pleas, completed the sexual act. The court was clearly warranted in rejecting accused's denial that the sexual intercourse was accomplished by force and without the woman's consent. Force, intimidation and physical violence were fully demonstrated by all the attendant circumstances. All elements of rape were fully established (MEM, 1928, par. 148b; CM NATO 386, Speed; CM NATO 779, Clark-Massie).

5. The record contains the following statements:

"Defense: May it please the court, I have just spoken to the Trial Judge Advocate and Assistant Trial Judge Advocate concerning a case yesterday in which we had yesterday some lengthy evidence about the formal investigation dealing with legal questions. It involved many hours and it is suggested that we use that record in so far as the evidence is concerned about that investigation for the purpose of this record and that we so stipulate at this time.

"Law member: There being no objection by the prosecution, defense and the accused, we will stipulate the evidence that relates to the formal investigation" (R. 50).

The evidence referred to was not read to the court or incorporated into the record. It was however probably in the companion case of Private William D. Kimbrell, in which a contention was raised by the defense that the

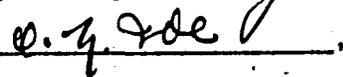
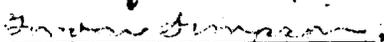
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charges had not been investigated as required by Article of War 70. In that case the Board of Review expressed the opinion that the record disclosed a substantial compliance with that Article of War and that any procedural deficiencies in the investigation did not injuriously affect the substantial rights of accused (CM NATO 904, Kimbrell). Upon the state of the record in the instant case, the Board is compelled to the same conclusion.

5. The charge sheet states that accused is 23 years old. He was inducted into the Army of the United States 15 September 1942. No prior service is shown.

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

 , Judge Advocate.
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 , Judge Advocate.

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

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

Board of Review

NATO 939

UNITED STATES)

SEVENTH ARMY)

v.)

Trial by G.C.M., convened at
Palermo, Sicily, 19,20 October
1943.

Private CARL VINCENT (38311050)
and Private First Class ROBERT
LOUDEN (33374884), both of Company
D, 27th Quartermaster Regiment.

As to each: Dishonorable
discharge and confinement for
life.
United States Penitentiary,
Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

2. Accused were jointly tried upon separate Charges and Specifications
as follows:

VINCENT

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Carl Vincent, Company D, 27th
Quartermaster Regiment, did, on or near Highway 120,
approximately seven (7) miles from Alimena, Sicily, on
or about September 1, 1943, forcefully and feloniously,
against her will, have carnal knowledge of Adele Adelfio,
a civilian woman.

LOUDEN

CHARGE: Violation of the 92d Article of War.

254527 Specification: In that Private First Class Robert Louden, Company
D, 27th Quartermaster Regiment, did, on or near Highway
120, approximately seven (7) miles from Alimena, Sicily,

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on or about September 1, 1943, forcefully and feloniously, against her will, have carnal knowledge of Adele Adelfio, a civilian woman.

Each pleaded not guilty to and was found guilty of the Charge and Specification pertaining to him. No evidence of previous convictions was introduced as to accused Loudon. Evidence of one previous conviction by summary court-martial for disrespect to an officer in violation of Article of War 63, was introduced as to accused Vincent. Each was sentenced to dishonorable discharge and "to be confined" for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved each sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for each accused, and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 1 September 1943 Mrs. Adele Adelfio, wife of a director of a bank in Alimena, Sicily, her son Giulio, age 16, Benedetto Nasta, an accountant, and Paolo Accurso, a school teacher, were at Petralia Sottana, Sicily, seeking transportation to Alimena. About 1930 hours the youth left the group in a bus station and went to a bar where he met a colored American soldier subsequently identified as Private Alston T. Denson, Company A, 249th Quartermaster Battalion. Denson told Giulio, who could speak some English, that he was going to Caltanissetta and the youth took him to the bus station where he introduced the soldier to Nasta, Accurso and his mother. Denson offered to take the group to Alimena since it was along the route he was going (R. 8, 9, 19, 31, 52, 53, 65, 75). He left and about 2300 hours that night returned in a "jeep", accompanied by two other colored soldiers. The four civilians and their baggage were loaded into the vehicle. Mrs. Adelfio sat in front between Vincent, who was driving, and Denson. The third soldier and the other passengers were seated in the rear (R. 10, 11, 32, 79; Ex. A).

The car proceeded on its way but the driver took the wrong road before they had gotten out of town (R. 12, 33). Mrs. Adelfio indicated some alarm at this development, and grasping the driver by the hand, told him they were going the wrong way (R. 12, 19, 33). After some insistence on the part of the soldiers that the road was the right one, the driver turned the car around and started toward Alimena (R. 12, 33, 55, 66, 80). As they drove along the soldiers talked among themselves and while she could not understand English, the manner of their speech increased Mrs. Adelfio's alarm (R. 33, 41, 42). The car had travelled some five or ten minutes after turning around and had reached the Madonmizza road junction when it again took the wrong road (R. 13, 33, 80; Pros. Exs. C, D). Mrs. Adelfio seized the wheel again saying they were "not going on the right road". She complained of feeling ill. The driver stopped the car and everyone alighted except Accurso and the soldier who had been riding on the rear seat. This soldier prevented Accurso from leaving the vehicle (R. 13, 33, 55, 66, 67).

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After alighting, the driver produced a rifle and Denson drew a chrome-plated pistol or revolver. The soldiers pointed the weapons at the group (R. 13,27,33,34,55,63). Giulio testified that "we all started to speak in loud voices, and the first soldier, because I was speaking too loud, not only told me to shut up but he also gave me a slap" (R. 13). One of the soldiers then seized Mrs. Adelfio and dragged her away. Giulio said this soldier was the driver, but other witnesses testified it was Denson (R. 14,34,67). As Mrs. Adelfio was being taken away, Accurso testified that she said "You can kill me but you cannot lay a finger on me" (R. 70). Mrs. Adelfio testified that she struggled and tried to escape but when she resisted "they slapped me and maltreated me"; that while this was happening, "Mr. Nasta and the boy also resisted and received slaps" (R. 34); that she was dragged about ten feet away from the vehicle and thrown to the ground and that one by one the three soldiers forced her to submit while they had sexual intercourse with her; that "one would get off and the other would be ready to mount". She testified further that she did not consent; that she feared for the life of her son at whom a pistol was pointed; that she resisted "the best way" she could; that she wanted to scream, but her "voice did not come out"; that she tried to hold her legs together but each of her assailants forced them apart; that when she would try to move, she "would receive punches and slaps" as a result of which her eye was discolored and her face swollen; that she "struggled so that they really hurt my leg badly"; that after the assaults she remained in bed eight to fifteen days (R. 35,37,44,45, 46,48,50). Asked how and by whom her underclothing was removed she testified "at that moment, I was not reasoning any more, and they did everything" (R. 37).

The lights of the vehicle were turned off and there was no moon. Giulio could not see what was happening (R. 14,28). Nasta "could see two people one on top of the other" (R. 61), and Accurso testified that after Denson had dragged Mrs. Adelfio away "one after another they started to violate the woman"; he could "remember all three" of the soldiers attacked her; that although he could not see very well, he "could see the struggling movements of the woman" (R. 67,68). Nasta testified that while the assaults were in progress, he heard "sounds like coming from a woman who was suffering. It was sort of like crying" (R. 56). Giulio testified that his mother "was giving cries like one who was about to faint" (R. 24); that these cries were "sometimes a low lament" (R. 23). Accurso testified that the sounds from Mrs. Adelfio were loud at first "and then they were very low" (R. 68).

The soldiers took turns at pointing the firearms at Giulio and Nasta (R. 68). Accurso was detained in the car. He made an attempt on one occasion to alight and Denson who at the time was sitting by him, struck him and "left him in the vehicle almost unconscious" (R. 22, 72).

The automobile was stopped for about fifteen minutes "while these things were going on" (R. 17). After completing the assaults, the soldiers

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ordered their passengers to take their baggage out of the car (R. 16). Nasta went to aid Mrs. Adelfio, who was "struggling" to get up. He supported her; she was "clinging" to his arm. She picked up a white object from the ground as they started back to where the baggage had been deposited by the roadside (R. 16,61,62,64). Denson kept a rifle pointing at the group and the other soldiers turned the car around. Denson then boarded the vehicle while it was in motion, and the soldiers drove off in the direction of Petralia Sottana (R. 16,27,69).

Denson was called as a prosecution witness (R. 75). He testified he met Giulio in Petralia Sottana about 2000 hours on 1 September 1943 and upon learning that the youth wanted to go to Alimena, told him "if I see anybody going that way, I'll tell them to pick you up". Denson went to the bus station and met Mrs. Adelfio, Nasta and Accurso. After talking a while he left and loitered around town, drinking and talking, until about 2300 hours when he returned to camp (R. 75,76,77). There he met the two accused whom he had not known before (R. 75), and upon hearing they were to go in a "jeep" to pick up a road guide, he went along. They did not find the road guide and decided to try to find some "vino" and a house of prostitution. Vincent was driving (R. 77,78). As they turned a corner, they saw "the same little boy" and Denson told the two accused of Mrs. Adelfio and the others accompanying her wanting to go to Alimena. Vincent stopped the car, saying he would go inside "and if I can make a proposition to her, I'll carry her to Alimena". Presently Vincent and the civilians "began to come out with their luggage" and after the three soldiers and the four civilians with the luggage had gotten into the vehicle, they started on their way but took the wrong road. The driver turned the car around and proceeded toward Alimena to a point past the Madonnuzza road junction (R. 79,80). Denson testified further that when they stopped, they "had intercourse with the lady"; that she acted "like she were willing" and he would say that she consented; that Vincent was first, Louden second, and the witness last (R. 81). He further testified that Vincent's proposition to take the group to Alimena was not carried out because when Mrs. Adelfio "came back" with him, "those men refused to get back in the car", and "refused to let her get in" (R. 82,83). Denson also testified there was a carbine "laying on the hood of the car" but he never saw it pointed at anyone; that he did not see any pistol that night nor did he see anyone slap any of the four civilians (R. 83).

A detachment of Company A, 51st Signal Battalion, was bivouacked about 125 yards by straight line measurement from the place where Mrs. Adelfio was assaulted (R. 84,86). About midnight, a soldier of this detachment was awakened by the voice of a woman screaming "no, no". Shortly afterwards he heard "the sound as if someone had been slapped or struck" (R. 92). Another soldier testified he was awakened by sounds "like someone changing a flat tire" and he heard people talking, some in Italian and some in English. Someone was saying "no, no" and somebody

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in English said "shut up" (R. 84,85). These two soldiers dressed and having armed themselves, proceeded to the place from which the noises came (R. 85,92). At this time, the motor of a "jeep" started and the vehicle turned and "headed toward the crossroad to Alimena" (R. 90). When the soldiers reached the road, they saw Mrs. Adelfio, her son and the two Sicilian men by a bridge (R. 86,92). They were walking down the road toward Petralia Sottana (R. 86). Mrs. Adelfio "was in some sort of hysterics". Her clothes were rumpled but not torn. She "had her pocket book and her pants in her hand" (R. 88). Her face was described by one of the soldiers as "kind of red" (R. 96). The soldiers secured a truck and carried the four civilians to Petralia Sottana (R. 88,94).

An investigation subsequently made demonstrated that words spoken in a normal tone at the place where Mrs. Adelfio was assaulted, could be heard but not understood in the bivouac area where the soldiers were awakened on the night in question (R. 95,97,103).

An Italian physician and surgeon examined Mrs. Adelfio at a hospital in Petralia the night of 1 September 1943. He found "the lower third of her right leg had a contusion". On the rest of her body he did not find any lesions. He testified that "the patient was very much excited". He found a substance which in his opinion was sperm on the "external genitalia", "along the near aspects of the thighs" and in the vagina. He expressed the opinion that the injury he observed on the right leg would not impede the patient in walking. He did not notice any "mark about her eye" or "lesion in the face" but he explained he thought he was "called on to examine her genital organs and not to go into a complete physical examination" (R. 97,98,99,100).

A transcript of the testimony of Vincent, given at the trial of Denson, was offered against Vincent only and admitted without objection (R. 104; Pros. Ex. B). He had testified in the former trial that he, Loudon and Denson were driving along the road with Mrs. Adelfio and the other Sicilians when "she yells and I stop". She alighted from the vehicle and stumbled whereupon he caught her by the arm to keep her from falling. Denson told Vincent "she would like to give away some of her body". Vincent walked with the woman to a spot a "few paces" from the vehicle where she laid down, removed her "step-ins" and never "raised no kind of objection", while he had sexual intercourse with her. At first the youth appeared frightened but his mother spoke reassuringly to him as she walked away with Vincent and his fears appeared to be allayed. The youth then began playing with Denson. After Vincent had finished with the woman, Loudon "went on next" and after "all of us were finished, and the lady came back, she started to get into the jeep the tall fellow got angry" and started taking the luggage from the vehicle and "pulling the lady away". He had testified that Loudon wanted to pay the woman but she refused, indicating she had plenty of money. Vincent said there was a carbine in the vehicle and that he laid the weapon on the hood when he got out of the car. He testified that Mrs.

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Adelfio kept saying as the car was moving along "fickie fickie, buono buono" (Prox. Ex. B).

Each of the accused elected to remain silent (R. 105).

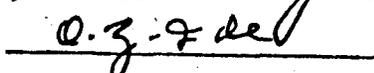
4. It thus appears from substantial evidence that at the place and time alleged in the Charges and Specifications, both Vincent and Louden forcibly and against her will, had unlawful carnal knowledge of Adele Adelfio. The acts of sexual intercourse were established by undisputed proof but defense counsel insisted that Mrs. Adelfio gave her consent. This hypothesis was supported by Denson's testimony and the testimony given by Vincent at a former trial. However, there is ample evidence that Mrs. Adelfio cried out and resisted; that the soldiers slapped her and her son and pointed firearms at the youth, giving her cause to fear for her son's life; that she and the Sicilian men with her were threatened and intimidated, and that she was over-powered and forced to submit while the two accused and Denson ravished her. The facts and circumstances in evidence fully warranted the court in finding that accused were guilty as charged (MCM, 1928, par. 148b; Winthrop's, reprint, pp. 677,678; NATO 1030, Jingles).

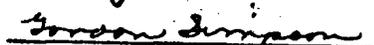
5. Each of the accused was sentenced "to be dishonorably discharged the service and to be confined at such place as the reviewing authority may direct for the term of his natural life". The sentences were unusual in that provisions for forfeiture of all pay and allowances due or to become due and for confinement at hard labor were not included. However, the validity of the sentences imposed is not affected by these omissions (AW 37,92).

6. The charge sheets show that Vincent is 22 years old, was inducted into the Army of the United States 19 September 1942 and had no prior service; and that Louden is 34 years of age, was inducted into the Army of the United States 9 September 1942 and had no prior service.

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

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feloniously take, steal and carry away from the person of Elie Arari, one handkerchief, a brown leather purse with nickel frame and some change in it, a pocket book in brown leather with one thousand five hundred and forty (1540) francs, an old fountain pen, several personal papers and a pair of sun glasses the property of said Elie Arari, value of about \$30.00.

Specification 3: In that Private Allen L. Harlan, 2698th MP Co. (Prov) did, at Tunis, Tunisia on or about 29 August 1943 by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Desplanes Florian, one fountain pen, one pencil, a pair of glasses, miscellaneous personal papers and one brown leather pocket book containing one thousand two hundred and seventy five (1275) francs the property of said Desplanes Florian, value of about \$25.00.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 30 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that about 2150 hours 29 August 1943, as he was passing the Square of "Verdum", in Tunis, Tunisia, Eymon Auguste was stopped by a military policeman whom he identified at the trial as accused, and was asked for his "papers". As he was in the act of producing them, two soldiers "assaulted" him, took his hands "and held them up" while accused searched his pockets. Accused took a white handkerchief, "a small cigarette case in black leather" and a pocketbook containing, along with some miscellaneous personal papers, the sum of 865 francs. When the search was finished, they kicked Auguste and accused told him to "go away". Auguste asked for "the money he took but he refused" (R. 6,7,8,9). The following day at Military Police Headquarters, the cigarette case, the pocketbook, about 165 francs and some identification papers which had been taken from him the night before, were returned to Auguste by "a man named Bessius" (R. 7,9,14,15). Auguste recognized accused by "his awk(w)ard stature and his features of his face". He testified

"It was this way I could recognize him the next day and that day he wasn't wearing a helmet on his head" (R. 8).

About 2140 hours the same night as Desplanes Florian, chief cook at the French Residence General at Tunis, was returning to his living quarters, he was stopped by an American Military Policeman who said "Come here, I am going to search you" (R. 15). Florian testified

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"I told him I am not an American that I am French and if you please excuse, I don't like to use these words but he said, 'I don't give a God damn what you are. He then took everything from my pockets. The eye glasses and fountain pen and I said, 'This is not good to you.' He said, 'I said keep your damn mouth shut and he said, 'I shoot you if you no keep your mouth shut.' In the mean time another civilian fellow came up and they grabbed him the same way like me and the LP told me, 'Stay here' and I stayed between the Mp and the two other soldiers and after he searched and took the things from the other man he said for me to get out and he kicked me" (R. 15).

At the trial he identified accused as the military policeman who had robbed him. He testified further that among the effects accused took from him was a pocketbook which contained 1275 or 1375 francs and also some personal identification cards, envelopes and pictures. He paid 250 francs for the glasses and testified that the value of the pocketbook was "Five dollars in the States" (R. 16,17,18).

As accused and the other two soldiers were engaged in robbing Florian, Elie Arari happened to come on the scene. Arari testified that accused said to him "Come on, come on" and that

"he then take and search me and take all things, that I have on my clothes. He took my glasses, handkerchiefs, my little purse, pocket-book, and I said, 'Why?' and the other soldiers said, 'Why - because this is night and you don't march on the street at this time.' They take things from the other civilian man and me also" (R. 11).

The pocketbook accused took from Arari contained about 1540 francs (R. 12).

A French Aspirant walking along the street at the time saw the military policeman and two other soldiers searching some civilians. He kept on his way but presently Florian and Arari overtook him and reported the robbery (R. 11,15,19,21). The three went to Military Police Headquarters and, as Arari related it in his testimony

"the Lieutenant he give us a Jeep and with two other MPs we are going down the streets to search around the streets. Coming back we see the MP that search us and he was with some few English soldiers and I said, 'American Police, that is the man what took the things. The Jeep it stopped and we take him with us. We go to the MP station and then we search this MP what took our things and we find my glasses" (R. 11).

Arari remembered accused as the person who robbed him because "He had on the MP band and I noticed his stature, his face" (R. 14). Of the articles

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taken from him, Arari only got back his glasses, fountain pen and personal papers (R. 12).

Florian also recognized accused as the man who robbed him. He testified

"We go and try to find him and we don't see him and we then get a Jeep and we turn up all the streets around Avenue de Paris and maybe very near fifty yards difference from the place we see him. I said to the Sergeant this is the man and we stopped him and take him to the Police Station and at the Police Station he was searched and all was gone except the pencil with the ring rubber and my eyeglasses" (R. 15,16).

At Military Police Headquarters, accused was searched in the presence of the French Aspirant and the two civilians (R. 24). The American officer who conducted the search testified that

"From his left shirt pocket I found two pair of glasses. One pair was ordinary glasses and the other a pair of sun glasses. Also a fountain pen was found and then I told him to dump out the things from his pants pockets and he did. Among the things he took out was a paper of French Nationality of which I couldn't read it. A cigarette case which was identified also numerous other personal property and some French money and American money" (R. 24).

Accused had four or five hundred francs in French money and "a great deal more" in American currency (R. 25). The civilians "immediately identified the glasses" (R. 24). Although they were talking French which the American officer did not understand, the latter testified that the civilians did not say accused was the man who had robbed them but that "he was dressed the same and that he was the right size" (R. 26). Accused told this officer "that he had taken the glasses of some civilians from the Casbah here in Tunis while on duty a week ago" (R. 27). It was stipulated that the rate of exchange of the franc to American money was "50 francs to the American dollar" (R. 20).

There was evidence that at the time of the alleged offenses, accused was wearing an "MP band on his arm", had a club and a "gun" (R. 6,8,11,16, 22); although when he was later searched at the Military Police Headquarters, "no side arms" or "gun" was found on his person (R. 24,25).

Accused elected to remain silent (R. 28).

4. It thus appears from the evidence that at the place and time alleged, accused and two unidentified soldiers, by force and violence and putting them in fear, took and stole from Eymon Auguste, Elie Arari and

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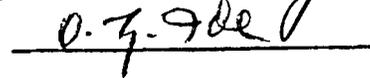
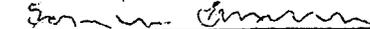
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Desplanes Florian, the persons named in Specifications 1, 2, and 3 of the Charge, respectively, the personal property as alleged in the Specifications. As to Auguste, accused and his two companions assaulted him, held up his hands, took the articles as alleged from his person and thereafter kicked and sent him on his way. As to Florian, accused stopped and spoke menacingly to him, threatened to shoot him if he did not remain quiet and simultaneously took from his pockets all his personal belongings. The third victim, Arari, then happened by and accused, with the other two soldiers, seized Arari in the same manner as they had Florian and took all his personal effects from him. The evidence clearly shows that the assault in each instance either preceded or accompanied the larcenous taking of the victim's personal property and that the taking was effected against his will by means of violence and intimidation. Each victim, under the circumstances, was warranted in making no resistance other than to remonstrate with and try to dissuade accused and the other two soldiers from committing the crime. The situation presented a reasonably well-founded apprehension of present serious danger if resistance were offered. The court was amply justified in finding accused guilty as charged (MCM, 1928, par. 149f). The robberies were committed by accused with the aid of two accomplices, for whose acts the accused became responsible as a principal (18 U.S.C.A. 550; NATO 643, Moor). The value of the personal property taken by accused was proved substantially as alleged in each Specification.

The accused was properly charged with three separate robberies, although they were closely related in point of time and place. Each robbery was basically a separate trespass and as such constituted a distinct and complete offense. The case does not present the situation of a larcenous taking of several articles from different persons where the taking is substantially the same transaction and the rule against multiplicity of specifications is therefore inapplicable (MCM, 1928, par. 149g).

5. The charge sheet shows that accused is 39 years old. He was inducted into the Army of the United States 25 September 1942.

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

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

APO 534, U. S. Army,
11 December 1943.

Board of Review

NATO 951

UNITED STATES	)	EASTERN BASE SECTION
)	
v.	)	Trial by G.C.M., convened at
	)	Bizerte, Tunisia, 21 October
Private WILLIAM C. CHASTAIN	)	1943:
(34166145), Company D, 20th	)	Dishonorable discharge and
Engineer Regiment, attached	)	confinement for life.
to Company A, 5th Replacement	)	United States Penitentiary,
Battalion.	)	Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private William C. Chastain, Co. "D" 20th Engineer Regiment, attached to Co. "A" 5th Replacement Battalion, did at or near Bizerte, Tunisia on or about 19 October 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with pre-meditation kill one Private Joe H. Hector, a human being by hitting him on the head and face with a bottle.

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

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Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 19 October 1943, accused with another white soldier had breakfast and lunch at the mess of the 227th Quartermaster Salvage Company, located on the Ferryville road from Bizerte, Tunisia. At about 0900 hours they were seen with Private Joe H. Hector, a colored soldier of that organization, coming from a French house near the camp. The accused and the other white soldier each had a bottle of wine (R. 2,8,10). Immediately after the noon meal, as mess kits were being washed (R. 11), accused became involved in a fight with Hector, who hit accused in the face with his mess kit. Accused ran away and Hector threw rocks at him. Accused returned in about two minutes, his face bleeding. The two apparently exchanged apologies and after Hector had said "come on there, say let's get another bottle", they went away together, accompanied by the other white soldier (R. 8,9,10,11).

At about 1400 or 1500 hours the three soldiers came to a place near a British camp located about four or five miles from Bizerte where they sat down "in a small triangle with two feet intervals". They had one or two bottles and some cans of food (R. 13,19,24). A few minutes later (R. 16,19) accused picked up a bottle and with it hit Hector on the top of his head. The bottle broke and with the neck piece of the bottle accused jabbed and struck "the negro three or four times in his neck" and "on the side of the face" (R. 13,14,17,18,22). When accused lifted the bottle Hector was "sitting down quietly", not saying anything, and made no move toward or effort to strike accused and had nothing in his hands (R. 16,22, 23,25,26,27). Hector, while he was being assaulted by accused, tried "to cover himself with his hands" and afterwards "just lay there for awhile, staggered up to his feet", moved seven or eight paces and fell down. He did not get up again (R. 22). He was dead two or three minutes later (R. 22,25). A medical officer who examined the body of deceased at about 0800 hours the following day testified that

"There were a number of cuts, one of greater importance was situated on the right side of the neck and its depth involved the internal jugular vein" (R. 5).

In his opinion the wounds were made by a sharp object, which could have been a broken bottle and death was caused from exsanguination, meaning extensive hemorrhage (R. 5,6).

Accused made a written statement to the investigating officer which was admitted in evidence (R. 28; Ex. 3). Accused stated therein that on the day alleged he, Johnson and deceased had drunk about five bottles of wine before dinner and that when they were washing their mess kits they were all "pretty well lit". Hector, he stated, "turned around and slapped me full force with his mess kit". It cut accused's lip and gashed his chin. Accused then "ran away" but returned shortly to get Johnson. As they were leaving, Hector, who rejoined them, asked "What did I hit you for?" and said "I'm sorry". Accused said "Let's skip it". They crossed the road

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together and went down into a clump of trees to eat and "drink up the wine". The statement continues:

"The three of us sad down. The negro sat facing me and said to me, 'I got a good mind to kill the mudder fucker'. This he repeated several time to me. I was pretty drunk at the time and so were the others. Then shortly afterwards Hector swung the bottle with wine in it at my head, I caught it and took it away from him. We got up I had the bottle and started to walk on, the other two came up to me and they sat down to opened a can a rations. The colored soldier sat in front of me facing me. Johnson was on my right. The negro made a move to grab for the bottle again so I grabbed it. The bottle, had some wine in it. I cant remember what exactly happened except that I hit him. I saw 2 foreigners not far away, I don't recall what happened there except that some British soldiers put us under guard. Some M.P. Sergeant questioned me but I dont remember what I said at the time as I had been intoxicated at this time" (R. 29; Ex. 3).

Private Lawrence Johnson, 20th Engineer Regiment, a defense witness, testified that he and accused spent the night of 18 October 1943, with the 227th Quartermaster Salvage Company, near Bizerte. They were without a pass from their own organization (R. 31). The following morning they had breakfast there and at about 0800 hours purchased a quart of wine. They finished this wine within the next half hour and purchased another quart. They were then joined by Hector. The three of them drank the bottle of wine and during the morning consumed about five quarts (R. 32). They returned for lunch and after accused had washed his mess kit he threw the brush on the ground. When he did this, Hector hit accused twice across the face with his mess kit. Accused ran away and Hector threw rocks at him. They had had no quarrel prior to that time and had not been talking about "anything special" (R. 33). Accused came back and thereupon the trio left for a place nearby where they purchased three quarts of wine and began drinking "right outside" of the camp. They drank one bottle (R. 34) and Hector and Johnson went together to get the bottle filled. When they returned accused had obtained some tinned food from some British soldiers. As witness was opening a can of beans,

"the trouble started and I looked around and there was a bottle sitting down. Chastain had the bottle, he set the bottle down and the colored fellow was sitting there and they said something, I dont know what they said. I seen the colored fellow making like he was getting up and Chastain got the bottle and hit him with it" (R. 35).

Witness did not think they were quarreling. They were sitting about five feet apart. The bottle which was not full broke when accused hit Hector on the head. Hector fell,

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"then he started getting up and he pushed him back down. The fellow started reeling, he made a swing at him with his bottle and I figured he hit his hand. Then he hit the fellow in the neck with the bottle neck" (R. 36).

One of accused's fingers was cut and bleeding and when asked by witness "what was the matter", he replied, "I am cut, I got a cut artery". Witness and accused thereupon left for the nearby British camp to have the finger bandaged, and as they did so Hector got up and started walking away (R. 36). Witness testified that accused was drunk (R. 37) but that he could walk "all right" and that his words were understandable (R. 38).

Accused was sworn as a witness. His testimony corroborated that of Johnson as to what occurred before the time of the alleged assault (R. 38, 39). He then testified:

"Johnson had some canned stuff and started opening this can and this fellow looks and said, 'I've got a good mind to kill a mother fucker'. On one lick he got up. He reached over for the bottle. After he reached over and grabbed the bottle it was sitting like this (indicating) and grabbed the bottle with the left hand and changed over with my right. He had plenty of time I figured he was after the bottle and he threw up his hand like that (indicating) and he caught my hand. He just caught it with his finger and I twisted it out like that (indicated), it poured wine and I got my hand loose, then I hit him" (R. 40).

He further testified that:

"After I hit him he went down and he come up and just come out just like he had his hands out like that (indicating) and I hit him again. Then I broke the bottle and I must have cut myself, I dont know how it happened" (R. 41).

When Hector reached for the bottle there was nothing to keep him from walking away. When asked if he was afraid of Hector, accused replied, "I don't know, sir, it was me or him" (R. 41). Hector had nothing in his hands and accused could not remember how many times he jabbed Hector with the neck of the bottle. The bottle broke the second time he hit Hector. Hector did not fall, he just "ducked his head". He was not sitting when accused hit him, they were both on their feet (R. 42,43). He hit Hector with the bottle because,

"I figure if he got the bottle he would do the same thing...he was close to me and he was coming at me (R. 43)...The first time I hit him, sir, he just kind of ducked, just kind of glanced. It wasn't very hard, figured to knock him out that is all and so he just throws up his hands like that and di(d)n't make attempt

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to get away at all (R. 44)...It didn't knock him out:
I dont remember hitting him with the bottle" (R. 45).

He testified that after the bottle broke he threw the neck part on the ground, "I wasn't going to try to hide it"; "I figured it was either him or me"; and that "my mind was just blank, coming and going...I remember striking him one time, after then, I don't know". He then testified that he remembered striking deceased three times, two with the bottle full and one with it broken (R. 45), and that when deceased "swung at" accused "he hit my hand" (R. 46).

4. It thus appears from the evidence that at the place and time alleged accused hit Private Joe H. Hector on the head with a bottle, breaking it, and with the neck piece thereof repeatedly struck and jabbed him in the face and neck with such force and violence as to sever the internal jugular vein and thereby cause his death by hemorrhage. The charge is that of unlawful homicide with malice aforethought. Although some time before this fatal assault accused and Hector had an altercation, in the course of which the latter hit accused in the face with a mess kit, this altercation had no apparent causal relationship with the subsequent assault. They had exchanged apologies and had set out, with a third soldier, to buy and drink some more wine. No less could the facts and circumstances which immediately preceded the fatal assault serve as adequate provocation to reduce the offense to that of manslaughter and, consistently with the findings of the court, it must be concluded that the homicide was committed deliberately and with malice. Even though the court should have believed the defense testimony that Hector spoke insulting words or made impotent threats against the accused, they alone would have been inadequate as a legal provocation or as an excuse in self-defense (MCM, 1928, pars. 148a, 149a). The factual background admits of no hypothesis but that of murder. There is evidence that Hector made no move or show of violence against accused and that he was without a weapon of any kind. Nevertheless and without the slightest disposition either to withdraw or avoid any difficulty, accused viciously and with violent effect hit and jabbed his victim with the jagged edges of a piece of the broken bottle. And as the blows were being struck the latter tried to cover his head with his hands. The court was fully warranted in rejecting the theory of the defense that the homicide was done either in self-defense or under heat of passion induced by legal provocation. The evidence sustains the finding of guilty of murder (MCM, 1928, par. 148a; Winthrop's, reprint, p. 672 et seq.).

The evidence shows that accused had been drinking heavily that day. While one witness testified he was drunk, he was described as being able to walk and talk normally and understandably. He could sense a cut on his finger and went about to have it bandaged. His own testimony demonstrated a full recollection of what had transpired before and at the time of the assault. Moreover the blows he inflicted on his victim showed a directed malevolent design with malicious intent. The court, in the light of these circumstances, was amply justified in concluding that accused had sufficient control of his faculties to entertain the specific intent involved in the charge of murder.

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5. The Specification alleged that accused killed Hector "by hitting him on the head and face with a bottle". The evidence shows that Hector was cut so severely in the region of his neck, face and head by a broken bottle wielded by accused that he presently bled to death. The exact means of inflicting the fatal wounds might have been more particularly averred, but there is no substantial variance between the pleading and the proof. Accused did not object to the phraseology of the pleading nor was he in any sense misled (AW 37).

6. The charge sheet shows that accused is twenty-nine years of age. He enlisted in the Army of the United States 20 January 1942 with two previous enlistments, with discharge ratings of "very good" and "excellent".

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

Samuel W. Hughes, Judge Advocate.
A. J. Gde, Judge Advocate.
Sarah Sumner, Judge Advocate.

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fail to repair at the fixed time to the properly appointed place of assembly for members of Battery "C" 171st F.A. Bn. on pass in Palermo, Sicily.

Specification 2: In that Private Edward A. Palac, Btry "C" 171st F.A. Bn. did, without proper leave absent himself from his organization at an area near Trabia, Sicily from about September 6, 1943 to about September 7, 1943.

Specification 3: In that Private Edward A. Palac, Btry "C" 171st F.A. Bn. did, without proper leave absent himself from his organization at an area near Salerno, Italy from about October 3, 1943 to about October 5, 1943.

CHARGE III: Violation of the 69th Article of War.

Specification: In that Private Edward A. Palac, Btry "C" 171st F.A. Bn. having been duly placed in arrest in battery area on or about September 2, 1943, did at an area near Trabia, Sicily on or about September 6, 1943 break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to the Charges and Specifications. He was found guilty of the Specification, Charge I, except the words, "Desert the service of the United States by absenting", and "with intent to avoid hazardous duty, to wit: the invasion of Italy of the 171st Field Artillery Battalion", and "in desertion", substituting for the first and third exceptions respectively the words, "Absent" and "without leave", of the excepted words not guilty, of the substituted words guilty; not guilty of Charge I, but guilty of a violation of Article of War 61; and guilty of the other Charges and Specifications. Evidence of one previous conviction by special court-martial for violation of Article of War 61 was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½. He did not designate the place of confinement.

3. As to the Specification, Charge I, the evidence shows that accused absented himself without leave from his organization at 0600 hours on 11 September 1943, and remained unauthorizedly absent until 14 September 1943 (R. 4; Pros. Ex. A). At the time accused so absented himself, his battery was stationed in a staging area near Trabia, Sicily, where it had moved from another such area (R. 5). Trucks were lined up, loaded with heavy ammunition (R. 5,8) and the battery was ready to sail for Italy; it was only "awaiting orders to pull out" (R. 5). The men had been told that the move would be "in the very near future" but they "didn't know exactly when" (R. 7). The battery left on 12 September 1943 and accused was not with it (R. 5).

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As to Specification 1, Charge II, the evidence shows that accused went with a group of soldiers from his battery into Palermo, Sicily, on 30 August 1943, on pass, and the officer in charge fixed a time and place for the men to meet upon expiration of the passes (R. 5,8). All the party gathered as directed except accused (R. 5,8,11). After waiting fifteen or twenty minutes past the scheduled time of departure, the group left without him (R. 8,9) and he did not return to the battery area with them (R. 11). The morning report of his organization shows that accused absented himself without leave at 1700 hours on 30 August 1943 (R. 4; Pros. Ex. A).

As to Specification 2, Charge II, the evidence shows that accused absented himself without leave from his organization at 0700 hours on 6 September 1943, and remained unauthorizedly absent until 0800 hours on 7 September 1943 (R. 4; Pros. Ex. A). The battery was then stationed near Trabia, Sicily (R. 5).

As to Specification 3, Charge II, the evidence shows that on 3 October 1943, accused and some other soldiers were detailed to guard some barracks bags at Salerno, Italy. When a noncommissioned officer went to pick up the bags at about 1500 hours on this date, accused was not there. He was reported to be at another area nearby, washing some clothes, but a search for him there proved futile (R. 9,10). This absence was unauthorized and continued until 5 October 1943 (R. 4; Pros. Ex. A).

As to the Specification, Charge III, the evidence shows that accused was placed under arrest by the commanding officer of his battery about 2 September 1943 (R. 5,6). The arrest was not lifted (R. 6) and he was specifically confined to his battery area (R. 11). On 6 September 1943, while he was still under arrest, accused broke his arrest by absenting himself from his organization without leave (R. 4,11; Pros. Ex. A).

Accused testified that on 11 September 1943, he went a short distance from the area where his organization had halted for the night and, in company with some soldiers from the 180th Infantry, began drinking at the invitation of "some boys from Cannon Company" who had five gallons of wine (R. 12). He got sick and after that

"I wandered off somewhere and when I came to I found myself in the San Cola train station. I stayed there near all day before I could get a ride back. I met a boy from the 180th after that and he told me that my outfit had pulled out. I got scared then he asked me 'How come you aren't with them?' I just told him what happened then and told him that I was over the hill. He said, 'Well, come along with me'. They were back there with the barracks bags and stuff. He asked me if I had anyplace to to stay and I said 'No.' He said that I should go with him and he'd find a place for me to sleep and when I woke up he took me to a staff sergeant who took me to the Captain and said, 'Captain,

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here's another straggler for you.' He asked me, how come I was over there and I told him...he said that he'd put me on his passenger list and I could find my outfit when I got out of Sicily" (R. 12,13).

He testified that he did not know his organization was going to leave so soon; he was not afraid to go into action with them and he did not absent himself with intent to avoid hazardous duty (R. 13).

He knew he was in a staging area and knew that his unit was going to move, but he did not know what boat team he belonged in (R. 14). When he got out of the truck, he laid his bed out, walked about ten yards to the "boys from the 180th", walked "about 20 or 25 yards away" to the boys from Cannon Company, then "got drunk and wandered off" (R. 15). He "woke up in the San Cola Station...about six kilometers" from the staging area (R. 15). He knew that he was in the area "for a pretty serious purpose" and "that they were going to make some operation" but he did not know they were going in landing barges (R. 16). Once before he had wandered off when drunk but he "never drank that much wine before" (R. 16).

Accused further testified that on 30 August 1943, when he went with his battery on a pass into Palermo, Sicily, he walked around and had no idea what time it was; a military policeman came up to him and told him he should not be in town at that time and took him to a guardhouse where he was detained over night. The next morning he was sent to a "straggler point" and later placed on a train from which he alighted near enough to his organization to get "a lift back to camp" (R. 13,16).

He testified further that he did not remember being absent from his organization at Trabia, Sicily, on 6 September 1943. He did remember the incident of being on "a barracks bag detail" in Salerno, Italy. He told a corporal that day that he was going to wash some clothes and might have supper at a nearby house and the corporal said "it would be all right as long as there was one man with the barracks bags". He had supper "over there" and when he returned everything was gone except his bedding roll (R. 14). He had formerly been a carrier in the ammunition section of the battery, then a machine gunner and a kitchen worker; since he left Sicily 7 October 1943 he had been guarding barracks bags (R. 17).

4. It thus appears from the evidence that at the places and times alleged in the Specification, Charge I and in Specifications 2 and 3, Charge II, accused absented himself from his organization and remained unauthorizedly absent for the periods of time as averred. And further, that at the place and time alleged in Specification 1, Charge II, he failed to repair to the properly appointed place of assembly. At the place and time alleged in the Specification, Charge III, having been duly placed in arrest, he broke that arrest before he was set at liberty by proper authority. The court acquitted accused of desertion to avoid hazardous duty as alleged in Specification, Charge I, and found him guilty of the lesser included offense of absence without leave in violation of Article of War 61.

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All findings of guilty are fully supported by the evidence.

5. The accused is 23 years old. He was inducted into the Army of the United States 19 September 1941, at Camp Grant, Illinois. He had no prior service.

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

 Judge Advocate.
O. J. G. de Judge Advocate.
Gordon Simpson Judge Advocate.

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

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

Board of Review .

NATO 965

UNITED STATES	)	TWELFTH AIR FORCE
)	
v.	)	Trial by G.C.M., convened at
	)	La Marsa, Tunisia, 6 October
Private JAMES E. SAUNDERS	)	1943.
(15090418), 347th Bombardment	)	Dishonorable discharge and
Squadron, 99th Bombardment	)	confinement for life.
Group (Heavy).	)	United States Penitentiary,
	)	Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private James E. Saunders, Three Hundred Forty Seventh Bombardment Squadron, Ninety Ninth Bombardment Group (Heavy) did at Oudna #1, Oudna, Tunisia, on or about September 3, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Claudie L. Allen, a human being, by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions, one by summary court-martial for absence without leave in violation of Article of War 61, and the other by special court-martial for being drunk and disorderly in violation of Article of War 96, was introduced. He was sentenced, three fourths of the

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members of the court present concurring, to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that at about 2300 hours on 2 September 1943, in the area occupied by accused's organization, located at Oudna No. 1, Oudna, Tunisia, accused awakened Private Ralph J. Brown, 99th Bombardment Group, and enlisted his presence as a guard at the enlisted men's club where accused worked as a bartender (R. 7,19,31,55). The club was in a tent with a bar located at the rear (R. 12,33). They went to the club in a bomb service truck in which there was a 1903 Springfield rifle which accused explained he had because he was going on guard that night (R. 14). After Brown and Technical Sergeant Albert L. Gonyea, 99th Bombardment Group, who was in charge of the club that night (R. 25,26) and accused had talked a while sitting on Brown's bed, "Sergeant Allen... barged in and wanted a drink" (R. 8). He was told the bar was closed and Gonyea, observing that he was "very drunk", told Allen he had better leave. Allen did not go but picked up a bottle, sat on Brown's bed, pushed him and told him to get up, that "he wanted to lay down" (R. 9,27). Brown told him to go and sleep in his own bed and "there was quite a few curse words going back and forth" between Brown and Allen. Brown testified that some of Allen's remarks were insulting and were directed at accused as well as himself (R. 9,15,27).

It was a part of accused's duties to keep order at the bar and to eject persons who were not supposed to be there, even after the bar had closed. Accused told Allen to go out, that "we don't want none of that shit". When Allen would not leave, accused picked up a carbine off Brown's bed and again told Allen to go (R. 9,27,31). Gonyea told accused "to put the gun down because we wouldn't necessarily need" it (R. 27). He got between accused and Allen and "made a grab for the gun" but accused backed away and fired the weapon, aiming it at the bar near the ground (R. 9,14,15,28). Allen exclaimed "I'll go", hesitated momentarily, and then went out of the rear entrance. One witness testified he saw Allen go out of the club "Fast and get a big rock" (R. 10,28,74). Accused followed him to the exit and thrust his head and shoulders outside. At this moment an object, presumably a rock or similar object Allen had seized, hit against the tent, striking accused. Accused then fired a second shot (R. 29,32,74,98) and afterwards "staggered back into the tent". He was bleeding from a "fairly nice size gash in his head" (R. 10,11,29). He turned around and worked "the bolt of the gun", saying "How do you fix the thing?". Presently he left the tent.

Gonyea followed accused and found him in the day room next to the club standing by a table on which the carbine, now unloaded, had been laid. Gonyea told accused he should see a doctor about his injury "because it was a pretty bad cut". Accused asked Gonyea to take the carbine and the two returned to the club where Gonyea, at accused's request, gave him a bottle partially filled with whiskey (R. 29,30,32). Brown asked accused to bring

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him some blankets, which accused promised to do (R. 83). Accused and "two of these little French kids that they have around" then got in the bomb service truck and proceeded to the dispensary (R. 30,75,80,83) where a sergeant washed accused's wound with alcohol, put sulfanilamide powder on it but did not think it necessary to apply a bandage. This sergeant testified that accused told him Allen had hit him on the head with a rock and had run away "but I shot at him". While the wound was being cleaned, accused took a drink of whiskey and "either got strangled or burnt on it". Previously at the club he had taken a drink; altogether he had "two little drinks". After taking the drink at the dispensary, he said he did not want any more and gave the bottle which was about two-thirds full to "one of the French kids" who subsequently threw it away (R. 43,44,45,46,80,84). The sergeant who had dressed his wound testified that as he was leaving the dispensary, accused said he was going down to find Allen

"and challenge him to fight with his bare hands, and if he didn't fight he was going to kill him" (R. 43).

One of the French youths testified that accused said to the soldier who was treating his wound "I fix, go kill Tiny" and the other testified accused said in talking of "Tiny", which was Allen's nickname, "I am going to get him tonight" (R. 75,83). Accused had "a large gun" with him at the dispensary (R. 43).

In the meantime, at about 2345 hours, Allen went to the officer's club and sought out his former squadron commander who testified that his expression was "that of fear", and that his "physical condition was that of having been drinking" (R. 37,38). The officer told Allen to remain at the club until he got the Officer of the Day but Allen left when he went out to telephone (R. 40,41). Shortly after midnight Allen went to the tent of another soldier who testified that Allen said accused

"was firing shots at him and he wanted to know what to do. He wanted to get his gun and go out gunning, but we finally got together and decided we would go down the line and pick up a truck and report it to Captain Scarborough" (R. 50).

This soldier testified that Allen had also made the statement that "When a man shoots at me, I am going to have it out with him" (R. 53). He and Allen left the tent and presumably were going to report the matter when, the headlights of a truck appeared. Allen exclaimed "My God, here's Saunders again. I need some self-protection". He pushed his companion into a ditch and ran away toward the armament shop (R. 51).

A few minutes past midnight, the charge of quarters at the orderly tent, which was about 500 feet north of the medical tent, heard a sound "like somebody mumbling to himself". He turned on the light and saw accused walk into the tent. He was armed. When asked what he wanted, accused

"said he was going out to get him...that Sergeant Allen

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had hit him on the head with a rock" (R. 47).

Soon afterwards accused went into a tent occupied by several soldiers including Technical Sergeant J. Sterling Price and Sergeant Howard D. Baier, both of 6632d Ordnance Airdrome. He stumbled over a bomb fin crate beside Price's bed, awakened him and asked "where does Tiny Allen sleep" (R. 55,57,58). Price replied "a few tents down", and at that moment accused turned around, dropped to his left knee, called out "Halt, Tiny", aimed his rifle and fired (R. 56). From the place where he fired, the muzzle of the rifle did not extend outside the tent. There was no light in the tent (R. 62) but outside the lights of the truck accused had been driving were turned on (R. 64). After firing, accused ejected the empty shell, "chambered another one" (R. 56), and moved over to the other side of the entrance to the tent. He said "Tiny, drop the gun" several times. After a short wait, he ordered Baier at the point of his rifle, to get out of bed and search outside for Allen's body. Accused said to Baier, "Go out and put your foot on Tiny Allen's gun". Unwillingly Baier went outside and presently called back to accused "It's all right to come on out now" (R. 57,64,66).

Accused, Price and the other soldiers then went out and saw Allen lying motionless on the ground at a point 50 or 75 feet from the tent entrance. His body lay beyond the range of the light of the truck but Baier, who was standing by the body, could be seen "pretty distinct". Price felt his pulse and there was no beat. Accused came up to the body and said "Feel his heart". Price told accused "There's no use, there is no beat in his pulse". Accused handed his rifle to Baier who unloaded it (R. 58,59,63,64,67,91). Price testified accused

"said he thought 'Tiny deserved this and he wasn't sorry he killed him because he bullied over people', or several words to that effect" (R. 59).

Another soldier at the scene testified that accused "made quite a few remarks to the effect he would like to stomp on Sergeant Allen's face, and he was glad he killed him, and if he had a chance he would do it again" (R. 52). A medical officer who had been summoned testified that accused looked at Allen's body and said "I should of shot him again" (R. 21). The officer of the day testified that when he arrived at the scene of the homicide, accused "told one of the boys to tell me 'I had to do it.'" (R. 93).

The two French youths who had accompanied accused, were in the front seat of the truck at the time of the shooting (R. 76). One of them testified accused had said at the orderly tent "I am fixing to go kill Tiny" (R. 76); that he drove the truck to Price's tent, left the lights on and entered the tent; that accused asked Price "where Tiny live" and at that moment, Allen was seen coming around the tent. Witness testified:

"Tiny come with small gun like this and charge it..."

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Sandy (accused) listen to him when he charge the shot and said 'Halt'. Tiny say 'O.K.'. After, poom...Sandy say 'Halt', but one second after he shoot him. Tiny drop dead" (R. 77,78).

He testified that when accused called to him Allen pointed his weapon at accused (R. 79). Allen's body could not be seen from the truck after he fell. Upon being told by Price that Allen was dead, accused said "Tell him I sorry. I don't want to kill you" (R. 78). The other French youth also testified that Allen had pointed his weapon at accused just before the fatal shot was fired (R. 85).

The medical officer who examined Allen after the shooting found him "lying on his back with a Carbine under his back, partially covered by his body, his finger on the trigger" (R. 19). The carbine was "on safety" and there was a round of ammunition in the chamber (R. 91). He had been shot by a bullet which entered the right jaw and passed out slightly above and to the left of the left ear (R. 19). Allen was dead. His death was "probably instantaneous as a result of damage to the vital centers of the brain and the center which controls the heart action". The officer testified that this damage was caused by "a bullet in that area" (R. 20). He noticed "a definite odor of alcohol about" Allen (R. 22).

The evidence shows that accused had been drinking during the night in question but that he was not drunk (R. 23,30,48,60,61,81,93,101).

Accused testified that about 2230 hours on the night of the shooting, he overheard Gonyea saying he needed a guard to sleep at the enlisted men's club all night and volunteered to get someone. He secured the services of Brown and brought him back to the tent which housed the club (R. 96). Accused testified that after he had helped to set up a bed for Brown, he heard a commotion and

"Sergeant Allen came through the entrance and said 'I want a drink'. Sergeant Gonyea said 'I can't give you a drink, the bar is closed'. Then Sergeant Allen came over and sat down beside Private Brown and pushed him with his elbows and at the same time said 'Get up. I want to lie down'. Private Brown told him 'I don't want any trouble with you. Let me alone'...There was four bottles of beer on the floor there and one bottle on the cabinet, and Tiny grabbed one. There was a few curse words between Sergeant Allen and Private Brown. I don't remember the exact words, but Tiny said 'Fuck the whole damn bunch, and you too Saunders'. I said 'I don't take that shit. Go on, Tiny, the Club is closed'. I picked up the gun and Tiny walked over to the entrance of the tent...I said, 'Get out, Tiny', and he said 'O.K. I'm going'. He walked to the entrance of the tent and stopped and started arguing again. Sergeant Gonyea

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stepped between us, and I shot in the floor (R. 97) ...After I fired the first shot, Tiny went out the slit of the tent, and I went to the slit and stuck my head out. Soon something hit me on the head...I staggered back into the tent. I said, 'He hit me with a rock'. That is, I said that he hit me with a rock, but I didn't know what it was he hit me with, and I went outside the tent and I didn't see Tiny, and I fired a shot in the air ...To scare him away if he was around...I went back to the tent...and fooled around there a minute or two, then I went outside and across to the day room...there was blood running down my face, and one of the fellows handed me a handkerchief, and he picked up the gun I laid on the table, and I said, (R. 98) 'Look out, it's loaded', and he took the clip out and emptied the chamber..." (R. 99).

Sergeant Gonyea advised accused to go to the dispensary and gave him a bottle containing whiskey. Accused continued:

"I started out and Private Brown asked me to go down to the line and pick up some blankets for him because he only had one. I said 'O.K., after I go to the dispensary I'll get you some blankets'...I got in the truck with the two French kids and went up to the dispensary, and somebody awakened the Charge of Quarters. I walked in and he asked me what was the matter, and I told him I wanted to get my head fixed. He said 'O.K. have a seat'. He looked at my head and said he would have to cut the hair away. I said 'O.K. go ahead'. He said 'I'm going to put some alcohol on it and it might burn a bit'. I said 'Wait a minute I want to get a drink of whiskey'. I asked one of the kids, Jean, for the bottle and took a drink and handed the bottle back to him...It burnt my throat and choked me. Sergeant Edwards fixed my head, and I got in the truck with the two kids. We stopped at the orderly room tent and I went in to wake up the Charge of Quarters. I told him what happened, and he told me to go down to my tent. I didn't say anything. Just turned around and walked out...I knew somebody would tell them the next day, so I thought I would go and tell him about the shots being fired" (R. 99).

He further testified that,

"We got back in the truck and started down to the line. There is an intersection there, one road goes to the Base Headquarters, and one turns off to the 347th area. I drove as far as Sergeant Price's tent, picked up my rifle and walked in the tent. When I walked in I stumbled over a fire crate...These two French kids dearly love rifles. They always pick up any rifle, and my rifle was loaded with one in the chamber. I was afraid one of them might pick it up.

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Also I was afraid Tiny might be in the area with his gun ...I walked in Sergeant Price's tent and stumbled and I fell against his bed. I said 'Hughes', and Price said, 'No, this is Sergeant Price'. I said 'Where does Tiny live'. He was about half-asleep and was trying to tell me...I wanted to go down and challenge Sergeant Allen to a fair fist fight...Because he had hit me on the head with a rock (R. 99). Sergeant Price was about half-asleep trying to tell me where Tiny's tent was. At that time I heard someone outside say, 'Tiny bring that gun back'. When I heard that, I had my gun on Sergeant Price's writing table, I picked up the gun and saw Tiny walking towards the truck. He was carrying his gun at approximately port arms. I said 'Halt, Tiny', and he spun around and put the rifle to his shoulder" (R. 100).

Accused two or three times told Allen to drop his weapon. As Allen "spun" about to his right (R. 100,101) accused

"dropped to my knee and fired...While I was standing in the doorway. I fired that shot and moved back in the tent farther, and put another round in the chamber. I didn't hear a sound outside, and I turned towards Sergeant Baier's bed and said, 'Pee-Wee, go out and get his gun'...I knew he would shoot me if he saw me in the light. Sergeant Baier is smaller than me. Sergeant Baier got up and started off in the wrong direction, and I showed him where it was. I said 'That way', indicating to the left of the truck. Sergeant Baier went over there and a few seconds he said, 'I got it. Come on out'. I said, 'You got his gun?', and he said, 'I got my foot on it'. I said, 'Keep your foot on it'. I ran out and went to the left side of Tiny, and I said 'Pee-Wee go get a doctor'. I felt his heart and I didn't feel any heart beat, and I handed my rifle to Sergeant Baier. It seemed like then I had a blackout or something. I woke up the next day down at El Aouina in the guardhouse. I remember someone telling me I was under arrest, and I was telling some of the fellows 'Good Night', and I remember someone searching me. That is all I remember" (R. 100).

Accused testified further that he did not fire until he saw Allen put his weapon to his shoulder (R. 100); and that he could see Allen clearly, "just a little to the right" of accused, when he fired at him (R. 105, 106). Allen was "approximately 6 feet and 3 or 4 inches tall, and weighed around 225 or 240". Accused had had "a couple of drinks" but was sober. He did not recall saying in the orderly room anything about "Going out to get him". He did say to the sergeant at the dispensary that he was going to challenge Allen "to a fight with my bare hands" but did not recall saying that if Allen did not fight, he was going to kill him. He took the rifle in the medical tent as a precaution "against Tiny" and also because the

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French youths were in the truck (R. 101). He killed Allen in "self-defense. It was shoot him or be shot". Allen's weapon was pointed at him and he was afraid of being shot if he did not shoot his adversary. The wound on his head was very painful at first but did not bother him much after being treated. He was "thoroughly incensed" at having been struck the blow on his head. Allen was overbearing when drunk and accused "never fooled with him when he was drunk", but on the night of the killing he was going to challenge Allen with his bare hands (R. 102). Accused denied he shot at Allen when he fired the second time at the club tent and denied having so told the sergeant at the dispensary (R. 103,104).

4. It thus appears from the evidence that at the place and time alleged accused shot and killed "Sergeant Allen". The facts and circumstances preceding the fatal shooting are substantially uncontradicted. They show that at about an hour before the assault accused and Allen had become engaged in a verbal altercation which ended when accused fired a shot from a firearm. Immediately afterward Allen, as he was leaving the scene, had thrown a rock or other hard object at accused, hitting and injuring his head. Accused fired another shot. Later, after receiving treatment for his injury and stating that he proposed to kill Allen that night, accused with his rifle set out to find Allen. Upon seeing Allen, who was armed with a carbine, accused called him by name and at about the same time aimed at him and fired his rifle, killing him. With these facts in evidence, the court was amply justified in finding that the killing was unlawful and with malice aforethought, the requisite elements constituting the crime of murder (MM, 1928, par. 148a).

Accused contended he fired the shot in self-defense. This does not conform with the factual background. There is substantial evidence to show that after the shot was fired by accused at the enlisted men's club, Allen not only avoided accused but actually expressed a fear of him. On one occasion during the intervening period he fearfully hurried away from a spot where he saw accused in a truck. Allen was then unarmed and it is reasonable to conclude that it was only then that he decided to secure a weapon with which to protect himself. At the moment accused fired the fatal shot, certain inferences are deducible with respect to the position in which Allen was then standing in relation to the accused and the position in which he was holding his carbine. The fact that the bullet entered on the right side of Allen's face and emerged from the left side of his head supports an inference that when the shot was fired Allen was not, as implied by accused and certain prosecution witnesses, aiming his carbine directly at accused but was facing in another direction. The fact that Allen's forefinger was on the trigger as his body lay on the ground might justify an inference that it was in that position the moment he was shot and, as claimed, while pointing the weapon at accused. There is however the circumstance, which lessens its inferential value, that the weapon was found with the safety mechanism applied. But assuming that the evidence shows that Allen had in fact presented his weapon for instant use against accused before accused fired and that accused was in fact in imminent danger when he fired, accused could not invoke the legal excuse of self-defense. He was the first of the two to use a firearm in a threatening

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manner. While anteriorly he had been the victim of a retaliatory assault by Allen, his subsequent conduct and declarations were characterized by a determined purpose to avenge himself. At no time did he withdraw or evince a disposition to avoid difficulty with Allen. To the contrary, he pursued his avowed objective unabatedly and maintained throughout the role of an aggressor.

The applicable rule of law is stated in the Manual for Courts-Martial as follows:

"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; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (MCM, 1928, par. 148a).

After having provoked the difficulty accused could have purged himself of aggression and revived a right of self-defense only had he withdrawn or sought peace. Instead, as the court justifiably concluded, he continued unalterably his armed aggression and ultimately accomplished his deliberately designed purpose to stalk and kill Allen. It is pertinently stated in Wharton's Criminal Law, 12th Edition:

"If the defendant in any way challenged the fight, and went to it armed, he cannot afterward maintain that in taking his assailant's life he acted in self-defense. 'A man has not,' as is properly said by Breese, C. J., 'the right to provoke a quarrel and take advantage of it, and then justify the homicide.' Self-defense may be resorted to in order to repel force, but not to inflict vengeance" (Sec. 614).

Any theory of homicide committed in the heat of sudden passion caused by adequate provocation must also be excluded. The circumstances demonstrated marked deliberation in the conduct of accused and, aside from other considerations, it cannot reasonably be said that sufficient cooling period had not elapsed since the time of the initial altercation (MCM, 1928, par. 149a; NATO 419, Addison; Wharton's Crim. Law, 12th Ed., par. 426).

Accused was alleged to have killed "Claudie L. Allen". Deceased was identified by the proof only as "Tiny" Allen and Sergeant Allen.

"Proof of the killing of a person of the same name is sufficient to prove the killing of the person named in indictment. A variance in a witness' references to the christian name of deceased does not affect the sufficiency of the proof of identity of deceased. Where the surname of the person killed is established, his identity with the person named in the indictment may be shown by proof of his occupation" (30 C.J. 289).

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Applying these principles, the identity of deceased as the person named in the Specification was sufficiently established by the proof of his surname and his occupation. With substantial completeness, the evidence identified the deceased, Sergeant or "Tiny" Allen, as the person named in the Specification (NATO 384, Middleton et al.).

5. The charge sheet states that accused is 23 years old. He enlisted in the Army 16 February 1942.

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

 Judge Advocate.
O. J. Felt, Judge Advocate.
Wm. Simpson Judge Advocate.

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

APO 534, U. S. Army,
27 November 1943.

Board of Review

NATO 980

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

EASTERN BASE SECTION)

v.)

Trial by G.C.M., convened at
APO 763, U. S. Army, 15
October 1943.)

Privates JAMES F. OVERSTREET)
(38075075) and WILLIAM C. COX)
(34450857), both of Battery A,)
532d Separate Coast Artillery)
Battalion, Automatic Weapons,)
(Anti-Aircraft) (Mobile).)

Each: dishonorable discharge
and confinement for 20 years.
United States Penitentiary,
Lewisburg, Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

2. Accused were jointly tried upon separate Charges and Specifications as follows:

OVERSTREET

CHARGE: Violation of the 93d Article of War.

Specification: In that Private James F. Overstreet, Battery A, 532nd Sep CA Bn AW (AA)(M) did, at 8 Rue Du General Ducros, Tunis, Tunisia, on or about 1630 August 21, 1943, with intent to commit a felony, viz rape, commit an assault upon Madame Veuve Viviant by willfully and feloniously laying hold of said Madame Veuve Viviant on her face and body with his hand.

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COX

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

Specification: In that Private William C. Cox, Battery "A" 532nd Sep CA Bn AW (AA)(M), did at 8 Rue Du General Ducros, Tunis, Tunisia, on or about 1630 August 21, 1943, forcibly and feloniously, against her will, have carnal knowledge of Madame Veuve Viviant.

CHARGE II: Violation of the 93d Article of War.

Specification: In that Private William C. Cox, Battery A, 532nd Sep. CA Bn AW (AA)(M), did, at 8 Rue Du General Ducros, Tunis, Tunisia, on or about 1630 August 21, 1943, with intent to commit a felony, viz, rape, commit an assault upon Madame Veuve Viviant, by willfully and feloniously laying hold of said Madame Veuve Viviant on her face and body with his hand.

Accused Overstreet pleaded not guilty to and was found guilty of the Charge and Specification pertaining to him. Accused Cox pleaded not guilty to the Charges and Specifications relating to him. He was found not guilty of Charge I and its Specification and guilty of Charge II and its Specification. No evidence of previous convictions was introduced as to either accused. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement in each case and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 21 August 1943, at about 1600 hours, two American soldiers knocked on the door of the apartment of Madame Veuve Viviant (R. 5,6), a 66-year old woman (Def. Ex. A) living in Tunis, Tunisia. She opened the door and as she did so they entered the apartment, closed the door (R. 5,12), started to push her and threw her on the bed (R. 5,12), where "the small one opened" her legs (R. 6). They squeezed and hit her. They also drank some wine in the apartment (R. 6). "The big soldier" got on top of her first; "he was very, very drunk and he just threw himself on" her (R. 7). While "the big one" was on her "the small one" tried to hush her up "saying shh, shh, shh...He was just walking around until he was ready and preparing himself. When he was ready, he just pulled the big one off" her, "and then he threw himself on top of" her (R. 7). Madame Viviant testified:

"After the big one finished with me...the small one got on top of me...I was crying and continually battling with them. They wanted to kill me both of them...when the small soldier finished with me the big one that drank some drinks threw himself on top of me and stayed about a quarter of an hour battling

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with me squeezing me around...As I was screaming and hollering, he was on top of me and trying and trying and trying and he couldn't come...He was on top of me and battling with me when Monsieur Kerlidou came in" (R. 6).

"The small one...did not enter his penis into" her; "he discharged on the outside" (R. 7). "The small one was very nice with" her "but the big one used force and was pretty rough" (R. 12). "The big one was big and brutal" and was on top of her twice (R. 7). After

"the young one or smaller one...finished, he got up, opened the door, and he told the big one he was going, and the big one got on top of me and was hitting me on the head...As he was too drunk and as he was battling with me all the time, he was on top of me for about ten minutes, and I don't know, I don't think he could do anything...The big one was too drunk. He could not come...As the big one was on top of me, and as I was battling with him to do his affair with me, he saw that he couldn't. Monsieur Kerlidou entered by the window of the kitchen and saw him on top of me" (R. 7).

They did not tear any clothing from her but squeezed her around the breasts and lifted up her dress (R. 7). Both soldiers "had their penis out of their pants" but neither one penetrated her genitals (R. 8). She had never seen either soldier before; the small soldier was not very drunk, but the big one was very drunk (R. 8).

Madame Viviant identified accused Cox as one of the soldiers who came to her door (R. 6) and as "the small one who went shh, shh, shh" (R. 9). She identified a Captain Long, a spectator in the court room, as accused Overstreet.

Adrien Kerlidou, a neighbor in the same apartment house, heard Madame Viviant "complaining" and crying "they kill me, they kill me" and tried to enter her apartment but could not open the door (R. 9,10). He entered by the kitchen window, went into her bedroom, which was very dark with the shutters closed, and turned on the light. He saw Madame Viviant "lying on the bed, and there was this man above her" (R. 10). He identified accused Overstreet as the man he found in the apartment (R. 11). Overstreet came to him and said "How much" and Mr. Kerlidou replied "no good" and opened the apartment door so "that the owner of the house could enter" (R. 10,11). Military police arrived and arrested Overstreet (R. 10). Mr. Kerlidou had seen another soldier running, before he saw Overstreet (R. 10); "they seemed to be very drunk" (R. 11).

Madame Minguat Anne Marie, another neighbor and the owner of the apartment building (R. 12), was in her kitchen 21 August 1943, heard

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footsteps and saw two Americans in her living room (R. 13). They were drunk and "asked for Linnette". She told them Linnette was down below, and they left. Shortly thereafter she heard a cry for help from Madame Viviant and went down to her apartment. She knocked and tried to open the door with a key, but there was a key in the lock on the inside (R. 13). She asked Madame Viviant to open the door but she said she was unable to. "Then an American soldier opened the door, pushed" Madame Mingual aside and ran out. When she heard Madame Viviant say "They killed me, they killed me", she went out and called the police. She could not recognize either soldier (R. 13).

Each accused made a written statement to the investigating officer, which was admitted in evidence. Accused Overstreet's statement was admitted, without objection by defense counsel "in so far as it relates only to the accused Overstreet" (R. 15,16; Pros. Ex. 1). In his statement Overstreet said that he went into the apartment but that he did not "remember much of what went on. If there were any wine, I don't remember drinking it. I don't remember hitting the woman. I don't think I had intercourse with her because I was too drunk...I don't remember the M.P.s picking me up, but I do remember going to the jail" (Pros. Ex. 1).

The statement of accused Cox, "in so far as it applies only to William C. Cox" (R. 18) was admitted in evidence over the objection of defense counsel (R. 18; Pros. Ex. 2). Lieutenant Streger, the investigating officer, testified that he read to Cox the 24th Article of War, taking it "phrase by phrase", that he explained the meaning of the word "incriminate", and was satisfied accused understood the meaning of the Article (R. 17). The statement was in the officer's handwriting and signed by accused at the end (R. 16; Pros. Ex. 2). He learned the next day that accused could not read or write and had only gone to the third grade in school (R. 16) but was certain in his own mind that Cox knew what he meant, because when he "asked him certain questions, he refused to answer under certain grounds that are stipulated in the 24th Article of War" (R. 18). In his statement, accused Cox admitted going into Madame Viviant's apartment but he refused to answer the question as to whether he had intercourse with her on the grounds that it might incriminate him (Pros. Ex. 2).

Each of accused elected to remain silent, but the defense introduced by stipulation the report of a medical officer (R. 19; Def. Ex. A), which states that he examined Madame Viviant at 1830 hours on 21 August 1943, that she gave her age as 66 and "appeared somewhat perturbed"; that her neck in the area of the throat was red, there was a small abrasion of the right knee, and several small areas on her neck, arms and legs which appeared to be bruises "but one could not be positive". It further states that the pelvic examination showed no spermatazoa, and revealed no evidence, as far as the officer could determine, that she had been raped (Def. Ex. A).

The company commander of accused testified that neither of them had ever been court-martialed. He rated Overstreet as a "fair, an average soldier" and Cox as "very satisfactory" (R. 20).

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4. It thus appears from the evidence that at the time and place alleged, both accused wrongfully entered the apartment of Madame Viviant, the woman named in the Specifications, and there severally made assaults upon her while engaged in an effort, forcibly and without her consent, to have carnal knowledge of her. The evidence is uncontradicted that they forced their way into her apartment, locked the door, hit her, threw her on the bed, squeezed her, lifted her dress, "opened" her legs, and that each one lay on top of her with his penis exposed. She "battled" with them, screamed and "hollered" for help and, except for her resistance, each would apparently have accomplished his purpose. The intent of each to have carnal knowledge of her by force and without her consent was clearly shown by the evidence and concomitantly therewith the requisite overt act amounting to an assault was also established. All elements necessary to establish guilt of the crime of assault with intent to rape were satisfactorily proved and the court was fully warranted in finding each accused guilty as charged under Article of War 93 (MCM, 1928, par. 1491; CM NATO 830, Cooke; CM NATO 538, Terrell).

There was evidence that both accused were drunk. In finding them guilty of the assault as charged, the court in effect found that neither was so drunk as to be incapable of entertaining the specific intent to commit rape. This was properly within the province of the court to determine and the facts and circumstances amply sustain the findings of the court.

5. The court, over objection by the defense, received in evidence the written statement made by accused Cox to the investigating officer. The evidence shows that Cox was properly advised of his rights prior to his making the statement and that it was voluntarily made. Furthermore, Cox admitted nothing in his statement except his presence in Madame Viviant's apartment, which was clearly established by other competent testimony. It cannot be said that accused's substantial rights were injuriously affected by the admission of the statement.

6. The charge sheet states that accused Overstreet is 23 years old. He was inducted into the Army of the United States 30 January 1942. No prior service is shown.

The charge sheet states that accused Cox is 26 years old. He was inducted into the Army of the United States 9 September 1942. No prior service is shown.

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

Richard A. Thompson Judge Advocate.

W. G. J. Lee, Judge Advocate.

James J. Jones Judge Advocate.

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Private Isaac Crum, Private Hughie T. Dickerson, and Private Jack T. Owens, all of Company C, 203rd Quartermaster Gas Supply Battalion, acting jointly and in pursuance of a common intent, did, at Mathlain, Tunisia (near Bizerte, Tunisia), on or about 12 October 1943, with intent to do him bodily harm commit an assault upon Mohamed Ben Sleyman by thrusting the muzzles of dangerous weapons, to wit: United States Army carbines, into the body of the said Mohamed Ben Sleyman.

Each pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced as to Crum, Owens, or Hyatt. Evidence of one previous conviction for absence without leave in violation of Article of War 61, was introduced as to Dickerson. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 15 years, three fourths of the members present concurring in each sentence. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that between 2100 and 2200 hours on 12 October 1943 (R. 5) the four accused entered the Arab village of Mathlain (R. 10), Tunisia (R. 12) about three fourths of a mile or a mile from their bivouac area (R. 8) and near Bizerte, Tunisia (R. 12), armed with carbines (R. 6, 11, 13, 16, 31). Three of the carbines were loaded (R. 5, 20, 26, 27). Owens also carried a pistol (R. 6, 27) and Hyatt had a hunting knife (R. 7, 18).

Mohamed Ben Hammadi testified that as he was standing "near where I stay" in the village, four armed American soldiers approached him and said they were looking for German soldiers. He told them to "look with their flashlight". They searched his house, came outside, called to and pointed a "rifle" at witness and told him to proceed in front of them. The five went to the nearby house of Mohamed Ben Sleyman, the man named in the Specifications. Witness testified

"I went in front of them to the house of Mohamed Sleyman. When we got there near the house, two stood outside and two went in with me. The two came in with me, one stood at the outside and one went into the house, searching the house, started searching the drawers of the bureau and the house in general. And at that time Mohamed Ben Sleyman came in with his leg wounded. The one by the door put the rifle in his stomach and then his wife from ins(i)de screamed" (R. 11).

The soldiers were in the house about an hour or an hour and a half (R. 11).

Mohamed Ben Sleyman testified that on the night in question he went outside his house and saw two armed American soldiers about ten meters from the building. Witness addressed them "bon jour" and they immediately stuck,

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the one put a rifle in my stomach and one on my side and said 'get out of here' (R. 13). Witness walked a short distance and met two more armed soldiers, apparently at the entrance to his home. One of the soldiers, who was "by the little wall", thrust his rifle against witness' "stomach", threw him to the floor and said to him "zig zig, vino". The other soldier was inside or went inside the house. After witness was thrown down he arose and went into the house. The soldier inside was "searching the hut". One of the soldiers, at the door, followed witness and "stuck" his rifle in witness' "stomach". At this juncture, witness' wife screamed. Witness left the house and went to the bivouac area (R. 14). The wife of Mohamed Ben Sleyman testified that on the night in question, while she was in the house, she saw an armed soldier "searching the drawers of the bureau" while another armed soldier stood by the door (R. 15,16).

First Lieutenant Donald E. Ranson, Company C, 203d Quartermaster Supply Battalion, Officer of the Day, at the bivouac area, testified he heard a guard call the Corporal of the Guard, went to investigate and found the guard with an Arab whose legs were bleeding. Witness, together with the Sergeant of the Guard and the Arab, started towards the Arab village and were joined by an Arab boy who led them to a corner in the village. He pointed around the corner (R. 5), but would go no further. Witness walked around the corner and saw the four accused about 20 yards away. Each was armed with a carbine. They were facing Mohamed Ben Sleyman's house at a distance of 10 or 15 yards and had their carbines "trained on someone in the darkness" (R. 5,6). They swung towards witness and pointed their rifles at him. He disarmed them. Three of the carbines were loaded (R. 6). Hyatt handed witness a chisel-like instrument and said the Arabs had thrown it at them. Witness asked if that were any reason "for coming here and bothering around" and Hyatt answered "No" (R. 7). Witness took them back to the bivouac area and searched them, finding several loose rounds of ammunition, a bottle two-thirds full of wine and a knife. They appeared to be sober (R. 8).

The Sergeant of the Guard who accompanied Lieutenant Ranson to the Arab village testified that when they arrived the four accused had their rifles at port arms. When they saw witness and Lieutenant Ranson they "kind of stiffened up and lower their rifles a little, that's all". They did not point their rifles in the direction of Lieutenant Ranson and the witness (R. 31,32). It was fairly light and he could see them. He turned his flashlight on them but it was not necessary (R. 32).

Accused Hyatt testified that on the night in question the four accused had gone together to a water point about three miles from their company area, where they got some "vino" from a French house. They returned in a roundabout way and stopped on a little knoll about 150 yards from the Arab village to take a drink. They had been there 20 or 25 minutes when they heard an Arab scream. It sounded like a woman. They "went on down to see what was going on" and as they approached the building someone "dressed in undershirt and shorts" ran past them and threw a chisel at them. Then they saw someone coming toward them and they stopped, waited, and found "it was the CQ and the sergeant of the guard". The officer disarmed the four

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accused and placed them under arrest. He did not strike or point a weapon at any of the Arabs, did not go into any house and did not take or attempt to take anything from any house. He did not point his rifle at Lieutenant Ranson when he arrived. The four were in the vicinity of the Arab huts 25 to 30 minutes (R. 17-30).

Accused Crum testified in substantial corroboration of Hyatt, and denied any assault, unlawful entry, or attempt to take any property (R. 21). Accused Dickerson and Owen each testified that he did not commit any assault or unlawful entry and did not attempt to take any property (R. 24,26,27).

4. There is evidence that at the place and time alleged the four accused, armed with carbines, three of which at least were loaded, entered an Arab village in the nighttime and gave a fictitious reason for their presence. After threatening an inhabitant of the village and searching his house they went to the house of Mohamed Ben Sleyman, the man named in the Specifications. In the neighborhood of this house two of accused thrust the muzzles of their carbines against the body of Mohamed and demanded that he leave. Shortly afterwards another accused, at the entrance to the house, thrust his carbine against the body of Mohamed, threw him to the floor, and demanded wine. The fourth then, at great length, conducted a search of the house and of certain furniture therein. Later, when arrested, one of accused had a wine bottle in his possession. In view of the demands made and of the searches that were conducted, the court was justified in inferring that the accused who entered Mohamed's dwelling did so intending to steal wine or other property which might be found. The attending circumstances sufficiently show that the entry was the result of a common design by all of the accused and that each accused aided and abetted the man or men inside the house in their venture by guarding the door or by attempting to intimidate the man who lived in the house. The weight to be given the denials by accused was a matter for the court. The finding of a joint and unlawful entry by the four accused, with intent to commit larceny, as found under Specification 1 of the Charge, was legally justified.

The offense alleged in Specification 2 of the Charge is an assault aggravated by the specific present intent to do bodily harm with a dangerous weapon. There is direct evidence that on two occasions in the course of the transaction in the village, one or more of accused thrust a carbine or carbines against the body of Mohamed Ben Sleyman. On the first occasion accused ordered the victim to leave and on the second demanded women or wine. At least one of the carbines thus used was loaded and was a dangerous weapon. Accused had no legal right to impose their demands. It has been held that

"Where an assault with a dangerous weapon is accompanied by a demand or condition which the assailant has no legal right to make or impose, an intent to do bodily harm may be inferred. C. M. 170158 (1926)* (Dig. Op. JAG, 1912-40, par. 451 (10)).

All of the elements of the offense as charged are clearly established. Again, the assaults were the result of a common venture for which all accused were legally responsible. The court was justified in its findings

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of guilty under this specification.

5. The charge sheet shows that accused Owens is 27 years old. He enlisted in the Army 8 October 1940 and had no prior service. Accused Hyatt is 24 years old. He enlisted in the Army 15 July 1940 and had no prior service. Accused Crum is 27 years old. He enlisted in the Army 5 October 1940. He had no prior service. Accused Dickerson is 29 years old. He enlisted in the Army 6 January 1940 and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentences. Penitentiary confinement is authorized for the offenses of housebreaking and assault with intent to do bodily harm with a dangerous weapon as alleged in Specifications 1 and 2, respectively, both of which are recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year, housebreaking by Section 22-1301, Title 22, Code of the District of Columbia and assault with intent to do bodily harm with a dangerous weapon by Section 455, Title 18, Criminal Code of the United States.

James P. Hughes Judge Advocate.
O. J. Gde Judge Advocate.
Harold Simpson Judge Advocate.

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

APO 534, U. S. Army,
10 December 1943.

Board of Review

NATO 1020

UNITED STATES)

FIRST INFANTRY DIVISION)

v.)

Trial by G.C.M., convened at
Palma di Montechiaro, Sicily,
20 September 1943.)

Private CLIFFORD (NMI) MABRY
(17013150), Company I, 16th
Infantry.)

Dishonorable discharge and
confinement for 18 years.
NATOUSA Disciplinary Training
Center, Casablanca, French
Morocco.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private (then Private First Class) Clifford Mabry, Company "I", Sixteenth Infantry did, at St Leu, Algeria on or about 0600 hours 9 June 1943, desert the service of the United States with intent to avoid hazardous duty, to wit: amphibious combat operations and did remain absent in desertion until he surrendered himself at 1st Replacement Depot, Canastel, Algeria on or about 14 July 1943.

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

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become due and confinement at hard labor for eighteen years. The reviewing authority approved the sentence, designated the NATOUSA Disciplinary Training Center, Casablanca, French Morocco, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 9 June 1943, accused absented himself without leave from his organization, Company I, 16th Infantry, the location of which at the time was not shown, and surrendered himself at the "1st Replacement Depot, Canastel, Algeria on or about 14 July 1943" (R. 5,8,10). He was subsequently returned to his company which was then near Palma, Sicily (R. 5,8). An extract copy of the morning report showing the initial unauthorized absence with additional entries was introduced without objection (R. 7; Ex. A). The prosecution showed that about two days before 9 June 1943, the company commander had stated at a formation that the company "would soon be engaged in assault operations" and that the company thereupon made "preparations for the maneuver which preceeded the assault operation" (R. 5,8). All members of the company were officially reported present at the formation. Upon his return to his organization and after having been warned that any "confession" he made could be used against him, accused stated to his company commander that "he had deserted the organization to avoid the assault operations which he knew were imminent...that he had spent his time in Oran and after he learned we had landed in Sicily he surrendered himself to the Military Police at Oran" (R. 6). Accused also stated that he absented himself "to avoid being in the operation, that he couldn't stand another operation" (R. 6). A sworn written statement was signed by accused and was introduced in evidence without objection (R. 9, 11). It reads:

"Having been explained to me that this confession may be used against me in Court, and realizing the consequences thereof, I hereby, of my own free will and volition, make the following confession without the coercion of an officer or any other person.

"On or about June 7, 1943, I, Private Clifford Mabry, deliberately absented myself from my company in an attempt to avoid combat duty in any forthcoming invasion because I did not feel mentally able to withstand another battle experience.

"I waited until news of a successful landing in Sicily reached me before I turned in to the Military Police.

"I went absent in Oran, Algeria from service with the Army of the United States for approximately thirty-four (34) days. After having news of the successful invasion, I immediately turned myself in to the Military Police on July 13, 1943" (Ex. B).

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Accused's company commander testified that accused had been with him during the "El Guettar battle" in March or April, 1943, that witness had had no trouble with him and that accused had performed his duties satisfactorily (R. 7).

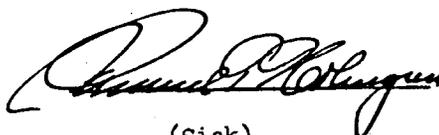
Accused chose to remain silent and no testimony was offered for the defense.

4. The evidence thus shows that accused unauthorizedly absented himself from his organization with the intent to avoid hazardous duty. The nature of the operations involved was sufficiently established and from the evidence, even aside from accused's statements, the inference is inescapable that when he left his organization accused intended to avoid the hazardous duty as alleged. The Specification alleges St Leu, Algeria as the place of desertion and the evidence shows it as Oran, Algeria. This variance is immaterial (Dig. Op. JAG, 1912-40, sec. 416 (10)). The evidence sustains the finding of guilty (MCM, 1928, par. 130a).

5. The record of trial fails to disclose compliance with paragraph 81 of the Manual for Courts-Martial with respect to the announcement of the findings and sentence. This omission does not affect the validity of the proceedings.

6. The charge sheet shows accused to be 24 years of age and that he enlisted in the Army of the United States 3 October 1940. No prior service is indicated.

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

 Judge Advocate.

(Sick) _____, Judge Advocate.

_____, Judge Advocate.

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

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

Board of Review

NATO 1030

UNITED STATES

) FIFTH ARMY

v.

) Trial by G.C.M., convened at
) APO 464, U. S. Army, 6
) November 1943.

Private CREOLA (NMI) JINGLES
(38314924), 2037th Quarter-
master (Aviation) Truck
Company.

) Dishonorable discharge and
) confinement for life.
) United States Penitentiary,
) Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Creola Jingles, 2037th Quartermaster Truck Company (Avn) did, at Acera, Italy, on or about 10 October 1943, forcibly and feloniously, against her will, have carnal knowledge of Maria Russo Spena Piscitelli.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50.

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3. The evidence shows that about 1600 hours on 10 October 1943, on a street in Acerra, Italy, as Mrs. Maria Russo Spena Piscitelli and her sister were about to enter the house of a friend, accused, a colored soldier, approached from the rear and seized Maria by the wrists. He brandished a knife, frightening away her sister and some children who happened to be nearby, and then "dragged" Maria into the house and closed the double doors (R. 4,5,7,8,10,11). The brother-in-law of the owner of the house came in and accused "chased him away". Maria testified that accused "grabbed" her and "dragged" her to a bed where he had sexual intercourse with her, completing the act (R. 11). She testified further that she "was very much afraid of him"; that she was "shouting and screaming" but "could not have run away" because accused had seized her and was threatening her with a knife which he held next to her "neck and back as though to cut" her. She testified she did not consent to accused having intercourse with her and did not accept any payment (R. 12,13). One witness testified accused "acted drunk" (R. 7) and another that he "seemed to be drunk...a little drunk" (R. 9).

Accused, being advised of his rights as a witness, elected to make an unsworn statement through counsel (R. 13). In that statement, accused admitted having sexual intercourse with a woman but said the affair was arranged through a man to whom he gave a \$10.00 bill and who directed him into a house where he found a woman he had never seen before. He stated she led him to a bed on which she laid and partially disrobed herself and that she did not object while he had sexual intercourse with her. He stated she had a \$10.00 bill with her which he "presumed" was the one he had given "the man on the outside". He identified the woman as the same person "who appeared on the stand today and accused me of raping her". After completing the intercourse, accused stated he went outside where some children kept trying to find if he were from Africa or America and that he "pulled out" his knife to frighten them away (R. 14).

4. It thus appears by competent evidence that at the place and time alleged accused forcibly and against her will had unlawful carnal knowledge of Maria Russo Spena Piscitelli. In his unsworn statement accused admitted the act of intercourse but denied it was accomplished by force and without her consent, implying that the woman received money in consideration of her submission to him. Contrariwise, the evidentiary facts disclose that the sexual act was accomplished by force and by threat of bodily harm with a knife. The woman, it was shown, cried out, was afraid and did not consent. With these facts and circumstances, establishing the essential elements of the offense here charged, the court was fully warranted in finding accused guilty (MCM, 1928, par. 148b; Winthrop's, reprint, p. 677, 678; NATO 797, Lawson).

5. The charge sheet shows that accused is 27 years old. He was inducted into the Army of the United States on 24 October 1942. No previous service is indicated.

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

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

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APO 534, U. S. Army,
9 December 1943.

Board of Review

NATO 1031

UNITED STATES)

FIFTH ARMY

v.)

Trial by G.C.M., convened at
APO 464, U. S. Army, 9 November
1943.

Private First Class SAMIE E.
HOWLETT (34488596), Company B,
536th Quartermaster Service
Battalion.)

Dishonorable discharge and
confinement for ten years.
Federal Reformatory, Chillicothe,
Ohio.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private first class Samie E. Howlett, Company B, 536th Quartermaster Service Battalion, did at Atripalda, Italy, on or about 10 October 1943, with intent to commit a felony, viz, murder, commit an assault upon Private John R. Williams, Company B, 536th Quartermaster Service Battalion, by willfully and feloniously shooting him in the shoulder with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for fifteen years. The reviewing authority approved the sentence but reduced the term of confinement to ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the

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place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that during the afternoon of 10 October 1943, at Atripalda, Italy, accused went into the mess tent of Company B, 536th Quartermaster Service Battalion where Private John R. Williams of that organization began "cussing" him and "putting him in the dozens" (R. 5,7, 9). By this vernacular is meant "talking about his mother" (R. 11). One of the cooks in the kitchen at the time testified that accused "came in drunk" (R. 7). Another cook testified that

"Williams called Samie Howlett a mother fucker. Howlett said he was not. Williams kept coming upon Howlett and said 'Goddamned you are a mother fucker.' Samie Howlett walked out of the mess tent and picked up a stick. Williams kept cussing at Samie Howlett. Samie Howlett put the stick down, walked away, and came back to the tent with his gun. Williams came up on Samie Howlett and said 'I don't want to do anything to you, I just want to talk to you'. He walked up again and Samie Howlett shot him" (R. 5).

Accused got his rifle from the storeroom which was about 15 feet from the mess tent (R. 5). When he returned with the weapon, Williams advanced upon him. Accused told him to stop three times. Williams, who was not armed, continued to advance (R. 6,7) and had gotten within five or six feet of accused when the latter pointed and aimed his rifle at Williams and fired from a "sort of port arms" position (R. 6,7,10). One witness testified that accused appeared angry but seemed

"Like he was doing it just to scare him. Looked as though it was pointed over his head. It was just a glancing shot" (R. 6).

The shot caused a wound about two and one-half inches long and one inch deep in Williams' right shoulder and a small abrasion of the skin over his larynx. He was evacuated to a hospital at Oran, Algeria (R. 8).

Accused elected to remain silent. A witness in his behalf testified that when accused fired his weapon, "He brought it down...not far"; that he did not seem to be mad; that he "just did not want to play the dozens" (R. 10); and that immediately after the shot was fired, Williams said "Howlett, you shot me" and Howlett replied that he was sorry (R. 9). Accused handed his rifle to witness (R. 9).

4. It thus appears that at the place and time alleged accused assaulted Private John R. Williams, 536th Quartermaster Service Battalion, the person named in the Specification, by shooting him in the shoulder with a rifle. While to constitute the offense charged the assault must have been accompanied by a specific intent to kill, this requirement is met if such intent is inferable from the attendant circumstances. It was

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within the province of the court to infer this intent from the evidence and to consider

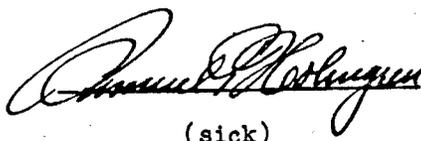
"the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made" (Roberts v. Peo; 19 Mich. 401,416; cited in 30 C.J. 22).

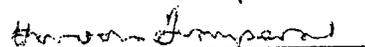
There was here no legal excuse or justification for the assault and it is clear that if death had ensued the homicide would have constituted murder (MCM, 1928, par. 148a). That accused entertained the requisite concomitant specific intent to murder may be inferred from the use of a deadly weapon, the character of the injury inflicted and his resentment, though righteous, at Williams' insulting language (Winthrop's, reprint, p. 688; MCM, 1928, par. 1491). While one witness testified accused was drunk, his demeanor demonstrated he was sufficiently sober to act with deliberation and to entertain the specific intent involved. There is substantial evidence to sustain the findings of the court.

The evidence shows that before he fired the shot, accused told Williams three times to stop advancing toward him. Williams was unarmed. These circumstances warranted the conclusion that the shooting was deliberate and the wounding was without legal excuse or provocation. Moreover, conjunctively with the foregoing principles, an "alternative intent to kill if victim does not comply with demand of assailant warrants conviction" (People v. Connors, 253 Ill. 266, 97 N.E. 643; cited in Wharton's Crim. Law, 12th Ed., sec. 841, note 14).

5. The charge sheet shows that accused is 21 years of age. He was inducted into the Army 13 December 1942. No prior service is shown.

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

 Judge Advocate.
(sick) _____, Judge Advocate.

 Judge Advocate.



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

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APO 534, U. S. Army,
27 December 1943.

Board of Review

NATO 1045

UNITED STATES)

FIFTH ARMY)

v.)

Trial by G.C.M., convened at
APO 464, U. S. Army, 30
October 1943.
Dismissal.

Lieutenant Colonel CLIFTON L.
MAC LACHLAN (O-18367), Coast
Artillery Corps, 441st Coast
Artillery Battalion (Anti-
aircraft).

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Lieutenant Colonel CLIFTON L. MAC LACHLAN, 441st Coast Artillery Battalion (AA), was, in the battalion area of the 441st Coast Artillery Battalion in Sicily, on or about 25 August 1943, drunk while on duty as battalion commander.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

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3. The prosecution's evidence shows that on 25 August 1943 a part of the headquarters battery of the 441st Coast Artillery Battalion (Anti-aircraft), which battalion was commanded by accused, had moved up from Campo Felice and bivouacked at a point some 20 miles west of Messina on the north coast of Sicily. Accused was of this echelon. The command was attached to the 13th Field Artillery Brigade, units of which were located around Messina (R. 5,8). Firing across the Messina Straits some 20 to 25 miles from the bivouac area was still in progress and one witness described the position of the battalion as being "in a combat zone". Another witness testified that "We had an occasional, supposedly enemy planes over at night" (R. 8,10,15). Accused's bivouac was some 200 or 300 yards from the bivouac of Headquarters of the 13th Field Artillery Brigade (R. 10).

About 1700 hours in the afternoon of 25 August accused approached a table where five other officers were eating their evening meal (R. 5). One of the officers present was First Lieutenant Lawrence Kalom, Medical Corps, 441st Coast Artillery Battalion (Antiaircraft), who testified:

"We were near the end of our meal and I looked up, because all of the other officers had looked up. Colonel MacLachlan was about twenty paces away coming towards the table, and I noticed that he staggered. His gait was unsteady, face flushed, and he dropped down. He did not sit down, he just dropped down. His head was hanging down, and he raised it up and then he picked up a dish of food that was sitting on the table and sat it over in another place. He then asked for something to eat. His eyes were bloodshot, his face red and he seemed to have trouble holding his head up. A can of "C" rations was brought to him. It had been warmed up and the food was still in the can. He proceeded to eat and he had trouble eating. About as much food landed on the table as he ate. I was sitting across the table from him about two seats further down. I could not detect alcohol on his breath, but it was quite obvious that he was intoxicated" (R. 5).

Lieutenant Kalom testified further that accused hung his head down and demanded food in "the manner of a drunken man", in "a very uncourteous manner". He considered it possible, but doubted, that accused's red eyes could have been caused by riding in a motor vehicle in the wind with the windshield down (R. 6,7). He testified that

"Our whole Battery had moved and the ambulance that I was in we had to keep the windshield down because the driver could not see there was so much dust. The countryside was very dry, and the dust was very bad and we had no windshield, and I do not believe that any of us had red eyes. We had dirty faces" (R. 6).

This officer testified that he formed the opinion that accused was intoxicated "because of his condition at that time and because that I had known him for

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all of those months" (R. 7). He reported accused's condition to "the General" (Brigadier General John A. Crane, C. G., 13th Field Artillery Brigade) who directed Lieutenant Colonel Luther C. Davis, 13th Field Artillery Brigade, to investigate. In company with Major Benjamin L. Camp, Medical Corps, Headquarters 13th Field Artillery Brigade, and Lieutenant Kalom, Colonel Davis proceeded "to the bivouac area of the 441st to check the condition of Colonel MacLachlan" (R. 8). He testified that upon arrival at the bivouac area he saw accused and

"called out and told him I wanted to see him. I called out a second time and he was walking and did not notice me. I cut across to him and told him that I wanted to see him in his tent on a private matter and he said, 'What could it all be about?', or words to that effect. He started around through a civilian yard and house and came up to a high embankment. He seemed disturbed about winding up there and started back. We went back through the civilian yard to where we started from and he veered to the left and we ended up again at the same wall. About that time the Colonel said, 'Rogers, double time', and a captain, who I later found out to be Captain Rogers appeared. He asked where his tent was and I believe he said he had just come there and he didn't know the directions. We went to his tent, what is commonly known in the army as a pup tent, which was too small to hold a conference in and be comfortable. I told him that this was a private matter and asked if he wanted Captain Rogers to be present and he said that he did. I asked Captain Rogers if we could use the C P tent and we proceeded over to the C P tent. The Colonel was unsteady on his feet, face flushed, eyes red, and his speech was fair***I tried to explain again that I was up there to see if he had been drinking too much and I told him his rights, that he did not have to say anything, and that anything that he said might be used against him at some future time, and he did not object to my asking questions. I asked him if he thought he was drinking too much, and he said 'No'. I asked him if he thought he was drinking too much to take care of his duties and he said 'No'*** I could smell alcohol, or some form of it on his person" (R. 9).

Colonel Davis testified further that in his opinion accused was drunk and unable to perform his duties (R. 9,12). During the interview accused was not discourteous, answered questions asked of him sensibly and walked unaided (R. 11,15).

Major Camp saw accused in the bivouac area at the time in question and testified that

"He was partly dressed. He had no shirt on. He was rather

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red in the face. His eyes were red. His gait was unstable. He had what I call an occasional slurring in his speech" (R. 13).

In the opinion of Major Camp accused was drunk and did not have complete control of his faculties (R. 13). He had a distinct odor of alcohol about his person (R. 15).

For the defense, the evidence shows that on the afternoon of 25 August 1943 accused reconnoitered the country between his bivouac area and Messina, leaving between 1230 and 1300 hours and returning about 1630 hours (R. 19). The driver of his car testified that during this trip accused did not take a drink, that he talked normally and was not under the influence of intoxicating liquor. The car had no windshield. Accused did not wear goggles but had on "sun glasses" (R. 19,20). Upon his return, accused called his orderly and got him to spray around his bed for insects. This orderly testified he saw accused between about 1645 and 1715 hours and that he remained at accused's tent about ten minutes during which time they passed "everyday remarks" and that there was no indication that accused had been drinking (R. 17,18). Two officers of the battalion talked to accused that afternoon about 1600 hours; one of these officers testified he was about three feet from accused, talked to him about five minutes and "observed nothing that would indicate a lack of sobriety" (R. 26); the other testified that he talked to accused for fifteen or twenty minutes, stood an "arm's length or so" away from him, did not smell alcohol on his breath, did not notice any "outward actions whatsoever" which would indicate accused had been drinking, and that accused was sober (R. 21,22). Another officer went to accused's tent with two or three bottles of cognac about 1750 hours and he and accused had a drink, accused taking about one and one-half ounces of cognac. This officer remained at accused's tent eight to ten minutes and testified accused was sober (R. 27,28,29).

Captain Francis F. Rogers, Adjutant of the 441st Coast Artillery Battalion, who had just finished his evening meal when accused came to the mess table at 1800 or 1830 hours, detected a distinct odor of alcohol on the breath of accused as the latter sat down at the table (R. 30,31,34,36). Between 30 minutes and an hour later Captain Rogers, upon hearing his name called, went to a farm house about 100 to 150 yards away, where he saw accused, Colonel Davis and Major Camp (R. 32). The group proceeded to the command post tent where Colonel Davis told accused

"what he had come for and asked if he had been drinking and asked something about if he was in condition to remain in control and Colonel MacLachlan said that he was. He ordered him to report the next morning at 9:00 to General Crane" (R. 32).

To the witness accused appeared very nervous, but he was not discourteous or vociferous during this conference, he walked unaided (R. 32,33), his answers to questions asked by Colonel Davis were "simply yes and no statements", but were "very coherent" (R. 35). The witness testified

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further that accused "has normally an impediment of speech" (R. 34), but that the odor of alcohol on his breath and the hesitancy of his speech indicated that accused had been drinking (R. 35).

A witness for the defense testified that on 25 August 1943, Battery B of the 441st Coast Artillery Battalion was located some four or five miles east of the battalion command post and about 12 or 14 miles from the Straits of Messina. The other "lettered batteries" were to come up the following day from their positions 110 or 120 miles to the west (R. 21). The assignment of Battery B was to provide antiaircraft protection for the second battalion of the 36th Field Artillery Regiment. The battery had four of its 16 guns in firing position (R. 22). Operational instructions came from the 36th Field Artillery Regiment. While accused was not expected to give tactical orders, he was kept informed of the battery's movements by radio or telephone and whenever a new bivouac area was set up, he was informed of that (R. 22,23). Administrative control of the battery remained with the 441st Field Artillery Battalion and that battalion's headquarters was responsible for the battery's Class 2 and 4 supplies while the unit to which the battery was attached was responsible for its Class 1, 3 and 5 supplies (R. 23,34). The 36th Field Artillery

"had planned in a day or so to go into action up the river to give protection to the Eighth Army that was going to go across" (R. 23).

At the request of the defense, the court stated that it took judicial notice that enemy ground forces ceased to occupy any portion of Sicily on 18 August 1943 (R. 16).

Accused testified that on the morning of 25 August 1943, he reported to the Field Artillery Brigade commander that he was going on a reconnaissance to see if the roads were passable. While there were to be no further movements of his command that day, certain forward elements would "go into position" in two or three days. Accused left on the reconnaissance about noon, was gone some three hours and traveled approximately 70 miles (R. 37, 38). Returning at about 1630 hours he reported to "the General", repaired to his bunk (his tent had not yet been pitched), interviewed some of his officers about routine matters, had his orderly spray insecticide about his bed. He considered his day's work done. He described the tactical situation as follows:

"***we had a few guns of the battalion in position. We had no warning service set up. Gun commanders are to fire only if he sees the plane. We never fire at night because of giving our position away. As my batteries were attached to the Brigade I considered that I was an antiaircraft staff officer on the General's staff, was the only job that was left to me. Fire orders were taken care of. In case of an attack all we could do was wait two or three hours until the report of results came in, then wait until the next morning and report to the Artillery Commander" (R. 38).

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He testified further that remembering his supply officer had gotten "a couple of bottles of cognac" he asked for the liquor, which was presently produced. After taking a drink which he testified the earlier witness had correctly described (about one and one-half ounces (R. 28)), he went to supper without doing any further drinking. He testified

"I always heard that cognac would effect ones physical condition more than other drinks. It may have affected me more than it normally would do because I was tired and drinking it on an empty stomach. I do not think it showed on me very much" (R. 38).

Accused testified further that he

"sat down by Captain Rogers and there were two or three other officers present. I got a can of C rations and ate it. Of course, a C ration can is hard to eat out of. I drank some coffee and carried on a normal conversation with the other officers present. After supper I went to the tent and took off my leggins and shirt. That was usually my custom. We allowed shirts to not be worn in bivouac area. After that I took a stroll and went to the motor pool".

As to the events incident to his conversation with Colonel Davis accused testified:

"I was on my way back from the motor pool when Colonel Davis and Major Camp came up. We started walking along together and I was paying no attention to the direction in which we were going. I had met him that afternoon and he introduced me to Major Camp. I was made rather aware at this time that the visit was for some investigation, that evidently they were giving me some sort of test. They said that they wanted to go to my tent. I think they said the CP but maybe they just said tent. At this time I made a hasty guess as to the direction. It would have looked very bad if I did not know the direction. The sun had already gone down and the west was as dark as the east. We went around to the other side of this civilian house but discovered that I had led off in the wrong way. I acted as confidently as I could and did not want to show any hesitation. After coming to this bank we turned around and went back a few yards and circled. I thought that we could get by the bank by going up a few yards. After coming to the bank again I realized that I had been turned around, so I called for the adjutant and he came up and he and Colonel Davis took the lead and we went to where my bunk was. I might mention that the grade of cognac obtainable at Palermo at this time was cheap and had a very strong odor and I knew that it was on my breath. We then went to the CP and I had

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no difficulty in understanding or answering the Colonel's questions".

Asked whether he believed he was drunk, accused testified:

"I do not believe I was, in fact I know I wasn't. That statement coming from the accused isn't always weighed very much. I do not think I was***I will put it this way. My mind was working at all times and I was perfectly capable of taking care of any conditions that might have come, however, there is nothing that could have come up that I would have had any control over" (R. 39).

He denied "speaking out of turn in any way" at supper and testified "If I was unsteady I did not know it" (R. 40). Accused testified further that one-half of his headquarters battery "was back with the three batteries and half up near the field artillery brigade". He was in command of all units of his battalion in all respects except tactics. As to that part of his headquarters battery bivouacked in the same area as accused, he testified, when asked if he was in entire command:

"Technically that is correct. The movement of the battery had been made by another officer to this area, one that I had delegated to accompany the convoy, but I suppose when I arrived I assumed command" (R. 42).

4. It thus appears from the testimony of prosecution witnesses that at the place and time alleged accused was found drunk while on duty as a battalion commander. Accused admitted drinking, but contended he only had one drink which a defense witness described as about one and one-half ounces of cognac. He denied he was drunk and was supported in this denial by the testimony of two other officers and two enlisted men of his command. To the contrary, two Medical Corps officers and a lieutenant colonel who had been directed to investigate accused's condition, testified he was drunk and the lieutenant colonel testified that in his opinion accused was unable to perform his duties. It was solely within the province of the court to evaluate the testimony and its conclusions that accused was drunk and that the drunkenness incapacitated him for the proper performance of his duty, had substantial support in the evidence (MCM, 1928, par. 145; Winthrop's, reprint, p. 611 et seq.).

Accused testified that when he took the drink, he considered his "day's work was done", thus by implication suggesting the defense that he was not on duty when the offense was alleged to have been committed. This position is not tenable. Accused was shown by the undisputed proof to have been in command of a battalion in a theater of active operations during time of war. While there is proof indicating he had no tactical control over units of his organization, all the evidence shows he was in administrative control of his battalion and was actually exercising functions of command. It was his duty at all times also to advise, as a staff officer, the brigade commander to whom he was attached. It follows he was constantly and continuously

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on duty in both capacities. Although his tactical command functions were limited, he was actually in command of his battalion for other purposes. As is stated in Manual for Courts-Martial, 1928, paragraph 145

"The commanding officer of a***command, or detachment in the field in the actual exercise of command, is constantly on duty".

To the same effect, see Winthrop's, reprint, pages 613, 614, and Bulletins, Judge Advocate General, April, 1943, section 443.

American and allied troops had occupied Sicily and at the time in question accused's battalion was moving up to the Straits of Messina, preparatory to supporting the British Eighth Army in further operations against the enemy. Accused was at that time responsible for the administrative control of his battalion and under any view of the case, he was on duty at the time at which the witnesses testified he was found drunk. The court was fully warranted in so concluding.

5. In alleging the offense, the Specification did not include the statutory verbiage "found", in averring that accused was drunk on duty. The omission of this word is not material here nor was it in any sense misleading.

6. While accused was on the witness stand, defense counsel asked him to read sections 10 and 11 of the Antiaircraft Artillery Field Manual, FM 4-100, issued by the War Department, 28 June 1943. Defense counsel stated to the court: "We are trying to show the existing relationship between the Battalion Staff and his Batteries". The law member ruled that the matter sought thus to be introduced was "not responsive to any issue made by the pleading", and that the relationship between the battalion staff and the batteries "certainly cannot be determined from a manual" (R. 41). The provisions of this manual need not have been proved because the court was authorized to recognize their existence without proof, but it was appropriate for defense counsel to offer evidence of facts of which the court was authorized to take judicial notice (MCM, 1928, par. 125). In determining whether accused was on duty at the time in question, the scope and character of his tactical and administrative duties as laid down in the manual were material and it would have been preferable for the law member to have admitted the evidence. However, a consideration of the excluded matter demonstrates that accused was in no sense injured by its exclusion. The relevant part of the matter excluded is quoted from paragraph 11 of the Field Manual:

"BATTALION COMMANDERS - a. General. - The battalion commander is responsible for the training and administration, including supply, of his battalion, for the tactical disposition of its elements, and for the assignment of proper missions to those elements. He keeps himself informed of the friendly and hostile aerial situations. He also informs himself of the situation and activities of friendly ground and air

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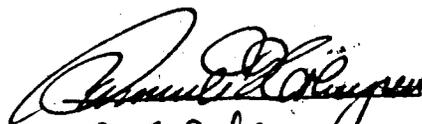
forces through the group commander or by direct liaison with the units concerned. As the elements of his battalion may be widely scattered for extended periods of time, the maintenance of efficiency requires that he make frequent personal inspections covering all phases of their activity. When attached to other arms the battalion commander must be prepared to advise his force commander on the subject of antiaircraft defense of the larger unit".

It is thus seen that accused was charged by the very terms of the manual his counsel sought to introduce in evidence with the continuous discharge of varied duties. He was indisputably in administrative control of all his elements and in actual command of that portion of his headquarters battery which was bivouacked in the same area as accused. His batteries being attached to other arms, he was required to be prepared at all times to advise his force commander on the subject of antiaircraft defense of the larger unit. Enemy airplanes were operating in the vicinity of his command and the exact time when the advice of accused on questions of defense against the enemy's aviation would be needed was obviously unpredictable. There was no time of night or day when he might not be called on for the performance of some duty appertaining to his command. The provisions of the manual which the defense sought to have read to the court serve rather to emphasize than to negative the duty status of accused. Moreover, the defense was permitted fully to develop the actual tactical relation of accused to his batteries by the testimony of defense witnesses and accused himself. The provisions of the manual which were excluded were in effect cumulative of other evidence which had already been received. The substantial rights of accused could not possibly have been injured by the exclusion of this evidence (AW 37).

7. Consideration has been given to a brief in behalf of accused, dated 5 November 1943, which is attached to the record of trial.

8. The charge sheet shows that accused is 35 years old. He enlisted in the United States Army 23 September 1925. He entered the United States Military Academy 1 July 1927 and was commissioned second lieutenant, Coast Artillery Corps, United States Army, 11 June 1931. He was promoted to first lieutenant, United States Army 1 August 1935 and to captain, United States Army 11 June 1941. He was commissioned captain in the Army of the United States 9 September 1940, was promoted to major, Army of the United States 1 February 1942, and to lieutenant colonel, Army of the United States, 12 October 1942.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence. Dismissal is mandatory upon conviction of Article of War 85.

 Judge Advocate.

O. J. Gde Judge Advocate.

CONFIDENTIAL Judge Advocate.

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

APO 534, U. S. Army,
27 December 1943.

Board of Review

NATO 1045

UNITED STATES)

v.)

Lieutenant Colonel CLIFTON L.
MAC LACHLAN (O-18367), Coast
Artillery Corps, 441st Coast
Artillery Battalion (Anti-
aircraft).

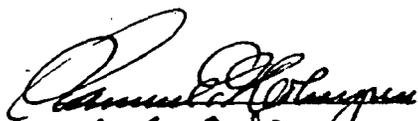
FIFTH ARMY)

Trial by G.C.M., convened at
APO 464, U. S. Army, 30
October 1943.
Dismissal.)

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

 Judge Advocate.
O. G. Ide, Judge Advocate.
 Gordon Simpson Judge Advocate.

NATO 1045

1st Ind.

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

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

1. In the case of Lieutenant Colonel Clifton L. MacLachlan (O-18367), Coast Artillery Corps, 441st Coast Artillery Battalion (Anti-aircraft), 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

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NATO 1045, 1st Ind.
27 December 1943 (Continued).

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

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

(NATO 1045).



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

(Sentence ordered executed. GCMO 58, NATO, 27 Dec 1943)

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on or about 14 September 1943, forcibly and feloniously, against her will, have carnal knowledge of Madame Marie Gonzalvez Pardo.

CHARGE II: Violation of the 93d Article of War.

Specification: In that Private Colman (NMI) Henderson, Company "D", 240th Quartermaster Battalion, did, at Oran, Algeria, on or about 14 September 1943, unlawfully enter the dwelling of Francois Pardo with intent to commit a criminal offense, to wit, assault and battery, therein.

CHARGE III: Violation of the 96th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

As to Tabron:

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

Specification: In that Private Curlee (NMI) Tabron, Company "D", 240th Quartermaster Battalion, did, at Oran, Algeria, on or about 14 September 1943, unlawfully enter the dwelling of Francois Pardo with intent to commit a criminal offense, to wit, assault and battery, therein.

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

Specification 1: In that Private Curlee (NMI) Tabron, Company "D", 240th Quartermaster Battalion, did, at Oran, Algeria, on or about 14 September 1943, wrongfully and unlawfully aid and abet Private Colman (NMI) Henderson, Company "D", 240th Quartermaster Battalion to forcibly and feloniously, against her will, have carnal knowledge of Madame Marie Gonzalvez Pardo.

Specification 2: In that Private Curlee (NMI) Tabron, Company "D", 240th Quartermaster Battalion, did, at Oran, Algeria, on or about 14 September 1943, commit an assault upon Francois Pardo, a civilian, by seizing him by the shirt and touching a knife against his face and stomach.

As to McClendon:

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

Specification: In that Private Thurman D. McClendon, Company "D", 240th Quartermaster Battalion, did, at Oran, Algeria, on or about 14 September 1943, unlawfully enter the dwelling of Francois Pardo with intent to commit a criminal offense, to wit, assault and battery, therein.

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

Specification 1: In that Private Thurman D. McClendon, Company "D", 240th Quartermaster Battalion, did, at Oran, Algeria, on or about 14 September 1943, wrongfully and unlawfully aid and abet Private Colman (NMI) Henderson, Company "D", 240th Quartermaster Battalion to forcibly and feloniously, against her will, have carnal knowledge of Madame Marie Gonzálvez Pardo.

Specification 2: In that Private Thurman D. McClendon, Company "D", 240th Quartermaster Battalion, did, at Oran, Algeria, on or about 14 September 1943, wrongfully strike Jeannot Rousseau, a civilian, by kicking him in the buttocks.

Accused Henderson pleaded not guilty to the Charges and Specifications relating to him. He was found guilty of Charges I and II and the Specifications thereunder and not guilty of Charge III and its Specification. Each of the other accused pleaded not guilty to and was found guilty of the Charges and Specifications pertaining to him. No evidence of previous convictions was introduced as to Henderson or Tabron. Evidence of one previous conviction by summary court-martial for absence without leave in violation of Article of War 96 was introduced as to McClendon. Henderson was sentenced to be hanged by the neck until dead, all members of the court present concurring in the sentence. Tabron and McClendon were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and confinement at hard labor, Tabron for twenty years and McClendon for fifteen years. The reviewing authority approved the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement in the cases of Tabron and McClendon, and forwarded the record for action under Articles of War 48 and 50½. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence as to Henderson but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of the natural life of accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 2100 hours on 14 September 1943, Francois Pardo and members of his family were about to eat dinner in their house on Rue Charpentier in Oran (R. 8,15). Pardo was living with Marie Gonzálvez though she was not married to him (R. 7,15). She had three children whose ages were twelve years, ten years, and five months respectively (R. 8). The eldest, Jeannot Rousseau, and the baby were present (R. 22). The dinner table was placed "near the door to get daylight" (R. 15).

At the time mentioned the three accused, strangers to Pardo, walked into the house "without knocking at the door". Pardo "got up and asked them what they were wanting of" (R. 8). Henderson replied "Fucky" (R. 9). Tabron

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then hit or tripped Pardo who fell to the floor (R. 9,16). Tabron thereupon seized Pardo's shirt and pointed a knife, having a six-inch blade (R. 9), at Pardo's ribs and throat (R. 16), threatening to kill him if he should shout (R. 9). While McClendon stood in the doorway (R. 10,22) "keeping the doorway so the husband couldn't be got out" (R. 10) and "watching if the police was coming" (R. 18), Henderson pushed Marie into a small adjoining bedroom, pushed her on the bed, raised her clothes, and "abused" her "exactly as a husband do". She testified "He took his penis and put it inside my uterus" (R. 9) without her consent (R. 11). Marie tried to push Henderson away, struggled, and cried (R. 9,10,14,20). Henderson held her by the shoulders and struck her when she protested (R. 9,20). The little boy, Jeannot Rousseau, when the trouble started, seized the baby and ran out of the house. As he went through the door McClendon kicked him on the right buttock (R. 22). The woman testified that after about fifteen minutes, "the one who had the knife (Tabron) came and tried to fight with Henderson "so he could abuse me again" (R. 10). Tabron "took" Henderson "off" Marie (R. 15). "Tabron had his penis in his hand at the time (R. 15). Marie left the house and called the police. When she returned accused had gone (R. 11). Henderson and Tabron were pursued by the military police and captured. When captured Henderson was lying near a wall, "in the mud". He was ordered to get up and did so. His trousers were open and his "penis out". He had in his possession the knife identified by witnesses as that used by Tabron during the occurrences at Pardo's house (R. 31,32).

Marie testified that she believed Henderson was drunk because of "his manner to talk and in his face, too" and that "He had some foam on his lips" (R. 12), "and his eyes out" (R. 13).

After having been warned that he need not make a statement and that whatever he said might be used against him, each accused made an oral statement, which was subsequently reduced to writing and signed (R. 23,25, 29). These statements were introduced in evidence (Exs. B,C,D). Henderson's statement was as follows

"On 14 September 1943 at about 1700 hours I, Thurman D. McClinton & Curlee Tabron, left camp & went down into town to the bath house & bought some vino. We then went into a Cafe & ate supper. At about 1900 hours we left the Cafe & then decided to go & get a piece of ass. We caught a trolley car & it carried us down to the bottom of the hill, going towards the docks. We got off the trolley car & went to the left, up the hill to the people's house. When we got to the house there was a little boy standing in the doorway. This boy went into the house & then the woman came to the door. McClinton asked for 'Senoritas' & the woman said 'Senoritas finished, 'Military Police'. I noticed a man standing also in the doorway. I pushed the woman into a room, just off to the left of the front door, and pushed her onto a bed, pulled up her dress & fucked her for a little while. I did not get my nuts off as the man was raising quite a racket. I did not want to get into any trouble so I got off her & we decided to go up to an Arabs house

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to see if we could buy some ass. While I was fucking the woman Tabron said for me to get up & for us to leave & see if we could buy some cock. We then went up a little farther on the hill & about this time the M.P.s came & picked us up & brought us to M.P. Headquarters. From M.P. Headquarters I was brought to C I D office.

"The woman that was brought into C.I.D office by Lt. Duncklee, was the woman I fucked tonight. I did not pay her any money or promise her anything. The man that was with her in the C.I.D. office, I recognized as the man that was also in the house & was being held by one of the soldiers with me. The other one was keeping the little kids from getting out of the house. When I first got the woman in the room Tabron helped push her onto the bed" (Ex. B).

Tabron's statement corresponded substantially with that of Henderson's as to the events preceding the entrance to the house. He stated, in addition

"Henderson and McClendon went in and the little boy ran off down a path. In a few moments a woman came to the door. One of the two (Henderson or McClendon) pulled her back into the house. In about a minute I decided to go in and see what they were doing. When I went into the room I noticed a man in the room and Henderson was fucking the woman on a bed. McClendon was arguing with the man and he was standing between the bed and the man. The woman was saying something that I did not understand. I tried to pull McClendon out of the house but he wouldn't come. I then went outside and in about a minute they came out" (Ex. C).

McClendon, after reciting substantially to the same effect the events preceding entrance to the house, stated

"Then a woman came to the front door of the house. Henderson asked for 'Senoritas.' I don't remember what the answer was. Then I noticed a man standing there. I saw Henderson push the woman into a room off the left. While Henderson was pushing the woman and arguing with her, I told him to leave her alone and come on to camp. Tabron and I were standing in the doorway and in about 5 minutes we went in. After we went in I saw her on the bed struggling with Henderson. She was trying to get up and was hollering something that I did not understand. While this was going on Tabron and I were in the same room and the man (her husband) was also in the room. He was hollering and seemed somewhat excited. Tabron and I were standing between the man (her husband) and the bed on which Henderson was fucking the woman. I pulled Henderson up

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off the woman and told him (Henderson) to come on, we go buy some pussy off an Arab" (Ex. D).

Each of the accused elected to remain silent. No evidence was introduced by the defense.

4. It thus appears that at the time and place alleged each of the accused unlawfully entered the dwelling of Francois Pardo. While in the house Henderson had unlawful carnal knowledge of Marie Gonzalvez, the woman named in the Specification, Charge I as to Henderson, by force and without her consent. Tabron directly aided and abetted Henderson in the commission of the rape by preventing the intervention of Pardo. McClendon likewise aided and abetted in the rape by standing watch in the doorway. Tabron assaulted Pardo as charged, by throwing him to the floor, seizing him by the shirt and threatening him with a knife. McClendon assaulted Jeannot Rousseau by kicking him, as charged.

While all of accused could properly have been charged with and found guilty of rape (Dig. Op. JAG, 1912-40, par. 451 (62); NATO 385, Speed; NATO 643, Moor), it was within the option of the pleader to charge Tabron and McClendon as aiders and abettors (18 U.S.C.A. 550, note 28).

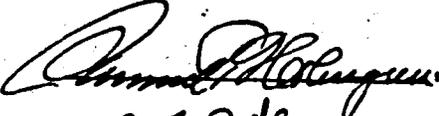
Each accused was charged with housebreaking by unlawfully entering the building with intent to commit a criminal offense, assault and battery, therein. It may be inferred from the circumstances that each intended, on entering the building, to rape or aid and abet in raping the woman, and since the rape necessarily included an assault and battery (MCM, 1928, par. 148b), the presence of intent to commit this latter offense was sufficiently established.

5. The charge sheet in Henderson's case shows that he is 21 years old. He was inducted into the Army 22 July 1941. He had no prior service.

The charge sheet in Tabron's case shows that he is 22 years old. He was inducted into the Army 25 March 1941. He had no prior service.

The charge sheet in McClendon's case shows that he is 22 years old. He was inducted into the Army 25 March 1941. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentences. Penitentiary confinement is authorized for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

 Judge Advocate.

O. J. Fide, Judge Advocate.

Tommy Simpson, Judge Advocate.

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

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

Board of Review

NATO 1047

UNITED STATES)

v.)

Privates COLMAN (NMI), HENDERSON
(34079794), CURLEE (NMI) TABRON
(37062025) and THURMAN D.
McCLENDON (34060065), all of
Company D, 240th Quartermaster
Battalion.)

MEDITERRANEAN BASE SECTION)

) Trial by G.C.M., convened at
) Oran, Algeria, 12 October 1943.
) Henderson: dishonorable dis-
) charge and confinement for life.
) United States Penitentiary,
) Lewisburg, Pennsylvania.
) Tabron: dishonorable discharge
) and confinement for 20 years.
) McClendon: dishonorable dis-
) charge and confinement for
) 15 years.
) As to Tabron and McClendon:
) Eastern Branch, United States
) Disciplinary Barracks, Beekman,
) New York.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

 Judge Advocate.
O. J. Ide, Judge Advocate.
Gordon Simpson, Judge Advocate.

NATO 1047

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

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NATO 1047, 1st Ind.
29 December 1943 (Continued).

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

1. In the case of Privates Colman (NMI) Henderson (34079794), Curlee (NMI) Tabron (37062025) and Thurman D. McClendon (34060065), all of Company D, 240th Quartermaster Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence as to Henderson, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. A separate holding with respect to the sentences as to Tabron and McClendon has been transmitted to the reviewing authority, the Commanding General, Mediterranean Base Section, who will publish a general court-martial order in the case pertaining to Tabron and McClendon. It is recommended that a general court-martial order promulgating the proceedings as to Henderson be published by your headquarters.

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

(NATO 1047).



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

(As to accused Henderson, sentence as commuted ordered executed.
GCMO 62, NATO, 29 Dec 1943)

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

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APO 534, U. S. Army,
27 December 1943.

Board of Review

NATO 1055

UNITED STATES)

v.)

Private HENRY J. HODGES
(36550314), Company A,
450th Signal Construction
Battalion (Aviation).

) XII AIR FORCE SERVICE COMMAND

) Trial by G.C.M., convened at
) Tunis, Tunisia, 10 November
) 1943.

) Dishonorable discharge and
) confinement for 25 years.
) Eastern Branch, United States
) Disciplinary Barracks, Beekman,
) New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

Specification: In that Private Henry J. Hodges, Company "A", 450th Signal Construction Battalion, Aviation, did, at Bivouac Area, Ariana, Tunisia, Army Post Office 528, on or about 16 September 1943, behave himself with disrespect toward First Lieutenant Louis J. Manfredo, his superior officer, by saying to him "you are a dirty coward Lieutenant Manfredo, you are a yellow bellied mother fucker, and cocksucker", or words to that effect.

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

Specification 1: In that Private Henry J. Hodges, Company "A", 450th Signal Construction Battalion, Aviation, did, at Bivouac Area, Ariana, Tunisia, Army Post Office 528, on or

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about 16 September 1943, offer violence against First Lieutenant Louis J. Manfredo, his superior officer, who was then in the execution of his office, in that he, the said Private Henry J. Hodges, did, grab a loaded carbine in the possession of the said First Lieutenant Louis J. Manfredo and did struggle with the said First Lieutenant Louis J. Manfredo for the possession of the said loaded carbine, and did at that time say to 1st Lieutenant Louis J. Manfredo, "I am going to kill you", or words to that effect.

Specification 2: (Finding of guilty disapproved).

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

Specification: In that Private Henry J. Hodges, Company "A", 450th Signal Construction Battalion, Aviation, did, at Bivouac Area, Ariana, Tunisia, Army Post Office 528, on or about 16 September 1943, strike Private Walter E. Carter, Company "A", 450th Signal Construction Battalion, Aviation, a sentinel in the execution of his duty, on the mouth with his fist.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 25 years. The reviewing authority disapproved the finding of guilty of Specification 2, Charge II, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that a little after 2100 hours on 16 September 1943, at the bivouac area of the 450th Signal Construction Battalion at Ariana, Tunisia (R. 33), the accused asked Private Walter E. Carter, a sentry of that same organization "about letting him have some gas from the Motor Pool". Carter refused (R. 7). Accused returned shortly with a carbine, which it was observed had no clip, and again asked Carter for gas. Carter again refused. A little later Carter "ran" accused "out" of the pool when the latter was trying to pump some gas from one of the cans. Shortly thereafter Carter saw accused rolling away a drum of gas. Carter fired a shot and went to the spot where accused was standing. Accused, still armed with the carbine stepped off some distance, then turned on Carter and snapped the trigger of his carbine. The gun did not go off (R. 8) although it was found later to have been loaded with a single shell in the chamber (R. 11). Carter had paid no attention to the weapon because "I knew it had no clip" (R. 8).

At this point First Lieutenant Louis J. Manfredo, also of Company A, 450th Signal Construction Battalion, arrived, dressed in pajamas (R. 29,34) and asked Carter what had happened. As Carter started to answer accused called him a "damned liar" and struck him on the mouth with his fist (R. 8, 16,18,22). Carter handed his rifle to Lieutenant Manfredo and a fight

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ensued between accused and Carter. The officer tried to stop the fight; he told accused to stop fighting. The fight was stopped by another member of the guard. Accused "broke loose", ran up to the officer and "grabbed hold" of the stock of Carter's loaded carbine which the lieutenant was then holding and said he was going to kill Carter and the officer (R. 9, 16,19,22). Accused, in the struggle that followed, succeeded in pointing the carbine at the officer as the latter retained hold of the barrel, but accused was prevented by timely assistance from getting at the trigger (R. 16,19).

A number of officers and enlisted men arrived on the scene at about this time and Lieutenant Manfredo ordered that accused be taken to the guardhouse. Accused thereupon "started to cuss" (R. 16), called Lieutenant Manfredo "a dirty coward" and addressing the officer by his title said "you are a yellow bellied mother fucker and a cock sucker" (R. 10,17,28,31,33, 36,38). A noncommissioned officer subdued and silenced the accused (R. 37). Accused had been drinking but was not drunk (R. 10,13,18,19,24,26,29,32,34, 35,37).

Accused elected to remain silent.

4. It thus appears from the evidence that at the time and place alleged accused behaved himself with disrespect toward First Lieutenant Louis J. Manfredo, his superior officer, by addressing him substantially in the language alleged in the Specification of Charge I. It is also shown by uncontradicted evidence that, at the time and place alleged, accused seized a loaded carbine which Lieutenant Manfredo then had in his possession and, attempting to wrest it from the officer's hands, said "I am going to kill you" or words to the same effect as set forth in Specification 1, Charge II. The acts of accused come clearly within the phrase "offers any violence against him" as used in Article of War 64. Whether a battery or mere assault the violence here exhibited was physically attempted or menaced (MCM, 1928, par. 134a). Although clad in pajamas at the time of the assault, apparently because of the exigency, Lieutenant Manfredo was in the execution of his office and his identity as the superior officer of accused was shown to have been known to the accused.

The evidence is likewise clear and undisputed that accused struck Private Carter in the mouth with his fist. The assault was vicious, clearly unjustifiable and made while Private Carter was acting as a sentinel in the execution of his duty, thus supporting the allegations of the Specification, Charge III.

5. The charge sheet states that accused is about 35 years old and was inducted into the Army 4 December 1942. There is no evidence the accused had any prior service.

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

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trial is legally sufficient to support the findings and sentence.

Charles P. Williams, Judge Advocate.
D. W. Hill, Judge Advocate.
Gordon Simpson, Judge Advocate.

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Specification 3: In that Private James Hale, Battery B, 935th Field Artillery Battalion, did, at or near Naples, Italy, on or about 14 October 1943, with intent to do him bodily harm, commit an assault upon Francesco Torres by pointing at him, the said Francesco Torres, in a threatening manner, a dangerous weapon, to wit, a pistol.

Specification 4: In that Private James Hale, Battery B, 935th Field Artillery Battalion, did, at or near Naples, Italy, on or about 14 October 1943, with intent to do him bodily harm, commit an assault upon Vincenzo Chianese by pointing at him, the said Vincenzo Chianese, in a threatening manner, a dangerous weapon, to wit, a pistol.

Specification 5: In that Private James Hale, Battery B, 935th Field Artillery Battalion, did, at or near Naples, Italy, on or about 14 October 1943, with intent to do him bodily harm, commit an assault upon Anthony Infima by pointing at him, the said Anthony Infima, in a threatening manner, a dangerous weapon, to wit, a pistol.

He pleaded not guilty to and was found guilty of the Charge and Specifications. Evidence of three previous convictions, each by summary court-martial for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 40 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 14 October 1943, an Italian girl named Anna Carusa was walking along the road in the vicinity of the Agnaro Race Track near Naples, Italy, when accused and Private Elmer Sexton, Battery B, 935th Field Artillery Battalion (R. 17,24) accosted her and offered her some chocolate. She refused the offer and continued on her way, but the soldiers proceeded to follow her. Upon passing a power plant she explained at the gate, to the guard named Francesco Torres, that she was afraid of the soldiers and he directed her inside, stating that there was a family there (R. 5,17,18). Torres sought to prevent the soldiers from entering but accused "pulled a pistol, pointed it at my ribs and demanded entrance through the gate" and thereby forced their way inside (R. 6). Anna ran into the kitchen of a small house on the grounds and tried to close the door. Sexton and accused got inside and Sexton exhibited in his hand a 500 lire note and chocolate (R. 7,9,17,18,19). It was the home of Vincenzo Chianese, who testified that after he told the soldiers to go away "as this girl was not the type they were seeking", accused "took out a pistol and pressed it into my stomach twice". Witness testified that he was afraid of the pistol, held by a man "under the influence of liquor". Witness further testified that he later told the girl to go away, saying that "I had my family to take care of" and that she departed crying with the soldiers following her (R. 8,9).

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Anna testified that she then met an elderly man who escorted her across a "short cut" and after they had proceeded a short distance she again saw the soldiers. Accused was standing on a terrace with a pistol in his hand. The old man ran away and the two soldiers approached Anna and began to "caress" her. She "rebuffed" them and accused threatened her. The soldiers argued for some reason and then "took me by each arm and brought me up on higher ground" where "the two started making advances to me and then threw me to the ground" (R. 18). She testified that the "two soldiers began to undress me" and "one held the pistol close to my head" (R. 18,19). Sexton had his trousers unbuttoned in the front and got on top of her and just as he "began to get to" her Antonio Infima came to the place in answer to the girl's "cry for help" and found "the girl lying on the ground" with two soldiers beside her. When Infima drew close, accused threatened him with the pistol and frightened him away (R. 10,11,12, 16,19,20). Anna called after him "help, help" and resisted the advances of Sexton until a group of American soldiers arrived on the scene (R. 10,19, 20).

With reference to the occasion when Antonio Infima was threatened by accused, Annuncia Infima the sister of Antonio, who lived in a house nearby, testified that she saw accused "holding a pistol moving towards my brother". She took her two children into the house and locked the door (R. 12) which accused tried to open three times. She testified that he thrust a pistol through the window and "made me understand to open the door or he would shoot". She then admitted accused who locked the door behind him. She testified further that he took a baby from her arms, putting "her on the ground", and then "put his hand on my throat and threw me to the ground" and removed "my shirt and underwear". She testified that she "had to remain quiet because the soldier had a pistol in his hand", and that his trousers were unbuttoned in front and that he got "on top of me". Within a few seconds she pushed him off and, getting up, said "My husband will come home soon and shoot you". Accused thereupon locked "me in the room and went away with the pistol in his hand". He soon returned, reentered the house and said he was going to shoot her husband (R. 13). Accused then took her by the wrists and pulled her outside. She was crying loudly. He pulled her towards the "other people in the fields" and then after apparently releasing her and motioning for her to go back to the house, repaired towards the "other American soldier and the girl". A few minutes afterwards some American soldiers appeared (R. 14).

At about 1730 or 1800 hours on the day alleged, a captain of the 935th Field Artillery Battalion and some soldiers, acting upon a report of "an Italian who seemed very excited", went with him for a distance of 300 to 400 yards from their bivouac area and found accused and Sexton with the Italian girl. Accused had a pistol in his hand and was "kneeling on the girl's arms, holding her to the ground" (R. 21). Sexton was "moving around on the ground" with his trousers open and his penis exposed. Accused started to run away as the officer and soldiers approached but returned when one of the group discharged his firearm. Accused was disarmed. His pistol had a cartridge in the chamber and five in the clip; the bolt was back and the "safety off" (R. 22).

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Sexton testified for the defense that at about 1615 hours on 14 October 1949, he and accused procured some wine from an Italian and as they stood drinking and talking to him, they indicated to the Italian by signs that they "were looking for a girl". The Italian pointed to a girl who was coming down the road. They walked up to her and she "made motions" signifying she wanted them to follow her. Sexton testified further that he went into a house near the power station with her, stayed inside a few minutes and came out (R. 24). Presently the girl also came out and beckoned to them to follow her. They crossed an orchard and stopped at a small ravine. On the way, accused had put a bracelet on "her arm and fastened it". Sexton testified further that while going through the orchard he offered the girl three dollars which she accepted; that "we then sat down. I put my arm on her shoulders and we leaned back her head on my arm". As they reached the ravine accused leaped "up on the embankment. As he jumped the gun slipped from his pocket" (R. 25). Sexton denied that accused threatened the girl with the gun and that he himself showed the girl a 500 lire note (R. 25,26). He testified he walked with the girl from the house near the power plant with accused walking "a little ways behind". He denied that the "fly" of his trousers was open or that he had his penis out when he was in the ravine with the girl. He testified that accused did not start to run away when the officer and soldiers arrived and that he did not know whether a shot was fired (R. 28). He denied attempting to have intercourse with the girl (R. 29).

Accused testified that on the afternoon in question he met Sexton who

"wanted to go get some wine. We had to go over the wall around the race track to get out. We met an Italian with some wine. Private Sexton gave him a dollar for some wine. We talked with him a while and drank about half of the wine. We made signs that we were looking for some girls. He made a motion towards this girl. We took what was left of the wine and walked over to talk with this girl. She motioned for us to follow her to the little house. There were two men there mixing lime. She motioned for us to come in. The girl went inside and Private Sexton was behind her. I stayed outside the house. Pretty soon Sexton and the girl came out. I reached for a cigarette and they saw the gun. They just looked at it. Asked her if she wanted a bracelet and she said yes. I put it on her wrist. We went to the orchard and down into a little ravine. I went up on the embankment. A fellow came by and went on" (R. 29,30).

He testified further that

"I had the pistol in my belt and walked over to the little house. She was looking out the window. I opened the door and she said, 'No vino'. I looked in and it was awful dark as there was no light in the house. She said, 'Ficky, Ficky' and I did an about face and out the door.

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I walked down the bank and she just stood there. I walked back up on the embankment above Sexton and the girl. I heard a shot and someone yelled. They came up and searched me twice and found the gun" (R. 30).

He denied that he ever touched the Italian girl who was with Sexton (R. 30). He testified that

"We handed her the three dollars and the 'K' rations and I passed them and went on up on the embankment" (R. 31).

He denied hearing the girl scream. He explained that his trousers were unbuttoned when he went into the house after leaving Sexton and the girl because "I took a leak before I went into the house and left the fly of my trousers open" (R. 31).

4. It thus appears from the evidence that at the place and time alleged in Specification 1 of the Charge, accused and another soldier accosted Anna Carusa the person named in the amended Specification and, having failed to seduce her with confections, money and trinkets, seized and took her to a nearby property and there, throwing her to the ground, proceeded to undress her, with accused also holding a pistol to her head. Accused's companion then undertook to compel the girl to submit to him sexually but was frustrated by her resistance. When a rescue party arrived on the scene accused was found with the pistol in his hand and forcibly holding the girl to the ground. His companion's trousers were open and his penis was exposed. From these and the other significant circumstances, it was reasonable to infer that both accused and his companion attempted by force and without her consent to have sexual intercourse with the girl. It is immaterial whether accused himself actually touched or attempted to force the girl to submit to him personally. The evidence clearly shows that he was giving effective aid and assistance to his companion and was therefore properly charged directly as a principal. He became thus responsible for the acts of his companion, even apart from an obviously inferable concurrent personal intent to commit rape as charged by having intercourse with the girl himself (NATO 643, Moor; NATO 646, Simpson et al; NATO 779, Clark et al). The court was amply justified in finding accused guilty as alleged in this Specification (MCM, 1928, par. 1491).

The court without objection by defense granted a motion by the prosecution to amend Specification 1 of the Charge by striking "Vincenzo" from the alleged name of the assaulted person, causing the name to read "Anna Carusa" as established by the evidence (R. 17). The amendment was properly allowed.

It further appears from the evidence that, as alleged in Specification 2 of the Charge, accused, at the point of a pistol, forced Annuncia Infima into her dwelling and when inside violently threw her to the floor and, after partially undressing her, undertook forcibly and without her consent to have sexual intercourse with her. He was frustrated in his attempt only

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by the woman's subterfuge and it was no defense that he later desisted. The court was fully warranted in concluding that there was here an assault with a concomitant intent to commit rape (MCM, 1928, par. 1491).

And it further appears from the evidence that at the place and time alleged in Specifications 3, 4 and 5 of the Charge, accused separately assaulted Francesco Torres, Vincenzo Chianese and Antonio (Anthony) Infima, by pointing his pistol at each in a minacious manner. It is clear that the weapon was employed in a manner likely to produce death or great bodily harm. It also appears either directly or by necessary implication that the pointing of the weapon was accompanied in each case by a demand or condition which accused had no right to make. As to Torres, accused forced his way into the power plant grounds which the former was guarding by threatening Torres with a drawn pistol. Accused pointed the pistol at Chianese to make him desist in his efforts to protect the girl Anna, and as to Infima, accused, at the point of the pistol, kept him from rescuing her from accused's companion. From the imposition of these conditions and demands and the manner and nature of the threat, an intent to do bodily harm in the case of each of the assaulted persons was properly inferable (Dig. Op. JAG, 1912-40, sec. 451 (10)). The court was fully warranted in finding accused guilty as alleged in Specifications 3, 4 and 5 of the Charge (MCM, 1928, par. 149m).

5. The charge sheet shows that accused is 21 years old. He enlisted in the Army of the United States 14 May 1940 and had no prior service.

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

Richard H. Rogers, Judge Advocate.
D. J. Ide, Judge Advocate.
Harold Simpson, Judge Advocate.

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sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on the afternoon of 14 October 1943, an Italian girl named Anna Carusa was walking along a road near the power station in the vicinity of the Agnano Race Track, near Naples, Italy. She met accused and Private James Hale, both of Battery B, 935th Field Artillery Battalion, who stopped her and offered her chocolate. She declined and continued on her way (R. 10), until she noticed that the soldiers had turned and were following her. She thereupon turned into the gate at a power station, where she told the civilian guard that she was afraid of the soldiers. The latter directed her to a small house within the grounds, stating that there was a family there (R. 5,10). As accused and Hale approached the gate, Hale pointed a pistol at the guard and "motioned that they wanted to go in". They entered (R. 5) and one of them followed her into the house. They soon came out and the owner asked the girl to leave stating that he had his family there and did not want any trouble and that "These American soldiers are good people. They won't bother you" (R. 7, 10). The soldiers offered her money, trinkets and chocolate, which she refused and left through the gate, the soldiers following her (R. 5,7,11, 20).

Anna testified that she met an "old man" who walked with her along a "short cut" and that the soldiers appeared again, one of them with a pistol. When the old man saw the pistol he ran away and one of the soldiers attempted to caress her but she "warded him off". The soldier "waived" the pistol at the girl and they took her by the arms and led her to an olive orchard where they threw her to the ground. They raised her dress and began to unbutton her underclothes. Their trousers were unbuttoned and accused got on top of her and attempted to insert his penis into her. She "kept putting him off and resisted" and cried out, "Asking for the Saints help" (R. 11).

An Italian who was passing by heard the girl's cries and upon approaching the spot where she was struggling with the soldiers, saw her lying on the ground crying for help with a soldier kneeling beside her holding her down. Another soldier threatened the Italian with a pistol and the latter ran to an American camp 400 or 500 meters away for help (R. 8,9). Accused was on top of the girl when officers and soldiers from the camp arrived (R. 11). He was "between her legs", his pants were open and his penis was out (R. 13), but, according to the girl, he had not succeeded in having intercourse with her (R. 12). Hale was holding the girl's arms down and had a pistol at her head. He started running away upon the approach of the soldiers but stopped when a shot was fired (R. 13,14).

Accused testified that he and Hale bought a bottle of wine from an Italian whom they met on the road. They stood drinking the wine and indicated by signs that they were looking for some girls. The Italian

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pointed at Anna who was coming down the road. They showed her three dollars and two "K" rations and "she made signs like she was going over to a house and we were to follow her". They followed her to the house and accused went inside with her, remaining about five minutes. The girl came out in about 15 minutes and motioned for them to follow her. They walked to an orchard where they gave her the "K" rations and three dollars. She also accepted a chain from Hale. She made no effort to run away. Hale went up on an embankment (R. 14). At no time did he or Hale force themselves upon her (R. 15), but when they got to the orchard the girl sat with her head on accused's arm. He kissed and caressed her and was "loving her up". Her dress was half way up above her knees and his pants were unbuttoned. He did not attempt to have intercourse with her and at no time was he on top of her. They lay there kissing when the officers and soldiers arrived (R. 17).

Hale testified that when they first met the girl on the road they gave her three dollars, two "K" rations and a bracelet, which they put on her wrist. She went with accused to the orchard willingly and no force was exerted upon her (R. 18). Witness was standing on a bank about 25 feet away from accused and the girl. He had a .45 caliber pistol. A man came by and he chased the man away. Ten minutes later some soldiers appeared. His first knowledge of their presence was when they fired a shot and came and "grabbed me off the embankment" (R. 19).

4. It thus appears from the evidence that at the place and time alleged accused, with a companion, accosted Anna Carusa the person named in the amended Specification and, after having failed to seduce her with confections, money and other things, seized her and took her to a nearby orchard where he threw her to the ground and thereupon attempted with force and against her will, to have sexual intercourse with her. In furtherance of this purpose and assisted by his companion who grasped hold of the girl's arms and held a pistol at her head, accused raised her dress and with his penis exposed forced himself upon her and between her legs, in which position he was found when a rescue party arrived on the scene. That the girl resisted was clearly shown. It was for the court to determine the credibility of the defense testimony that the girl accepted donations and that no force was employed. The commission of an overt act amounting to an assault accompanied by an intent to rape, constitutes the offense here charged and upon all the evidence clearly supporting the essential elements, the court was warranted in finding accused guilty (MCM, 1928, par. 1491; CM NATO 830, Cooke).

5. The charge sheet shows that accused is 29 years old. He was inducted into the Army 6 November 1942. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Penitentiary confinement is authorized for the offense of assault with intent to commit rape here

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involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 455, Title 18, United States Code.

 Judge Advocate.
0.7-9de Judge Advocate.
Gordon Simpson Judge Advocate.

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

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APO 594, U. S. Army,
28 December 1943.

Board of Review

NATO 1069

UNITED STATES)

XII AIR FORCE SERVICE COMMAND)

v.)

Trial by G.C.M., convened at
Souk el Khemis, Tunisia, 19 August
1943.)

Private First Class JOHN W.
SCOTT (38186576), Privates
WILL (NMI) WHITE (38201842)
and HURDLE L. LINESTOR
(34310958), all of Company B,
909th Air Base Security
Battalion.)

As to each: Dishonorable
discharge and confinement for
life.
United States Penitentiary,
Lewisburg, Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

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

Specification: In that Private Hurdle L. Linestor, Private Will (NMI) White, Private First Class John W. Scott, all of Company "B", 909th Air Base Security Battalion, acting jointly and in pursuance of a common intent, did, at Touatia de Touil, Tunisia, on or about 26 June 1943, forcibly and feloniously, against her will, have carnal knowledge of Laakri ben Touati.

CHARGE II: Violation of the 93d Article of War.

Specification-1: In that Private Hurdle L. Linestor, Private Will (NMI) White, Private First Class John W. Scott, all of Company "B", 909th Air Base Security Battalion, acting

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jointly and in pursuance of a common intent, did, at Touatia de Touil, Tunisia, on or about 26 June 1943, with intent to do him bodily harm, commit an assault upon Brahim ben Hamed, by hanging him by the neck and arm to a beam of a house, with a dangerous thing, to wit, a one half inch rope.

Specification 2: In that Private Hurdle L. Linestor, Private Will (NMI) White, Private First Class John W. Scott, all of Company "B", 909th Air Base Security Battalion, acting jointly and in pursuance of a common intent, did, at Touatia de Touil, Tunisia, on or about 26 June 1943, with intent to do him bodily harm, commit an assault upon Bou Ahmin ben Souisi with a dangerous weapon, to wit, a .45 caliber pistol.

Specification 3: (Findings of guilty disapproved).

Each accused pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced as to accused Scott and White. Evidence of one previous conviction by summary court-martial for absence without leave and disrespect toward a superior officer was introduced as to accused Linestor. Each accused was sentenced to "suffer death by hanging, and forfeiture of all pay and allowances due and to become due". The reviewing authority disapproved the findings of guilty of Specification 3, Charge II, as to each accused, approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence as to each accused but commuted it in each case to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 26 June 1943, Laakri ben Touati (R. 6), about 25 years of age (R. 21) and the mother of three children (R. 10), lived with her husband, Brahim ben Hamed, at Touatia de Touil, Tunisia (R. 6), about two or two and a half kilometers from the "American Air Base" (R. 19). At about noon on that date while her husband was asleep Laakri saw three colored soldiers approaching the house. She called her husband and he met them at the door (R. 6).

Brahim testified that the three soldiers were the accused (R. 15). He further testified that accused took him to a room adjoining his living quarters (R. 13,16) and there "beat" him (R. 17). Linestor had a dagger and Scott had a revolver (R. 14,18). Accused tied witness with a rope "around the neck and under the arm", passed the end of the rope over a rafter and pulled witness up until his feet were about ten inches above the ground (R. 18). They left him in this position. When he tried to "speak or yell" one of accused put a "gun" against witness' throat (R. 14). Accused then, one after another, went into the room where Laakri had gone (R. 17,18). Accused White was the first to enter the room. He closed the door after him, the other two accused remaining with witness and holding the rope

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(R. 13). While the various accused were in the room witness heard his wife screaming "Wa Wa"***they are going to kill me" (R. 18).

Laakri testified that she was the mother of three children (R. 10) and had a baby in her arms when the soldiers came in. She tried to escape but "they pulled me back and threw me down". She "tried to resist" but "was forced to submit". The first one to "attack" her was White, followed by the other two in turn (R. 7,12). "They" hit her on the head with a piece of wood, a wooden bowl, during the intercourse (R. 8,9). She testified "they had a dagger, a revolver, and a pistol". She "fought" but "every one of them completed the act". She was injured on the head, the thighs, the breasts and the shoulders (R. 8). None of the soldiers had been at her house before (R. 9,11). In her testimony witness at first identified the three accused as her assailants (R. 7) but subsequently testified, "I indicated previously the three that did the act. I am certain of two, of one I am not because so much time has gone by" (R. 9).

On 27 June 1943, a medical officer examined Laakri and her husband. He testified that Laakri had a bruise on the left clavicle or collar bone, a "brush burn" below the collar bone, a tender abrasion just under the left shoulder point and numerous bruises on the front and inner surfaces of her thighs. There was no injury to the muscles of the thighs or legs. The injuries, in witness' opinion, had been incurred in the last 24 to 72 hours. There was no injury to the external genital organs (R. 20,21). The examination of Brahim revealed "brush burns" on each cheek and jaw which apparently had been incurred in the past 24 to 72 hours (R. 22).

Bou Ahmin ben Souisi testified that he saw three colored soldiers approaching the village in question. He saw them enter the house of Brahim and went over "to inquire". He was "sent away by armed soldiers". He then called a friend "who came back with me, and we were chased away". They were "call back by the cries, and we know something was not just right" (R. 23). One of the soldiers whom Bou Ahmin identified as accused Scott "threatened" him with a pistol when he came up to within about two meters of him (R. 24) and "chased" him away (R. 23).

All three accused were identified as the soldiers who were at the house, by a neighbor who heard the cries and went to Brahim's house to investigate. This witness testified that he was within five feet of Linestor while the latter stood in front of Brahim's house with a revolver in his hand (R. 26, 27).

On 26 June 1943, at 1230 or 1300 hours, a roll-call formation was held at the company to which the accused belonged. The three accused were the only soldiers not there present or accounted for (R. 29,31,32).

Each of the accused elected to remain silent.

A soldier testified for the defense that on 26 June he was on guard duty at the air field where accused were stationed. He saw the three accused together between 1100 hours and 1200 hours walking into an Arab village near

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his post. This village was about two and one-half miles or kilometers from the one where the alleged assaults took place (R. 40,41). Witness was not certain as to the time he saw accused but believed it was about five or ten minutes before noon (R. 39,40,42).

4. It thus appears from uncontradicted evidence that at the time and place alleged the three accused entered the home of Brahim ben Hamed, the person named in Specification 1, Charge II. They were armed. They struck Brahim and, with a rope tied about his neck and arm, suspended him from a beam of the house where they kept him hanging with his feet off the floor. As it was used the rope was a dangerous thing, for it was obviously apt to cause great bodily injury by choking, burning or otherwise. After thus assaulting the husband one or more of the accused struck his wife, Laakri ben Touati, the woman named in the Specification, Charge I, on the head with a piece of wood and threw her to the ground. Then each accused, against her resistance, had sexual intercourse with her by force and without her consent. The defense introduced testimony tending to establish an alibi. The time element, according to the defense witness, was uncertain and, in any event, the weight to be given the testimony was a matter for determination by the court. All the elements of the offenses of rape and of assault with intent to do bodily harm with a dangerous thing, as alleged in Charge I and its Specification and Specification 1, Charge II, are established (MCM, 1928, pars. 148b, 149m).

The three accused were charged with "acting jointly and in pursuance of a common intent" in raping the woman named. Two or more persons cannot be jointly guilty of a single rape because by the very nature of the act individual action is necessary. It has been held, however, that all persons present aiding and abetting another in the commission of rape, as in this case, are guilty as principals and punishable equally with the actual perpetrator (52 C.J. 1036; NATO 385, Speed; NATO 416, Simpson et al). The joinder of the three accused could not have injuriously affected their substantial rights.

It was also shown by uncontradicted evidence that when Bou Ahim ben Soulsi, the man named in Specification 2, Charge II, went to Brahim's home "to inquire" Scott, at close quarters, "threatened" him with a pistol and "chased" him away. The court was justified in concluding that there was in fact an offer of violence by pointing the weapon at the victim, that an assault resulted, that the weapon was dangerous and that bodily harm was intended. This assault was a part of the unlawful enterprise in which all accused participated, and for which each accused was legally responsible. The evidence is legally sufficient to support the finding of guilty of this specification.

5. Captain Robert G. Knowles, 909th Air Base Security Battalion, testified that on 29 June 1943, he accompanied Laakri, her husband and an investigating officer to the Gendarmerie in Souk el Khemis for the purpose of identifying the accused (R. 29). The three accused were put in a line-up with seven other colored soldiers (R. 33) who were selected by witness (R. 30). He included the three accused in the line-up because they had

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previously been absent from roll-call and were under suspicion (R. 31) and in custody (R. 34). They were all dressed the same and lined up along a wall "in a crescent shape". Two of the men were sentries with sidearms (R. 35). As the group approached the line-up

"the woman was ahead of us she ran and with much motion and excited actions pointed to the three soldiers, and her husband confirmed the identification of these three".

Thereafter both the woman and her husband "identified" accused through an interpreter (R. 34).

It has been held improper as constituting hearsay for a witness to testify that a certain person on an occasion out of court identified the accused (CM 187116, Martinovitch; NATO 423, Stroud; NATO 460, Trevino). This rule seems applicable whether the witness' knowledge of such extrajudicial identification was acquired through an understanding of the language employed by the person making the identification or in consequence of any significant gesticulation or facial expression denoting identification by the latter. Such testimony is manifestly inadmissible where it includes statements by the identifying person, spoken in a language not understood by the witness, but translated for him by an interpreter. In such case the witness does not speak from personal knowledge but testifies as to what the translator declares the other party said (Wharton's Crim. Ev., 11th Ed., sec. 440). However, positive identifications of the accused as the persons who had committed the assaults were made in court by the husband and by another eye witness, and the woman identified two of the three. Under the circumstances it cannot be said that the substantial rights of the accused were injuriously affected.

6. The charge sheet shows that accused Linestor is 22 years old. He was inducted into the Army 15 July 1942 and had no prior service. Accused White is 19 years old. He was inducted into the Army 25 September 1942 and had no prior service. Accused Scott is 22 years old. He was inducted into the Army 24 July 1942 with no prior service.

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

Wm. P. Hughes Judge Advocate.

O. J. J. J. Judge Advocate.

Lyndon Simpson Judge Advocate.

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

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

Board of Review

NATO 1069

UNITED STATES)

v.)

Private First Class JOHN W.
SCOTT (38186576), Privates
WILL (NMI) WHITE (38201842)
and HURDLE L. LINSTOR
(34310958), all of Company B,
909th Air Base Security
Battalion.)

XII AIR FORCE SERVICE COMMAND

Trial by G.C.M., convened at
Souk el Khemis, Tunisia, 19 August
1943.

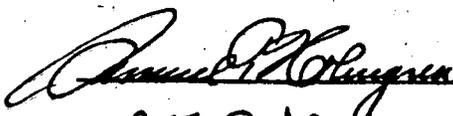
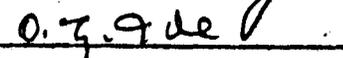
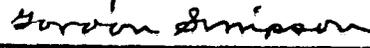
As to each: Dishonorable
discharge and confinement for
life.

United States Penitentiary,
Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

 , Judge Advocate.
 , Judge Advocate.
 , Judge Advocate.

NATO 1069

1st Ind.

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

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

1. In the case of Private First Class John W. Scott (38186576),
Privates Will (NMI) White (38201842) and Hurdle L. Linstor (34310958),

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NATO 1069, 1st Ind.
28 December 1943 (Continued).

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all of Company B, 909th Air Base Security Battalion, 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 50½, you now have authority to order execution of the sentences.

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

(NATO 1069).



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

(Sentences as commuted ordered executed. GCMO 59, NATO, 28 Dec 1943)

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

APO 534, U. S. Army,
23 December 1943.

Board of Review

NATO 1070

UNITED STATES)

v.)

Privates EDWIN P. JONES)
(15045804) and FRED T.)
BAILEY (33090327), both)
27th Armored Field Artillery)
Battalion.)

MEDITERRANEAN BASE SECTION

)
)
) Trial by G.C.M., convened at
) Oran, Algeria, 21 September
) 1943.

) As to accused Jones: Death.
) As to accused Bailey: Dis-
) honorable discharge, suspended,
) and confinement for one year
) and nine months.
) Disciplinary Training Center
) Number 1.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

2. Accused were jointly tried upon separate Charges and Specifications as follows:

JONES

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

Specification: In that Private Edwin P. Jones, Battery "A", 27th Armored Field Artillery Battalion, did, at Assi Ben Okba, Algeria, on or about 28 August 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private Alfred E. Raby, a human being, by shooting him with a pistol.

CHARGE II: Violation of the 93d Article of War.

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Specification 1: In that Private Edwin P. Jones, Battery "A", 27th Armored Field Artillery Battalion, did, at Assi Ben Okba, Algeria, on or about 28 August 1943, with intent to commit a felony, viz, murder, commit an assault upon Private Norman E. Hippert, by willfully and feloniously shooting him in the chest with a pistol.

BAILEY

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Fred T. Bailey, Battery "A", 27th Armored Field Artillery, did, at Assi Ben Okba, Algeria, on or about 28 August 1943, wrongfully and knowingly assault Private Alfred E. Raby, a military policeman, by striking him on the body with his hand with the intent to obstruct and hinder the said Private Alfred E. Raby and Private Allen Lewis, a military policeman, who were then and there, in the execution of their office, attempting to take into custody and search Private Edwin P. Jones.

Specification 2: In that Private Fred T. Bailey, Battery "A", 27th Armored Field Artillery Battalion, did, at Assi Ben Okba, on or about 28 August 1943, unlawfully carry a concealed weapon, viz, a .45 caliber automatic pistol.

Specification 3: In that Private Fred T. Bailey, Battery "A", 27th Armored Field Artillery Battalion, did, at Assi Ben Okba, on or about 28 August 1943, wrongfully dispose of by throwing away and abandoning a .45 caliber automatic pistol, value of about \$26.00, property of the United States.

A common trial was ordered by the convening authority. Neither accused objected to the common trial (R. 3).

Accused Jones pleaded not guilty to and was found guilty of the Charges and Specifications relating to him. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

Accused Bailey pleaded not guilty to and was found guilty of the Charge and Specifications pertaining to him. Evidence of three previous convictions by summary courts-martial for absence without leave and "off-limits", was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and nine months. The reviewing authority approved

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the sentence, ordered the sentence executed but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated Disciplinary Training Center Number 1 as the place of confinement. The proceedings as to Bailey were published in General Court-Martial Order No. 169, Headquarters Mediterranean Base Section, 31 October 1943.

3. Inasmuch as the sentence to dishonorable discharge in the case of accused Bailey was suspended and the general court-martial order in his case published, the Board of Review makes no holding and expresses no opinion in his case.

4. The evidence shows that about 2030 hours on 28 August 1943, at Assi Ben Okba, Algeria, the two accused and six other soldiers were "sitting along on a step drinking wine" when two military policemen drove up, told the men they could not drink the wine and requested surrender of the bottle. After some conversation the men were permitted to drink the wine. Thereafter the military police broke the bottle and drove away. While the wine was being consumed, Bailey told the military police "what poor sports" they were and "one fellow said, 'Well, I guess they didn't hear the news from the last town we was in'". Bailey said, "We will come back tomorrow night and show you a thing or two" (R. 11,12). One of the military policemen testified that at this time Jones and Bailey gave evidence of having been drinking, but that neither staggered and neither appeared to be drunk (R. 11, 12). The companions of accused left and after standing "around for a while", accused went to their bivouac area and there each armed himself with a pistol. Jones loaded his pistol with a clip and put a cartridge in the chamber. The two then returned to Assi Ben Okba and walked down a street near where they had previously encountered the military police (Pros. Ex. B).

Between 2100 and 2200 hours the same night, Private Allen Lewis, Military Police Detachment, 18th Battalion, 1st Replacement Depot, observed "some excitement" on a street in Assi Ben Okba and drove up on his motorcycle to investigate. He testified that

"these four fellows there, Jones, Bailey and two other soldiers, seemed to be running other fellows out of town, VI Corps men out of Assi Ben Okba. They wanted to get on me after I started talking to them" (R. 13).

Witness told accused that "they had better leave town because the town was off limits after ten o'clock to soldiers". Bailey "wanted to take" the motorcycle. A truck drove up at that time and accused went over to the vehicle whereupon Lewis rode away for help (R. 13). Presently he returned, followed closely by Private Norman E. Hippert, Military Police Detachment, 18th Battalion, 1st Replacement Depot, "Private Raby" of the military police and two other military policemen in a truck. Finding accused about where he had left them, witness told them it was "after ten o'clock". They asked why he had brought "this truck" back with him and he replied he "got it to take them back to camp" (R. 13). They stated they did not know where their

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camp was. At about this time Second Lieutenant Charles M. Hunter, Infantry, of the military police stopped his "jeep" across the street from the group and started towards the group (R. 7). As the officer started Jones "ran his hands down in his pockets" (R. 13,24). One of the military policemen said, "Soldier, what have you got in your pocket?" Jones replied, "It is none of your damned business" (R. 7) and ran his hands "further down" in his pockets (R. 14) and started "backing up" (R. 19). The group of men was between the lights of a truck and other motor vehicles (R. 18).

When Jones ran his hands further in his pockets, Lewis seized Jones' right arm, Raby seized his left and the two started searching him (R. 14, 16). Lieutenant Hunter testified that as the two military policemen seized accused's arms,

"Jones was more or less facing all the soldiers, who were in this direction. He was more or less against the wall. He wasn't exactly up against the wall. He was more towards the curbstone but there was a wall behind him and so he wasn't with his body in that direction facing the soldiers" (R. 9).

At this juncture Bailey said "Watch what you are doing" and "shoved" Raby (R. 21,24). Lewis testified that Bailey "knocked Raby into Jones and then Jones bumped into me. That gave him a chance to get his gun out" (R. 14). Jones drew his pistol, a caliber .45 (Pros. Ex. B), and fired at least three times (R. 14,21). One of the bullets struck Raby (R. 7,16), piercing his "left lateral chest", coming out the "right lateral chest", penetrating his heart and causing instantaneous death. The medical officer who subsequently examined Raby's body testified that death "was due to the penetration of his heart by a bullet" (R. 28,29). One of the other shots fired struck Hippert in the chest (R. 14,19) causing a serious wound (R. 41). Hippert testified that he had "made a dive" for Jones when it became apparent to witness that Jones intended to fire. When wounded, Hippert rolled away to a nearby spot behind a motor vehicle (R. 19).

After the shooting, Jones backed up "toward the corner" for about ten paces. He had his pistol pointed at "the entire group, moving it backwards and forwards", and said something to the effect that military policemen "were pricks or sons of bitches or something like that" (R. 9) and threatened that "If any of you other pricks move I'll mow you all down" (R. 14). He then disappeared around the corner (R. 9).

None of the military policemen had a firearm at the time of the shooting (R. 17,22), although one of them had a club with which he tried to strike accused during the melee (R. 26). A pistol which Bailey said belonged to him was found on the ground at the scene (R. 8,22). Lieutenant Hunter testified that during the course of the shooting, he heard someone say "Stop. Don't shoot any more. Realize what you are doing", and that Bailey asserted it was he who called out this warning (R. 9).

After being advised that he need not make a statement and that whatever

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he said might be used against him, Jones made a voluntary statement to a non-commissioned officer and an officer of the military police (R. 32,33), which was reduced to writing (Pros. Ex. B), that at about 1830 hours on 28 August 1943, he and Bailey went into a town about a mile from their bivouac area where they met some other soldiers in a bar. They drank wine and beer and after a time went to another bar where they resumed drinking. Jones and another soldier each bought a bottle of wine intending to take it back to camp. They drank until a military policeman "came & closed the place". Jones, Bailey and some other soldiers left the bar and sat down together on a street curb. Some military policemen drove up and told them they could not take the wine out of town. Jones stated further that

"When the M.Ps first came a staff Sergeant jumped out of the Jeep & grabbed me when he saw the wine that I had. This Staff Sergeant told me that he would have to take me in. Pvt. Bailey asked if it would be OK for us to drink it since we had bought it & could not take it back to camp. While we were drinking I mentioned something about, 'before we leave we will have to get this town under control'" (Pros. Ex. B).

After the bottles had been broken Jones and Bailey "caught a ride up to camp". Jones further stated

"We went to our tent & I got my pistol***a .45 Colt U. S. Army issue***. The pistol was loaded with a clip & I threw a shell into the chamber. Pvt. Bailey got his gun & we both put them in our right front pants pockets. When we were in town before & the M.Ps encountered us Bailey & I resented their attitude when they told us we would have to get out of town & also because they would not let us take the wine with us after we had paid for it. It was then that Bailey & I decided to go back to camp, get our guns & see how they would act toward us. After we got our guns we walked out of the camp area down to the black top road & thumbed us a ride with a 6 x 6. We then rode down the main road, got off & walked up a street near where we had previously encountered the M.Ps. We were walking up this street & met two soldiers from the 47th Medics. We stopped & started talking with them. About this time a motorcycle came up, stopped and the soldiers talked a few seconds. I do not remember what he said but anyway he left. Right after the fellow on the motorcycle left a jeep came up. I do not remember whether the motorcycle rider came up with the jeep or not. The jeep stopped & two or three fellows got out, telling us that we would have to get out of town. I could see that they were M.Ps & one took hold of my right arm & one took my left arm. I had my hands in my pockets. One of the M.Ps said 'what have you got in your pocket'. At this time the one on the right jerked my hand out of my pocket. I brought the gun out & shot. The M.P

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on my right was facing me when I shot. A little after I shot someone struck me in the back of the head. I turned to the left at almost the same time that I was struck & do not remember firing the pistol anymore" (Pros. Ex. B).

After the shooting Jones put his pistol back in his pocket and returned to camp where he borrowed a blanket from another soldier and went to sleep. He was awakened by the first sergeant the following morning and told to report to battalion headquarters (Pros. Ex. B).

Upon investigation of the charges his previous statement (Pros. Ex. B) was read to accused Jones and, after having been warned as before, he stated to the investigating officer that the statement was correct (R. 38). A statement by accused Bailey likewise was admitted in evidence but its use was limited by the court to the issue of his own guilt or innocence (R. 36; Pros. Ex. C). Bailey's statement did not differ in material particulars from that of Jones (Pros. Ex. C).

Accused Jones did not testify or make an unsworn statement at the trial (R. 42).

5. It thus appears from the evidence that at the place and time alleged accused Jones willfully and without legal justification or excuse killed "Private Raby", the person named in the Specification, Charge I as to Jones, by shooting him with a pistol, and committed an assault upon Private Norman E. Hippert, the person named in the Specification, Charge II as to Jones, by shooting him in the chest with a pistol. Jones' conduct was wanton. He threatened to "get this town under control" and expressed resentment toward the military policemen for insisting that he leave town. He returned to his camp and secured the pistol, and again went to Assi Ben Okba and created a disturbance. The demeanor of the accused was so ominous that a military policeman who sought to pacify the disturbance, went away for assistance.

When the military policemen again approached, without firearms, and undertook, in performance of their duty to maintain the peace, to search him, Jones drew his pistol and fired upon them. There was no element of self-defense or of sudden passion aroused by adequate provocation. Malice aforethought was inferable from the deliberation and ill will displayed. The specific intent involved in murder also flowed from the intentional opposition by force of the military policemen lawfully engaged in the duty of keeping the peace (MCM, 1928, par. 148a). Accused Jones was not drunk. The evidence discloses no extenuating or mitigating circumstances but to the contrary shows that the killing of Raby and the assault upon Hippert were characterized by viciousness and a determination to kill if the military police performed their duty of preventing further lawlessness by accused. Had death ensued from the wound inflicted on Hippert, the homicide would have been murder. The court properly found Jones guilty of murder and assault with intent to commit murder as charged (MCM, 1928, par. 148a; Winthrop's, reprint, p. 672 et seq., p. 688; NATO 213, Smith; NATO 1031, Howlett).

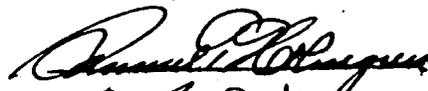
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6. The Specification, Charge I as to Jones, alleges that accused killed "Private Alfred E. Raby". Deceased was only shown by the evidence to have been "Private Raby". The failure to prove the christian name of the deceased person was not material. His occupation was shown and his surname established, thus sufficiently identifying him as the person named in the Specification (NATO 965, Saunders).

7. Accused Jones was tried jointly with his companion in the unlawful ventures from which the offenses resulted. Jones was entitled to a separate trial had he asserted his desire for such separate trial. He did not object to the procedure followed. He was accorded full rights of challenge and it does not appear that his substantial rights were in any manner injuriously affected. Bailey's offenses were closely related to those of accused and were provable by the same witnesses. The common trial having been directed by the reviewing authority and no objection having been made by accused, there was no legal impropriety in the procedure (Dig. Op. JAG, 1912-40, sec. 325 (33)).

8. The Charge Sheet as to Jones shows that he is 23 years old, and that he was inducted into the Army on 5 September 1940 at Fort Knox, Kentucky, without prior service.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused Jones were committed during the trial. A sentence to death or imprisonment for life was mandatory upon the court-martial upon conviction of accused of murder in violation of Article of War 92. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence as to accused Jones.

 Judge Advocate.
O. G. F. de Judge Advocate.
Horon Simons Judge Advocate.

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

APO 534, U. S. Army,
23 December 1943.

Board of Review

NATO 1070

UNITED STATES)

v.)

Privates EDWIN P. JONES
(15045804) and FRED T.
BAILEY (33090327), both
27th Armored Field Artillery
Battalion.)

MEDITERRANEAN BASE SECTION)

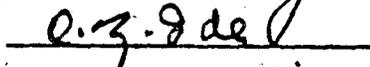
Trial by G.C.M., convened at
Oran, Algeria, 21 September
1943.)

As to accused Jones: Death.
As to accused Bailey: Dis-
honorable discharge, suspended,
and confinement for one year
and nine months.)
Disciplinary Training Center
Number 1.)

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

NATO 1070

1st Ind.

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

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

1. In the case of Privates Edwin P. Jones (15045804) and Fred T.

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NATO 1070, 1st Ind.
23 December 1943 (Continued).

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Bailey (33090327), both 27th Armored Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence as to accused Jones, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence as to accused Jones.

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

(NATO 1070).



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

(As to accused Jones, sentence ordered executed. GCMO 56, NATO, 23 Dec 1943)

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

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APO 534, U. S. Army,
27 December 1943.

Board of Review

NATO 1074

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

EASTERN BASE SECTION

v.)

Trial by G.C.M., convened at
Bizerte, Tunisia, 18 November
1943.

Privates BRADY (NMI) KETCHUM)
(38256824) and JIMMIE L.)
WASHINGTON (38262142), both of)
Company B, 270th Quartermaster)
Service Battalion.)

As to each: Dishonorable
discharge and confinement for
ten years.
United States Penitentiary,
Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Jimmie L. Washington, Private Brady Ketchum, both of Company "B" 270th Quartermaster Service Battalion, did, near Ferryville, Tunisia, on or about 26 October 1943, acting jointly and in pursuance of a common intent to commit a felony, viz., rape, commit an assault upon Zahara Ben Sarah, by willfully and feloniously seizing the said Zahara Ben Sarah, striking her in the face, throwing her upon a bed, and attempting to tear her underpants from her body.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions as to Ketchum was introduced. Evidence of two previous convictions, one for absence without

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leave for two days in violation of Article of War 61, the other for entering an out of bounds area in violation of Article of War 96, was introduced as to Washington. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for a period of ten years. The reviewing authority approved the sentence as to each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The undisputed evidence shows that at about 2315 hours on 26 October 1943 the two accused, colored (R. 5), whose organization, the 270th Quartermaster Service Battalion, was bivouacked about one mile from Ferryville, Tunisia (R. 16), went to the house or hut of Salah ben Hassen ben Salah Halalech Chalghoumi (R. 6), located 600 or 700 yards from the bivouac area (R. 17), in which house Salah, his "wife, two daughters, and five small children" lived (R. 6). One of the two daughters was Zahara ben Sarah, age not stated (R. 6,11,12). The nine members of the family slept in the same room (R. 7). When accused arrived Ketchum was carrying a rifle (R. 6,19, 26). Washington had a flashlight (R. 6). The Arabs also had a flashlight (R. 8).

Salah testified that when accused came to the house witness and his wife were awake but that Zahara and the others of the family were asleep (R. 7). Zahara had not recently been outside the house (R. 8). Accused struck and "unhinged" the door and entered the house (R. 6). Ketchum had his rifle "in his hands, standing up" (R. 8). Washington struck witness several times in the face (R. 6), knocking him down (R. 7). Ketchum then "stood guard" over witness with the rifle pointed at him. Washington laid down his flashlight, searched the house, found Zahara under the built-in bed, seized her, dragged her out and laid her on the bed. He tried to "pick her clothes" and raised her dress above her hips. The girl resisted and screamed whereupon Washington tried to put his hand over her mouth. She bit his hand. Witness testified that accused "tried to attack***and rape" the girl (R. 6) but that she was "always struggling, not giving him a chance to get set". The disturbance and attack lasted 15 or 20 minutes (R. 7). The wife finally screamed and she and witness ran outside the house, followed first by Ketchum and then by Washington (R. 6). Witness testified that he did not recall that a small boy had come to the house asking that Zahara go outside. Zahara never talked to soldiers. Witness never saw accused before their entrance into his house as described. He did not sell wine at his house (R. 8,9).

The wife of Salah, Mnie Bent Selbe, testified that when accused broke down the door of the house and entered, Zahara was sleeping with her and a little brother. Zahara had not been outside the house, had not been seen talking to any soldiers and had not had any candy or chewing gum during the evening (R. 12).

Zahara ben Sarah testified that she was asleep when accused entered the house. Washington pulled her from beneath the bed and threw her on the bed and tried to tear her "pants off". She kept her legs together and crossed them. He tried to get her legs apart and "as he tried to do it" she

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screamed. He put a pillow on her face and tried to place his hand over her mouth. She bit his hand until it bled. He then struck her on the nose causing it to bleed (R. 10). Witness denied that she had been outside the house earlier in the evening or that soldiers had given her candy and chewing gum (R. 11).

Accused's company commander examined Washington's right hand on the morning of 27 October 1943 and found a wound on the "heel" of the hand (R. 14). He also found a shirt, with blood stains on the sleeve and collar, in a barracks bag belonging to Washington. At this time each accused stated that he had been "at the Arab place" with the other accused. The company commander testified that Ketchum had been a "very good soldier" and that his character was "very good" (R. 17).

Accused Washington testified that on the evening of 26 October he and Ketchum went to Ferryville, bought two bottles of wine and returned to the bivouac area and drank the wine. They decided to "go over in the field" for more wine. Ketchum had been cleaning his rifle in accused's tent so the rifle was taken along. The two went to the Arab house at about 2100 or 2130 hours and bought two more bottles of wine. They sat on the "lawn about twenty yards from the house" and drank this wine. Washington told a small boy that he "wanted a Madam" and the boy brought Zahara to him. The three sat down and talked and Washington gave some candy and chewing gum to the girl (R. 19). At about 2230 hours (R. 24) the girl suddenly left accused and went into the house. About three minutes later Washington went to the house and pushed on the door which seemed to be held up by a block. The door fell aside. He testified

"I saw her sitting in the corner about in the middle of the building. Her mother was there and her father was on the side of the door and I walked in and she was sitting by the bed and I walked to her and I wanted to find out why she ran out on us like she did. I had her by the hand and I pushed her a little and she fell on the bed. Just then Brady (Ketchum) came with his rifle slung over his shoulder. He just came to the hut and he walked beyond me and then they all began screaming and they started scratching and hitting me and then I slapped her on the face with my left hand across the face. Then I turned on to walk out" (R. 19).

Accused bought more wine from the boy and then returned to their bivouac area. Washington had previously cut his hand on a "salvage" box. He did not try to "attack" the girl in any way (R. 19). Asked whether he had tried to eject the women from the house, he replied "I was talking and I wasn't thinking of what was going on, or do like we did, called rape" (R. 20). He became dizzy when the girl struck him (R. 20). He had never been at the Arab hut before the occurrence described. The next morning, when questioned by his first sergeant, he said that he had been at the hut once before to get wine, but meant by this that the boy had secured wine there. He did not, when questioned, say that he had seen the girl before going into the hut (R. 22). He was questioned by a military police officer

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but did not tell that officer that he pulled the girl from beneath the bed and threw her on the bed after "beating" her (R. 23).

Accused Ketchum testified that on the night in question he had a rifle belonging to a tent mate, which he had planned to clean (R. 25,26), and that he took this rifle, slung over his shoulder, when he and Washington went to the hut for the wine.- At the hut Washington gave a small Arab boy 50 francs and "we asked him about this little Arab girl". The girl later came outside. When she went back in the hut, Washington "went in after her" and three or four minutes later Ketchum "goes and come down with the rifle and they seen me with the rifle and began screaming" (R. 25). Ketchum did not point the rifle at anyone and kept it slung over his shoulder (R. 26). He had no ammunition for it (R. 28). He only went into the hut to see "what was going on" while Washington was there (R. 26). Ketchum testified that while about two yards away he saw Washington push the door down (R. 28); and also testified that he was about 35 yards away and "heard the door fall and I reconed he pushed it down" (R. 29). When questioned on 27 October, Ketchum at first denied that he had been at the Arab hut but later said he had been there. He did not at that time say the girl had come out of the house (R. 27); but said, in substance

"Yes, sir, I was there. We went to the hut. I never said anything. Just held the gun and put my finger to my mouth to indicate silence. Jimmie L. Washington pulled a girl from under the bed and beat her and threw her on the bed. I left the hut when his wife ran out screaming and then I went back to camp. It was Jimmie who broke down the door" (R. 27).

When he said he "held" the rifle he meant "just on my shoulder". He did not "want them to be scared of the gun" as the occupants appeared to be (R. 27).

In rebuttal, an officer of the military police testified that he questioned accused and that Washington stated to witness

"I went into the house and pulled the girl out from under the bed and threw her on the bed after beating her, after throwing her on the bed someone yelled and ran out of the house and then I ran out of the house" (R. 32).

Ketchum stated that he "held" the rifle while Washington did other things (R. 32,33).

4. There is competent and direct testimony that both accused, at the time and place alleged, acting in concert, forcibly entered the home of Zahara ben Sarah, the female named in the Specification, and that thereupon, while Ketchum stood by, armed with a rifle, imposing restraint upon the girl's father and effectively preventing his interference, Washington grasped and pulled Zahara from beneath a bed, pushed her onto a bed, raised her dress above her hips, attempted to tear her pants off, put a pillow

and then his hand on her mouth when she screamed, and finally, when she bit his hand, struck her on the face. Throughout the assault Zahara resisted. The force and violence used in this assault, the indecent advances, the attempt to tear off Zahara's pants, together with the brutal persistence in the face of her violent resistance fully justified the court's conclusion that in making the attack Washington had the intention of having carnal knowledge of Zahara by force and without her consent. There is ample evidence to warrant the conclusion that he intended to overcome any resistance by force and to penetrate Zahara's person. That he desisted from his course of action, is immaterial. "Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted" (MCM, 1928, par. 1491).

By standing guard over the father of the girl and thus preventing interference by the father with Washington's venture, Ketchum aided and abetted Washington in committing the assault and thus became a principal (NATO 385, Speed; NATO 646, Simpson et al). The court was justified in inferring that Ketchum knew of Washington's purpose to rape the girl and knowingly assisted him in his attempt to accomplish such purpose. Accused denied any unlawful purpose in their excursion to the house or in their acts within the house, but the court was justified in rejecting their denials as untrue.

Guilt as charged is sufficiently established in the case of each accused.

5. Accused were found guilty of an assault on Zahara, "acting jointly and in pursuance of a common intent to commit a felony, viz., rape****". Rape obviously is a crime which by its very nature does not admit of actual commission by more than one person, but it has been held that those aiding and abetting the commission of a rape become guilty as principals (52 C.J. 1035; NATO 385, Speed; NATO 646, Simpson et al). This doctrine is equally applicable to an assault with intent to commit rape. There was no legal impropriety in the finding of joint action in pursuance of a common intent.

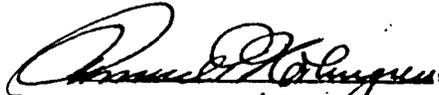
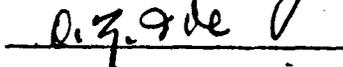
6. During the cross-examination of accused Washington the prosecution questioned him as to previous inconsistent statements made prior to the trial but, insofar as appeared, without previous warning as to his right to remain silent. Accused having denied certain of the statements, the prosecution, for the purposes of impeachment, introduced testimony that the statements had in fact been made. Similar inconsistent statements by Ketchum were also proved. The defense objected to the cross-examination and to the impeaching testimony upon the ground, in substance, that the prosecution was proving confessions not shown to have been voluntarily made. The statements made, as appears above, were not, in law or fact, confessions for they did not involve admissions of guilt of the offense charged. The objections were overruled by the court. There was no legal impropriety in this action. When an accused becomes a witness at his own request he occupies no exceptional status (MCM, 1928, par. 120b) and is subject to cross-examination and impeachment like any other witness. He cannot avail himself of his privilege against self-incrimination to escape proper cross-examination (MCM, 1928, par. 121b).

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7. The papers accompanying the record of trial show that First Lieutenant John W. Knowles, the immediate commanding officer of accused, was appointed investigating officer and investigated the charges after he had forwarded them recommending trial by general court-martial. This procedure was erroneous for it suggested a question as to the capacity of the investigating officer to make the impartial investigation required by Article of War 70. It was not, however, jurisdictional (Dig. Op. JAG, 1912-40, sec. 428 (2)). Neither does it appear that the substantial rights of the accused were in fact injuriously affected in any way.

8. The charge sheet shows that Ketchum is 27 years old and that he was inducted into the Army 31 October 1942. The charge sheet shows that Washington is 25 years old and that he was inducted into the Army 27 October 1942.

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

 Paul H. Holman, Judge Advocate.
 D. J. G. de V., Judge Advocate.
 Gordon Simpson, Judge Advocate.

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CHARGE III: Violation of the 66th Article of War.

Specification: In that Private Rhue E. Roland, Co D, 244 QM Bn (Serv), did, at Ain-Ghrasesia, Tunisia, on or about 26 October 1943, attempt to create a mutiny in Company D, 244 QM Bn (Serv), by saying to the members of said Company D, 244 QM Bn (Serv), "The captain struck me, I want you fellows to see it, hit me again, what are we going to do about it fellows?" or words to that effect, with the intention to usurp, subvert, and override, for the time being, lawful military authority.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of two previous convictions by summary courts-martial, one for being drunk and disorderly in uniform in violation of Article of War 96; and the other for absence without leave and "possession of intoxicating liquors" in violation of Articles of War 61 and 96, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 1945 hours on 26 October 1943 at Ain-Ghrasesia, Tunisia, in the area of a United States Army depot, Captain Marshall D. Meadows, company commander of Company D, 244th Quartermaster Battalion (Service), and another company officer, were riding in a "jeep" when they came upon accused (R. 5,9). The officers asked accused for his name and he replied "Smith" but gave no further answer and Captain Meadows asked for his identification tags. Accused then said that he had left his identification tags in his tent. Asked where his tent was, accused pointed toward an empty field and turned to go in that direction (R. 10). Captain Meadows then ordered him to get into the vehicle. He "refused" and when the order was repeated, accused, who was smoking a cigarette, "deliberately turned around and blew the smoke in the Captain's face". Captain Meadows repeated the order a third time (R. 6,10). Accused, who showed no signs of having been drinking (R. 8), turned abruptly, ran into the officer who was with Captain Meadows (R. 10) and "started waving his arms and yelling and started running and walking very fastly in the direction of a group of colored soldiers" who were standing and sitting in a circle around a fire about 25 or 30 yards away (R. 6). The group included members of Company D, 244th Quartermaster Battalion (Service) (R. 11). Captain Meadows testified that accused shouted that witness had "hit" him and exclaimed "what are we going to do about it fellows, hit me again, you're my buddies, what are we going to do about it, hit me again, Captain, go ahead, hit me again" (R. 6). Witness further testified that he had not struck accused and had made no motion or effort to do so (R. 7).

The officers followed accused (R. 10). Captain Meadows testified that the soldiers

"started moving around. Some of the men that had been

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sitting down got up on their feet. First thing I knew, I had colored soldiers all around me" (R. 7).

He told accused "You're under arrest" and accused said, "He's going to hit me again, go ahead, hit me again" (R. 10). Some of the soldiers about accused asked Captain Meadows if he "hit" or "cussed" accused. The officer, who had not struck or cursed him, replied "no" and said

"If you all make an issue of it, we'll go down and see my next in command the Commanding Officer of the Depot" (R. 7).

There were about 25 or more of the soldiers. Their attitude "definitely was not" friendly (R. 11). The officer with Captain Meadows testified that

"The whole attitude of the bunch was very hostile, and I don't think either myself or the Captain had any control over them at that time" (R. 10).

Another officer who came upon the scene testified that

"Those men at the time were rather angry and were in a group discussing more of less centered on racial prejudice against the colored men" (R. 27).

He described the discussion as "hostile" (R. 29).

Five soldiers of the group accused had approached testified for the defense (R. 14,16,19,22,24) and were in substantial agreement that accused had told them that "the Captain had swung at him" (R. 15,17,20,25), and that Captain Meadows said that "If this fellow says that I swung at him, he said a damn lie" (R. 16,18,19,20,25). One of these witnesses testified that "nobody got tough", that "no one seemed to be mad about it" (R. 20) but another testified that the group was "hostile to the Captain" (R. 14). Another testified that the men "were obedient as a soldier" (R. 24), that they did not "group around" Captain Meadows (R. 25) and did not "seem angry" (R. 26). Four of these soldiers testified in substance that no orders were given by the officers to the group and that there was no disobedience on the part of the men (R. 16,20;22,24).

Accused elected to remain silent (R. 20).

4. It thus appears from the uncontradicted evidence that at the place and time alleged in the Specifications of Charges I and II, accused received a command from Captain Marshall D. Meadows, his superior officer, to get into a "jeep" and that he willfully disobeyed the command; and further, after refusing to obey the officer, he rudely and insolently blew cigarette smoke in Captain Meadow's face. There are no circumstances shown by the evidence which would excuse or justify the misconduct of accused. He was shown to have been deliberately insubordinate and disrespectful toward Captain Meadows, his company commander, who was, insofar as appears, lawfully

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executing the duties of his office. Accused insolently defied the officer's authority and refused to obey his orders. The court properly found him guilty as alleged in Charges I and II and the Specifications thereunder (MCM, 1928, pars. 133, 134b).

There is evidence, further, that at the place and time alleged in the Specification, Charge III, accused attempted to incite a group of soldiers including some members of Company D, 244th Quartermaster Battalion (Service), to collective insubordination by inflaming them against their company commander and thus aiding him in defiance of and resistance to the authority of that officer. Accused had defied repeated orders by Captain Meadows to get into a motor vehicle and the evidence supports the inference that accused conceived the plan of inciting the soldiers of his organization to resist the lawful authority of the officer in order to secure himself in continued defiance of and resistance to lawful orders. This misconduct occurred in the area of a United States Army depot. While accused did not succeed in his design of creating collective insubordination in the form of combined resistance to lawful authority, and while, consequently, no mutiny occurred, the evidence shows that his acts were done with the specific intent to commit the offense and proximately tended to, but fell short of, its consummation. This comprised an attempt to create a mutiny. Accused was properly found guilty as alleged in Charge III and its Specification (MCM, 1928, par. 136a).

5. The designation of a penitentiary as the place of confinement was authorized by Article of War 42 for the attempt to create a mutiny, an offense recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Sections 9, 11, 13, Title 18, United States Code, Annotated. By Section 9 it is unlawful, inter alia, for any person

"with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States
(1) to advise, counsel, urge, or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States".

An attempt to commit any of the acts thus prohibited is interdicted (sec. 11) and penalties for violation of any of these provisions include imprisonment for not more than ten years (sec. 13).

6. The charge sheet shows that accused is 32 11/12 years old and was inducted into the Army of the United States 9 January 1942. No prior service is shown.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally

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sufficient to support the findings and the sentence.

Robert A. Hughes Judge Advocate.
E. J. Gode Judge Advocate.
Yonon Simpson Judge Advocate.

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

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

Board of Review

NATO 1087

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

v.)

Private STEVE LAPISKA)
(33280399), Company I, 18th)
Infantry.)

FIRST INFANTRY DIVISION)

)
) Trial by G.C.M., convened at
) Palma Di Montechiaro, Sicily,
) 8 October 1943.
) Dishonorable discharge and
) confinement for 18 years.
) NATOUSA Disciplinary Training
) Center, Casablanca, French
) Morocco.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private Steve Lapiska; Company I, 18th Infantry, did, without proper leave, absent himself from his company at Gela, Sicily, from about July 14, 1943 to about July 24, 1943.

Specification 2: In that Private Steve Lapiska, Company I, 18th Infantry, did, without proper leave, absent himself from the First Division Casual Detachment at Gela, Sicily, from about July 25, 1943 to about September 5, 1943.

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

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to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 18 years. The reviewing authority approved the finding of guilty of the Charge and of Specification 2 and so much of the finding of guilty of Specification 1 as involves a finding of guilty of absenting himself without proper leave from his organization at the place specified on 14 July 1943, approved the sentence, designated the NATOUSA Disciplinary Training Center, Casablanca, French Morocco as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence with respect to Specification 1 of the Charge shows that on the morning of 14 July 1943, accused was with his organization which was "in position" about three miles east of Gela, Sicily (R. 5,6). At about 0800 hours that morning the company commander had received notification that the organization was to "move by truck" and the "company was notified they were going into an attack" (R. 7). So far as the company commander knew, accused was with the company when it "left the position" at about 0900 hours to march to the trucks (R. 6). During the morning accused was reported missing (R. 6,7). The company commander testified

"We moved out to the entrucking point which was about a mile from our position. Prior to our moving out I had a check made of the platoons. The accused was not present. I did not see him again while I was in command of the company" (R. 5).

The officer was given another assignment "a few days later". He testified further that when accused was reported missing

"I left the second in command to search the area to see if he could find him" (R. 7).

The position from which the command left to march to the trucks was "open and rather bare". The company commander considered it possible for accused to have fallen asleep and for the company to have left without him "if he went away from the position" (R. 7). Accused testified that on 14 July 1943, his organization was located

"near the road where I fell asleep***The company was told they were going to move out by truck and we marched to where the trucks were going to pick us up. I fell asleep. I woke up about 4 o'clock and the company had gone" (R. 13,14).

He testified further that the place he went to sleep was "about 100 yards up the road" from where the captain had told the company to "spread out" (R. 15).

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The evidence with respect to Specification 2 was as follows: First Lieutenant Maurice Katz, who was in command of the First Casual "Company" of the 1st Division (R. 9), identified the morning report of the "Casual Detachment", 1st U. S. Infantry Division as the morning report of his organization and read from it an entry of 24 July 1943 showing that accused was attached on that date to that organization and another entry of 25 July showing that at 0930 on that date accused left the Casual Company to rejoin his organization, the 18th Infantry. Lieutenant Katz testified that when the casualties, including accused, left "they were told they would be put on trucks in order for them to rejoin their organizations" (R. 11). He did not recall if the group, including accused, went on ration trucks (R. 12). The destination of the trucks was not known except that "they were taking rations to the men up front and that they were moving forward". The trucks used belonged to the 1st Division (R. 11). Accused did not report to his company until 5 September 1943. He testified that on 25 July he was placed on a truck and told to get off at a ration dump. He stayed at the dump two days trying to get a ride to his company, and reported to a military policeman that he did not know where his organization was. Thereafter he went from place to place seeking his company and finally turned in to another military policeman (R. 14).

4. It thus appears that on 14 July 1943, at Gela, Sicily, the date and place alleged in Specification 1 of the Charge, accused was absent without leave from his company. His company commander, whose duty it was to know whether or not accused was present, testified that when the company was about to move out "The accused was not present". When the company moved out the second in command was left behind to search the area for the accused. The company was about to attack and this fact was known to the accused. The accused stated he went a substantial distance from his organization, off the road, and fell asleep. There is ample circumstantial evidence from which the court could reasonably conclude that the absence was without leave. Thus the court was clearly warranted in finding the accused did absent himself from his company without proper leave on 14 July 1943, at the place alleged. The reviewing authority disapproved that part of the finding of guilty of this specification relating to the period during which accused remained absent. The offense was committed when accused absented himself and a finding as to the duration of the absence was unnecessary (AW 61).

The evidence does not show as alleged in Specification 2 of the Charge, that accused absented himself without leave from the 1st Division Casual Detachment on 25 July 1943, but shows that he left that detachment or company on that day under competent orders to rejoin his own company. His subsequent failure to report to his own company, Company I, 18th Infantry, resulted in a new absence without leave from that company. There is thus a variance between the allegation and proof as to the identity of the command from which accused absented himself without leave. In the opinion of the Board of Review this variance was harmless. The gravamen of the offense charged was absence without leave from command for a certain period, and these essential elements were

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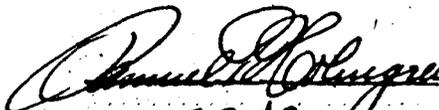
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proved as alleged. The nature or identity of the offense charged did not differ from that proved. There is nothing in the record to show that the defense was in fact misled by the allegation that accused absented himself from the casual unit. His departure from that unit was in fact the first step taken by him in effecting his absence without leave from his company. It is clear that upon the evidence of record accused could successfully plead his conviction in bar of a second trial for absence without leave for the period involved. The finding of guilty of this specification need not be disturbed.

The evidence is legally sufficient to support the findings as approved by the reviewing authority and the sentence.

5. The charge sheet states that accused is 34 years old and was inducted into the Army 18 June 1942, having had no prior service.

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

 Judge Advocate.
0.4.94, Judge Advocate.
Gordon Simpson, Judge Advocate.

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

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APC 534, U. S. Army,
30 December 1943.

Board of Review

NATO 1092

U N I T E D S T A T E S)	EASTERN BASE SECTION
)	
v.	)	Trial by G.C.M., convened at
	)	Bizerte, Tunisia, 12 November
Private ROBERT (NMI) SCOTT	)	1943.
(34043402), Company C, 28th	)	Dishonorable discharge and
Quartermaster Regiment	)	confinement for 15 years and
(Truck).	)	six months.
	)	United States Penitentiary,
	)	Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

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

Specification: In that Private Robert Scott, (NMI), Company "C", 28th Quartermaster Regiment (Trk), did, at or near Ferryville, Tunisia, on or about 25 September 1943, wrongfully and knowingly sell about four hundred (400) pounds of sugar, of the value of about twenty four dollars (24.00), property of the United States, furnished and intended for the military service thereof.

CHARGE II: Violation of the 93d Article of War.

Specification 1: In that Private Robert Scott, (NMI), Company "C", 28th Quartermaster Regiment (Trk), did, at or near Ferryville, Tunisia, on or about 25 September 1943, by

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force and violence and by putting him in fear, feloniously take, steal and carry away from the person of YOUSEF ben MEJID ben SALAH DJAOU DOUBI, two 500 franc notes, the property of YOUSEF ben MEJID ben SALAH DJAOU DOUBI, value in money of the United States about twenty dollars (\$20.00).

Specification 2: In that Private Robert Scott, (NMI), Company "C", 28th Quartermaster Regiment (Trk), did, at or near Ferryville, Tunisia, on or about 25 September 1943, with intent to do him bodily harm, commit an assault upon YOUSEF ben MEJID ben SALAH DJAOU DOUBI, by cutting him on the hand, with a dangerous weapon, to wit: a knife.

He pleaded not guilty to the charges and specifications. He was found guilty of the Specification, Charge I, except the words "four-hundred pounds" and "twenty four dollars", respectively, substituting therefor the words "three-hundred pounds" and "eighteen dollars" respectively, of the excepted words not guilty, of the substituted words guilty; guilty of Charge I; guilty of Specification 1, Charge II, except the words "twenty dollars", substituting therefor the words "of some value", of the excepted words, not guilty, of the substituted words, guilty; and guilty of Charge II and Specification 2 thereunder. Evidence of three previous convictions by summary courts-martial was introduced, one for failure to report contracting a venereal disease in violation of Article of War 96, one for disorderly conduct in violation of Article of War 96, and one for using insulting language toward a noncommissioned officer in violation of Article of War 65. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for fifteen years and six months. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence is substantially as follows:

Salah ben Ferdjani ben Salah ben Amami testified that at about 2300 or 2400 hours on 25 September 1943, he saw accused "on the side of the road going into Ferryville" selling sugar to other Arabs. Witness inquired as to the price and accused told him "thousand francs a bag". Witness bought a large bag of the sugar and saw two other Arabs whom he named buy two additional bags of sugar from accused (R. 14). Accused was the only soldier present. Witness recognized him because, following some remarks as to the propriety of buying "sugar from the American Army", accused stated he "was a police himself and he put on a flashlight he had with him". (R. 15).

A one hundred pound bag of sugar, marked like and of similar appearance to sugar bags in the local United States Army dumps and warehouses and to sugar bags issued locally to messes, was recovered by officers of the army from Salah some time after midnight of 25-26 September 1943. Two additional similar bags were also recovered (R. 16-18). Salah testified that he turned
254988 to the police the sugar he had purchased (R. 15). It was stipulated

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that a quartermaster officer named would testify, if called as a witness, that the list price of sugar was six cents per pound (R. 17).

Yousef ben Mejid ben Salah Djaoudoubi testified that on the night in question he saw accused was selling "American sugar" (R. 11,12). Witness was present for the purpose of buying either sugar or cigarettes and stood about 15 feet from accused. Accused had a flashlight. Witness testified

"he saw a thousand francs in my hand. He came over and asked me what it was. He put the knife on my thumb and opened my hand by force and took it away from me and started walking down the road" (R. 11).

The knife had a blade about six inches long (R. 12). Witness was put in fear by accused and "was afraid he would cut" his hand. His thumb was cut sufficiently to cause it to bleed (R. 11). The 1000 francs taken by accused was in the form of two 500 franc "Bank of Tunis" notes (R. 11,12).

At about 2300 hours on 25 September, on a dirt road within the city limits of Ferryville, accused was stopped, while walking down the road, by Captain Harold W. Cottle, 194th Military Police Company, who, with some of his men, was in the vicinity. Accused was accosted three times before he stopped. Captain Cottle noticed a bulge in accused's fatigues and asked what he had in his pocket. Accused replied "nothing". Upon being told to empty his pocket, accused, after some hesitation "pulled out quite a wad of French money". He also had a knife, "dagger" type with at least a six-inch blade, in the tool pocket on the leg of his fatigue clothes. Captain Cottle ordered accused to get into a jeep. At this time two Arabs came up excitedly from the "same direction" from which accused had come. They pointed at accused and pointed at a finger of the hand of one of the Arabs. Captain Cottle took them all to the civil police station (R. 6,8-10,19). On the way to the station Captain Cottle turned his "light" on accused and told him to open his hand. He refused to open it and the driver forced his hand open. He held two badly torn 500 franc notes which Captain Cottle described as "Bank of France" notes (R. 7,10). Captain Cottle testified that in trying to recover the sugar sold he told the Arabs that if they would return it and would testify they "would get their money back" (R. 18).

Accused testified that he was a truck driver and as such hauled sugar and other supplies (R. 21). On the night in question he had gone to see a friend at a ration dump and, failing to find him, had caught a ride on a truck going back toward his own area. He left the truck when it "turned off" and was "cutting through" from a dirt road when he was apprehended by Captain Cottle (R. 20,21). On the night in question he had about \$150.00 on his person. He usually carried that much money with him. He gambled a great deal and won most of the time. He had sent about \$900.00 to his wife since he had been in Africa. He testified that the Arab witnesses had said at the police station that he was not the man who sold the sugar, and that Captain Cottle told the driver to tell the Arabs that they would not get their money back unless they identified "the boy" (R. 21,23).

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It was stipulated that if accused's first sergeant were present he would testify that accused "does quite a bit of gambling and recently sent home as gains from his gambling eight-hundred dollars. He has also placed four-hundred dollars in soldier's deposits", and that accused had caused him no trouble since he became a member of his organization in May 1943 (R. 24).

4. It thus appears from direct evidence that at the time and place alleged accused wrongfully and knowingly sold about 300 pounds of sugar of the value of about \$18.00 to three different Arabs. While there was slight direct evidence that the sugar was at the time of the alleged offense property of the United States, furnished or intended for the military service thereof, it was clearly shown by descriptive testimony that the sacks containing the sugar were of the type and kind furnished or intended for and locally issued for use in the military service. These and the other circumstances warranted the court in inferring that the sugar involved was property of the United States, within the meaning of Article of War 94 (MCM, 1928, par. 1501).

It further appears from direct evidence, that at the time and place alleged accused by force and violence and by putting him in fear took two 500 franc notes from Yousef ben Mejid ben Salah Djaoudoubi, the person named in Specification 1, Charge II. The circumstances evidence larcenous intent. The taking was accompanied by an assault of sufficiently threatening import to warrant a reasonably well-founded apprehension of present serious danger if resistance were offered. The evidence justified the court's findings of guilty of robbery as charged (MCM, 1928, par. 149f). The notes were found to be merely of "some value". Their kind or issue and exact value were immaterial.

Specification 2, Charge II, alleges an assault upon Yousef ben Mejid ben Salah Djaoudoubi with a dangerous weapon, to wit, a knife, with intent to do bodily harm. The intent to do bodily harm may be inferred from the manner in which accused used the knife, the fact that accused made a demand which he had no legal right to make and from the circumstances surrounding the event (Dig. Op. JAG, 1912-40, sec. 451 (10)). The elements of the assault as charged were sufficiently established.

Accused's denials of guilt were for consideration by the court. The court manifestly did not believe them.

5. Accused was thus properly found guilty, among other things, of robbery and of assault with intent to do bodily harm with a dangerous weapon, under appropriate Specifications under Article of War 93. He saw money in his victim's hand and, applying the knife to the victim's thumb, took the money. There is no doubt that the two distinct offenses were but different aspects of the same act. The robbery was committed by means of the force involved in and the fear engendered by the assault. Insofar as punishment is concerned the offenses fall, therefore, within the rule stated by the Manual for Courts-Martial as follows:

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constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect" (par. 80a).

It has been repeatedly held that where an accused is convicted of two or more offenses which are but different aspects of the same act he may not legally be punished more severely than is authorized for the more serious offense (Dig. Op. JAG, 1912-40, sec. 402 (2), 428 (5); Bull., JAG, 1942, sec. 402 (2); Bull. JAG, April 1943, sec. 451 (2)). The most recent holding by the office of The Judge Advocate General in this connection is digested as follows:

"Two accused were found guilty of several Specifications of robbery in violation of A. W. 93. The evidence established the commission of these offenses. Two of the Specifications covered the robbery of two victims, separately specified. However, both occurred at the same time and place and by the use of the same act of force. Held: The separate Specifications in this case do not constitute, legally, an improper multiplication of charges, but since these two robberies were substantially one single transaction the sentences must be reduced to the maximum authorized for a single offense of robbery (MCM, 1928, par. 80). CM 231710 (1943)". (Bull. JAG, May 1943, sec. 428 (5)).

The more serious of the two offenses here is robbery, punishable under Paragraph 104c of the Manual for Courts-Martial by a maximum term of confinement of ten years. The maximum punishment by confinement authorized for the offense of which accused was found guilty under Charge I and its Specification is confinement at hard labor for six months.

6. The charge sheet shows that accused is 31 years old. He was inducted into the Army of the United States 7 May 1941. No prior service is shown.

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years and six months. Penitentiary confinement is authorized for the offense of robbery here involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 463, Title 18, United States Code.

James H. [Signature] Judge Advocate.
A. J. [Signature] Judge Advocate.
Garobin Simpson Judge Advocate.

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1st Ind.

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

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

1. In the case of Private Robert (NMI) Scott (34043402), Company C, 28th Quartermaster Regiment (Truck), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years and six months, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you will have authority, following action in accordance with the holding, to order execution of the sentence as modified.

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



HUBERT D. HOOVER
Colonel, J.A.G.D.

Assistant Judge Advocate General

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

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

Board of Review

NATO 1121

UNITED STATES	)	EASTERN BASE SECTION
)	
v.	)	Trial by G.C.M., convened at
	)	Bone, Algeria, 29 November
Technician Fifth Grade JAMES	)	1943.
(NLI) BRAY (35682921) and	)	As to each: Dishonorable
Private ANDREW A. IMAN	)	discharge and confinement for
(35647505), both of 167th	)	life.
Quartermaster Company (Bakery).	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

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

Specification: In that Private Andrew Allen Iman 167th Quartermaster Bakery Company and T/5 James Bray, 167th Quartermaster Bakery Company did, acting jointly and in pursuance of a common intent on or about the 9th day of November 1943, near Bone, Algeria forcibly and feloniously and against her will, have carnal knowledge of Boumerah Zohra Bent Mohamed.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced as to either accused. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three fourths of the members of the court present concurring. The reviewing authority approved the sentences,

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

3. The evidence shows that near Bone, Algeria, on the night of 9 November 1943, accused went to the home of Boumerah Zohra Bent Mohamed where Zohra, her husband and eight children were sleeping (R. 5,9,11,13,18, 19). When Zohra's husband "saw they were drunk", he offered accused some peppers and oranges. They refused the oranges but took a "double handful" of peppers for which the Arab would not accept payment. He testified he was afraid of accused and "just wanted them to go away" (R. 5,11,14,18). They had not been there before (R. 13,20). The soldiers then began "fooling around" with Zohra's "big daughter" who managed to flee. One of them pursued her but the girl eluded him. The other soldier remained in the house (R. 5, 11,12,18). Zohra testified that "after that they went away and then they brought a rifle and they came back" (R. 6). Upon returning, they "entered on the inside by force" and again lighted the light (R. 9,12,19). Zohra told the soldiers she was going outside to the toilet but accused Bray said to her "attencion", and put the rifle in" her chest. Pointing to the floor, he told her to "sleep" (R. 6,10). Zohra testified that Bray then attacked her "and this one here (indicating accused Iman) stood by with the rifle, by the door, not allowing anybody to go out because I had six children on the inside". She testified that Bray "screwed" her, that his penis penetrated her and "he did everything, he finished everything with me, he had enough from me", and that when he had "finished" with her, he spit in her face (R. 6). She testified further that Bray then "took the rifle away from the other one and the other one took his place", and that Iman then "did like the other one" (R. 7). She testified that she did not consent, that she "couldn't do anything else, anything to prevent it because I was alone", and that she was threatened with the rifle and was afraid they would kill her (R. 6,7).

Her husband and six of their children were present while Zohra was being assaulted (R. 7). The husband testified that Bray first "got on top of my wife and screwed her" and then he "got up and went to the door and took the rifle from the other one" and the "one soldier that was standing by the door screwed my woman again"; he testified further that he was "very much ascarded because the other one had the rifle pointed" at him (R. 12,13). The assaults occurred about midnight (R. 14) and about 0400 hours, he reported the crime to American authorities (R. 15).

At the trial, Zohra, her husband and her ten year old son identified accused as her assailants. The woman testified that Bray had a "blue mark" under his right eye and that she "saw them there and they were there", that she knew them (R. 6,9,10). Her husband testified that accused were his wife's attackers. In answer to an inquiry by the court as to whether he was sure that accused were the men at his house on the night in question, he testified "That's them, no other" (R. 16). He testified further he had seen them the day after the assaults and upon being examined by defense, described how he and his son had pointed out accused from "three lines" of about 50 soldiers (R. 12,15,16). The ten year old son also testified that accused were his mother's attackers and that "they were drunk". He testified that

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he "knew them both"; that he "did shine this one's shoes (indicating Private Iman)", and that he knew Bray "because he had some kind of a motor cycle or something he fooled around with on the road" (R. 18,19,20). It was about 250 meters from the soldiers' billet to the house where the assaults occurred (R. 16). Zohra's son testified further that "we have no other huts nearby us; we had no neighbors" (R. 20).

According to one witness, accused were not in bed at the bivouac area at 2130 hours on 9 November but they returned some time before 0030 hours that night. This witness testified that he saw some green peppers on Bray's "bunk" the following morning and that Bray then had a patch below his left eye (R. 21,22).

Accused were interviewed by a sergeant of the Criminal Investigation Division. He advised them that they were not required to make any statement and that any statement they made might be used against them. He testified that Article of War 24 was read to them and accused acknowledged that it had been read to them before and that they "understood the full meaning of the Article" (R. 25,26). This sergeant testified further that he went with accused to the various places they stated they had visited on the night of 9 November. He was asked by defense counsel:

"After you had visited these places, after having visited the places they had been on the night, then you ordered them to give you a statement, is that right?"

He replied "Yes, sir" (R. 27). He did not "order" accused to give a statement but told them if they wished they could give a "statement in writing as to all the facts that they presented and they voluntarily gave me that statement" (R. 28). The sergeant was not under arms at the time the statements were obtained. He was not wearing chevrons and did not tell accused that he was a sergeant (R. 29).

The statements were admitted in evidence, and the law member admonished the court "to consider the statement of Bray as pertaining to Bray and that of Iman to Iman only" (R. 30,32). Iman stated that about 1600 hours on the afternoon of 9 November 1943, as he was riding a motorcycle near his camp, he was injured in a collision and treated at a hospital where a "bandage was placed" under his left eye. Both he and Bray stated that they went to Bone during the afternoon of 9 November where they drank heavily and left for camp when the bars closed about 1930 hours. On the way they stopped at two civilian homes and drank more wine. They stated further that they then went to an Arab hut "where we were told we could get 'laid'". Bray stated that someone ran out of the hut and he followed for about 100 feet but could not "overtake this person". He returned and Iman was in the hut. The "Arab man" gave Bray some green peppers. He and Iman both stated that they returned to camp and then went back to the Arab home but neither remembered what happened upon their return to the hut (R. 30,31,32; Pros. Exs. 1,2).

The sergeant of the Criminal Investigation Division was asked if he knew personally "what the general reputation of this Arab family is in the

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community". He replied "Only from reports I received from the French Police". On the basis of that information he was permitted to testify that the reputation of the family was good (R. 34).

Accused Iman testified that he and Bray went to "the Arab hut" on the night of 9 November 1943, but said they left "close to 12" and never returned. He denied that they attacked the woman (R. 41). He answered "yes" to the question "you are definitely sure neither one of you got a rifle and went back?" He testified that Bray had heard "you could get laid there" but Iman "didn't have it in mind getting laid"; he had no money with him and he supposed Bray was going to pay for both of them (R. 43,44). He testified that Bray had a bandage over his left eye (R. 44). Iman also testified he "imagined" he and Bray got to the Arab house about 2330 hours (R. 44); he could not "remember doing anything" when they got to the hut; they did not stay long and he "imagined" it took them "about twenty, twenty-five minutes" to walk the half mile back to the camp (R. 45); he did remember "running into" a board when he got back to camp (R. 46). Iman testified further that during the investigation the sergeant had taken them to a place where they had banana drinks and to a civilian home but he "didn't take us to two civilian homes"; that when they "went to get into the car, he said, 'why don't you tell me the Goddam, fucken truth'" (R. 42); that the statement he made (Pros. Ex. 2) was false (R. 50); that he and Bray would tell the sergeant "one word and he would write five or six"; that they were told to sign the statements and they "signed it"; that he read the statements over only after they had been signed (R. 48,51). He finally testified that he never told the investigating officer that his statement was false (R. 52).

Bray made an unsworn statement through defense counsel that:

"The statement was signed before he read it and it was made to the C.I.D. on the same conditions that the other accused, Iman, testified to on the stand, that it was not a true statement that was given to the C.I.D." (R. 54).

The defense presented the stipulated testimony of a British corporal to the effect that in the morning of 10 November 1943, he was stopped by the husband of the woman who was "allegedly raped" and gathered from him that two American soldiers, one with a "gun", were in his hut. The corporal went to the hut to investigate, arriving around 0115 hours, and "there weren't any American soldiers at the place" (R. 36).

An officer of accused's company testified for the defense that he had his men line up on the morning of 10 November to enable two Arabs to undertake to identify two men who had "trouble with ... Arabs" (R. 36). He testified further that

"The little boy went first. He advanced along the line until he came in front of Corporal Bray and he stopped there and waited until the old man came up. They pointed at Corporal Bray. The boy went on and stopped to where Private Iman stood and the same thing happened" (R. 37).

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This officer also testified that Bray was a mechanic's helper and Iman a baker's helper and "in that capacity they are very satisfactory" (R. 37).

A soldier who assisted the investigating officer testified for the defense that Zohra, who denied at the trial that her husband told her the night of the assaults that accused were his friends (R. 8), stated at the investigation that "my husband said to me they were friends of his" (R. 39). This soldier also testified that Zohra's husband had inquired after the investigation if the proceedings were "a court martial or just a claim trial for him to get some money". Asked how much money he expected, the Arab said "about two million francs". The soldier testified he "asked him if it was worth two million francs and he laughed" (R. 39,40).

4. It thus appears from the evidence that at the place and time alleged the two accused, one armed with a rifle, intrudingly entered an Arab dwelling wherein each in turn forcibly and without her consent had unlawful carnal knowledge of Boumerah Zohra Bent Mohamed, the woman named in the Specification. While each of the accused was assaulting the woman, the other stood guard at the door and pointed the rifle at the woman's husband and children in the hut. That the sexual act was consummated by force without the woman's consent, against her protestations and while she was in fear of her life, is amply shown by the testimony of the woman and all the surrounding circumstances. There is substantial proof of the essential elements of rape as charged (MCM, 1928, par. 148b). Each accused, whose identity was clearly established, denied, in effect, the rape, though admitting having been in the Arab hut that night. The weight to be given to all of their exculpatory claims was a matter for the court.

5. Accused were charged by one Specification with "acting jointly and in pursuance of a common intent" in raping the woman named. The offense of rape obviously comes within the meaning of paragraph 27, Manual for Courts-Martial, 1928, where it stated that

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

Accordingly, insofar as these accused are in contemplation actual perpetrators of independent rapes, their joinder constitutes improper pleading. But in a situation, such as here, where each accused is directly associated with the other in a common venture, a joint charge is deemed 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 (52 C.J. 1036; CM NATO 646, Simpson et al; CM NATO 1069, Scott et al). 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.

6. Defense objected to the introduction of the statements of accused "in view of the evidence before this court that he (the sergeant taking the

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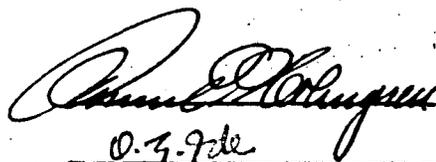
statements) ordered them to give them to him. It is not a voluntary statement". While the sergeant did testify while being cross-examined by defense counsel that he "ordered" accused to make the statements (R. 27), he obviously so testified through inadvertence and corrected the testimony when questioned further by the court (R. 28). The sergeant's testimony as a whole demonstrates that accused were fairly apprized of their rights and that no advantage was taken of them in obtaining their statements. The statements were clearly shown to have been voluntary and were properly admitted in evidence. Neither amounted to a confession.

7. A witness was permitted to testify to the "general reputation of this Arab family in this community" after stating that his knowledge of that reputation was gained "only from reports" he had received from the French police. Defense objected and assigned as its grounds "Hearsay rule". At the time this evidence came in, no attack upon the reputation of the Arab family had been made although later, both accused in their statements and Iman in his testimony asserted the Arab home was a place where one could "get laid". Where such evidence is relevant, it can be offered in the first instance only by the accused and then the prosecution may show the character of the injured party (Wharton's Crim. Ev., 11th Ed., p. 459). Nor had the witness demonstrated a very satisfactory knowledge of the general reputation of the Arab family. It is doubtful if the evidence was admissible but the guilt of accused was so clearly proven that the reception of this testimony could not have injuriously affected any of their substantial rights (AW 37).

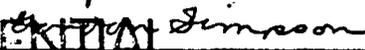
8. Seven of the eight members of the court recommended that the sentence be reduced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The youth of accused and their prior good military record were assigned as the reasons for the recommendation which is appended to the record of trial.

9. The charge sheet shows that Bray is about 20 years old and that Iman is about 21 years old. Each was inducted into the Army of the United States 12 January 1943, neither having had any prior military service.

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

 Judge Advocate.

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without a pass in violation of Article of War 96. The other two were by special court-martial for deliberately discharging a rifle, being drunk and disorderly in camp and having unauthorized ammunition in his possession in violation of Article of War 96 and for absenting himself without proper leave and breach of restriction in violation of Article of War 61. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved only so much of the "findings of guilty of the specification of the Charge as finds" the accused guilty of willfully, feloniously and unlawfully killing Private David (NMI) Joshua, Company A, 398th Port Battalion, Transportation Corps, at the time and place specified, in the manner specified, in violation of Article of War 93, and approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 1730 hours on 16 November 1943, the accused was in the guard tent located in the bivouac area of the 398th Port Battalion, in Bizerte, Tunisia, talking with Private David Joshua and Sergeant Frederick A. Nickerson, all being members of Company A, 398th Port Battalion, Transportation Corps. Nickerson was the sergeant of the guard that day (R. 6,7). Accused had been a member of the guard (R. 10) and had a rifle with him in the tent. He had turned over to the next guard the three rounds of ammunition issued "on that course" (R. 8). The conversation had to do with an indebtedness of accused to the sergeant arising out of a loan made that day of one hundred francs (R. 14,44). Nickerson testified accused stated the debt was 300 francs and that Joshua would "make it good". The sergeant replied the debt was 100 francs and he expected accused to pay it. Then Joshua said "I haven't got it now" and "Don't hold it against him, I'll take care of it" (R. 6) and turned around and walked out of the guard tent. Accused "picked up his rifle as he was going out. He just merely picked it up and started out the tent" (R. 7). It was the same rifle he had had on guard (R. 43). Nickerson started to talk with another soldier who was also in the tent (R. 7). But a matter of seconds later (R. 11) he "heard the report go off". He dropped his own rifle and "grabbed" accused, who was kneeling on one knee in the doorway of the guard tent, stood him up and took his rifle from him. Nickerson then looked out of the tent and saw Joshua "falling" (R. 7,8), or "trying to get up", about 20 feet away (R. 9).

Nickerson had not noticed "anything unusual about either" deceased or accused. They had talked to him "Just as calm and collected as anyone would" (R. 9), they were not excited, and though there was some difficulty as to whether the debt was 100 or 300 francs there was no apparent bitter feeling over that. Accused "was just as mild as" Sergeant Nickerson "always saw him", no different from times that he had been seen before (R. 10). No anger seemed to be between them (R. 43). Accused was not drunk and Nickerson did not see any indication that he had been drinking (R. 10).

Nickerson asked accused when he grabbed him "what did he do", but

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accused did not reply (R. 7). The sergeant turned accused over to the guard, and inspected the rifle. It had been fired (R. 8), but "there was no other round of ammunition in it" (R. 15). Nickerson further testified that five or seven minutes after the shooting

"When I took him to the guard house, I asked him why did he do it? He said that he had beat him up and took his money from him and that he had beat him up one time before when they was in the guard house, and he didn't do anything about, but he didn't know him" (R. 12).

After the shooting accused did not appear any different to the sergeant than he did before. Accused was not excited in any way at all and talked plainly and clearly (R. 13). In his testimony the sergeant denied he had given accused the 100 francs to buy him some wine (R. 14,45).

Corporal Willie W. Candler, 398th Port Battalion, saw Joshua "trying to get up on his arms". He went to the dispensary, got a litter and blanket, put Joshua on the litter, noted that Joshua had wounds in his back and right chest, covered him with a blanket and stayed with him until he died about five minutes later, before the ambulance arrived (R. 16,17).

Second Lieutenant Richard Washburn Davis, Company A, 398th Port Battalion, was reading the guard orders to the new guard when the shot was fired. He was about ten yards away from the place Joshua fell (R. 20). He testified accused was about 15 yards from Joshua (R. 19).

Captain Ernest Robbins Kimball, Jr., Medical Corps, First Medical Laboratory, 24th General Hospital, who made an autopsy on the body of Joshua (R. 32), testified that in his opinion Joshua died from a wound made by a bullet which entered his back and came out his chest (R. 33).

Accused testified that about 1500 hours the sergeant of the guard asked him to get some wine and that on his way for the wine he met Joshua who went along with him. They got some wine and cognac and on their way back stopped with some soldiers who were drinking wine by the roadside. They started a dice game in the course of which accused and Joshua had an argument. Accused started to leave but at Joshua's insistence resumed the game. Another argument between the two men followed and accused again started to go but Joshua protested against his leaving because accused was winner (R. 35,36). Accused testified further that

"I said, the money I win is not exactly yours, it's some of the other boys. At that time he hit me, and I had the money in my hands so he caught my hand and twisted it and took the money. He hit me again. I got up and he had a knife in his hand. Well, he started like this. (The witness raised his hand over his right shoulder as if he held something in his hand.) So he started to me with the knife and one of my friends I guess Pomer Grimes, run between us, so I started off, and he asked me where was I going. I told him I was going.

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to camp to tell the Sergeant about the fight. Before, during the time we was shooting dice when he first hit me, he took the vino and cognac at that time, that is when he hit me and I started off. He asked me where was I going I told him I was going to tell the Sergeant about him taking the money and wine. He said, that is alright I'll go and make everything alright with the Sergeant, and he said don't you try anything funny. He said because I'll cut your god damn head off. He said, you tell the Sergeant some Arabs jumped on you and took your money and vino, and if you don't I'll cut your head off. I'll kill you, so he told me to walk in front of him on the way to the guard house, he was walking about a foot from me with his knife" (R. 36).

Accused testified that he and Joshua walked to the guardhouse where accused "went to tell him about some Arabs jumping" on him and "about the money". Accused had "blood on his nose". The sergeant asked "how much was it" and accused replied 300 francs. Accused testified further that

"Joshua said well I won't make 300 but I'll make 200 francs sometime or another, I'll see you, so he started walking off, so I was so mad and crazy, I don't know what happened. I grabbed the rifle and fired it, sir" (R. 36,37).

Accused testified further that Joshua had "mostly killed" him in a fist fight in California, that in Oran Joshua had "jumped on" him four times or more, that he was "always making threats", and that while both had been confined in the stockade recently Joshua threatened to kill him "next week". Accused stated he was mortally afraid of Joshua, "I was afraid of him all the time. He threatened me and jumped on me and he's a larger man than me, and I was afraid of him" (R. 37). Accused testified he weighed 160 pounds, Joshua about 225 or 230 (R. 41). Accused denied having planned to kill Joshua stating "I must have been crazy or something" (R. 42).

Private Pomer Grimes, Company D, 398th Port Battalion, corroborated the testimony of accused as to Joshua striking accused and threatening him with a knife (R. 27,28). He stated that after the fist fight was over a bottle was passed around and accused, Joshua, and he had a drink (R. 51). Another soldier, a first cousin of Joshua, corroborated accused's testimony of prior trouble with Joshua (R. 24).

Captain Morris J. Rivet, Jr., Company D, 398th Port Battalion, testified that around the middle of May accused, who had been recently transferred to witness' company, asked to be allowed to transfer to another outfit because he was in the same company with some fellows that he had trouble with before, and he was afraid of some of them. No names were used (R. 31).

4. It thus appears from the uncontradicted evidence that at the place and time alleged, accused willfully shot Private David (NMI) Joshua, the person named in the Specification, with a rifle, almost instantly killing him. It was within the province of the reviewing authority to reduce the grade

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of the offense from murder, as found by the court, to manslaughter (NATO 581, Grant). The evidence amply supports the conclusion that accused was guilty of at least this grade of culpable homicide. There is substantial evidence supporting the view, obviously embraced by the reviewing authority, that accused had so long suffered indignities and oppressions at the hands of Joshua that the latter's overbearing and violent abuse on the afternoon of the fatal shooting was adequate to provoke a sudden passion in the heat of which accused shot and killed his victim. There were no circumstances in evidence which would either excuse or justify the homicide. Accused was clearly shown to be guilty of the offense of manslaughter as approved by the reviewing authority (MCM, 1928, par. 149a).

5. The charge sheet shows accused is 20 11/12 years old, was inducted into the Army of the United States 8 April 1941, and had no prior service. Accused testified he was 19 11/12 years old (R. 53).

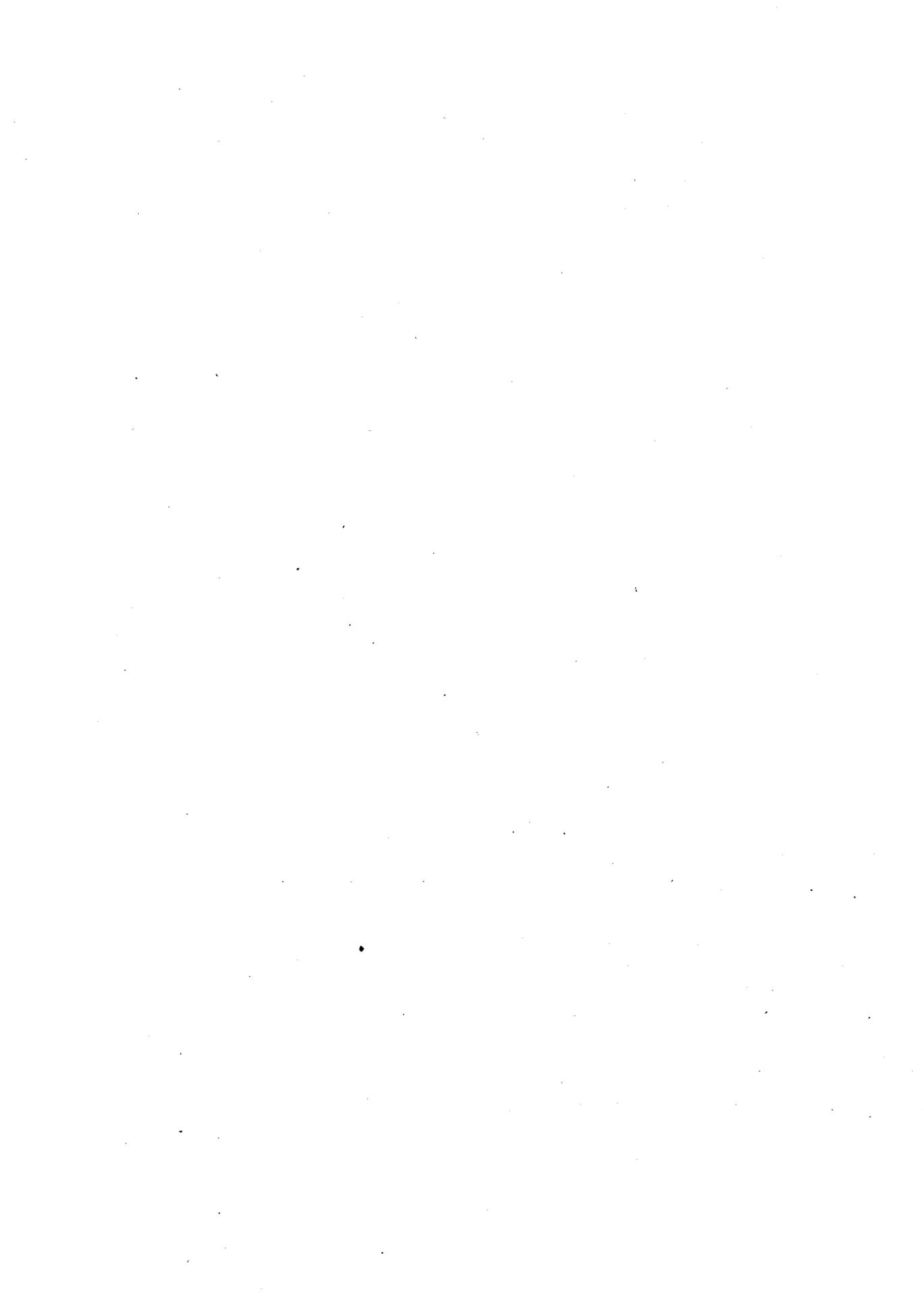
6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence. Penitentiary confinement is authorized for the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

 Judge Advocate.

O. J. De, Judge Advocate.

Simon Simpson, Judge Advocate.

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

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

Board of Review

NATO 1123

UNITED STATES)

EASTERN BASE SECTION)

v.)

Trial by G.C.M., convened at
Bone, Algeria, 30 November
1943.)

Privates JOHN E. McGEE
(34180768) and JOSHUA (NMI)
STALEY (32188951), both
unassigned.)

As to each: dishonorable
discharge and confinement for
20 years.)
U. S. Penitentiary, Lewisburg,
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification: "In that Private Joshua (NMI) Staley, unassigned, and Private John E. McGee, unassigned, did, jointly and in pursuance of a common intent, at Khroub, Constantine, Algeria, on or about 31 October 1943, with intent to commit a felony, viz, murder, commit an assault upon Bouhamdani Said, by willfully and feloniously stabbing the said Bouhamdani Said in the abdomen, stomach and chest with a knife."

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

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

3. The evidence was substantially as follows:

Hadjar Mokhtar testified that at about 1330 hours on 31 October 1943, he was walking on the street in front of the railroad station at Khroub, Algeria, when he encountered two colored soldiers with "Arabian" knives in their hands (R. 20,21). One was tall and the other short. Both were very drunk. They asked witness for "vino". He replied that he had none and continued on his way. He had gone but 25 or 30 meters when he heard another Arab, whose name was "Bouhamdane" Said, "cry out". Witness turned and saw the short soldier "holding his hand there" and the tall one "hitting him with the knife". The soldier hit Bouhamdane with the knife on the stomach, the left shoulder and the right side of the head (R. 21,22). Bouhamdane was not armed when attacked and had not molested the two soldiers (R. 22). Witness was with the police when they apprehended the two assailants an "hour or so" after the attack. He then identified them as Bouhamdane's assailants (R. 21,22). At the request of the defense, accused and eight other colored soldiers, all covered, were permitted to sit together during the trial (R. 2). Witness was asked if he recognized Bouhamdane's assailants among the ten colored soldiers who were placed in a line against the wall of the court room. He "picked out" accused McGee and a soldier who was not the other accused, Staley (R. 21). He testified on cross-examination that when he had first identified the assailants, they were not with any other colored soldiers but were the only two soldiers presented to him (R. 22).

Following the attack, "Bouhamdani Said" was taken to a hospital in Constantine where, according to the stipulated testimony of a hospital interne

"He presented one hole in the abdomen near the epigastrical region caused by a sharp instrument, also a hole in the stomach. And, 2 a hole in the sublivacular region, 1 centimeter long, straight down. The penetrating instrument touched the left lung" (R. 23).

Lucien Rousseau testified that at about 1400 hours on 31 October 1943, he was going to his office back of the railroad station at Khroub when he encountered two drunken colored soldiers (R. 5,9) "who injured or beat up an Arab" (R. 5). There were some Arabs following them (R. 6). The "big one" grabbed witness by the chest and threatened him with a knife. It was a big knife described as having a blade about nine inches long. The "small soldier" had a smaller knife. Both knives were of the "Arabian" type. The "big one" shook witness twice and then pushed him to one side and went away (R. 5,6). Witness had been about 50 meters from the Arab when the latter was attacked and did not see the blows struck but observed after the injuries were inflicted that the Arab was cut in the stomach, on the head, under the left eye and on the shoulder (R. 8). Witness testified

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that both soldiers were "very drunk and sort of not walking straight and didn't know what they were doing". He testified further that he reported the incident to the military police and 15 or 20 minutes after he was attacked he identified the two soldiers in the presence of the military police as the men who had stopped and attacked him (R. 9). The soldiers whom he identified were placed under arrest (R. 11). At the trial, witness was asked to identify the two soldiers who had stopped him on 31 October from among a group of ten colored soldiers who were at the time seated in the court room. He pointed out two men other than the accused. The soldiers then stood and witness "singled out" accused Staley, but added, at once: "I cannot identify; I want to make no false accusations on that definitely" (R. 6). He testified he was certain of his identification of "the big one". "The big one" was neither of the accused (R. 6,7).

Sergeant Frederick Charles Swift, Royal Engineers, British Army, testified that he was on duty at the Khroub railroad station on the day in question (R. 15). He assisted in apprehending the men who were "alleged" to have stabbed the Arab. Before "the stabbing", he had seen these soldiers walking along the railroad platform with a British soldier "with their arms around their back". They were "under the influence of drink" (R. 16,19,32). After "the stabbing" he went out on the main road of the village searching for the attackers and "only saw two colored boys, one tall and one short". He told them to "come to the railroad station" and the soldiers refused to go. Witness got an armed sentry and a "car" and returned to the place where he "would see the two believed to have done the stabbing" (R. 16). He testified that when he arrived on the scene

"There was a crowd of Arabs and French; the two men were lying down there" (R. 34).

He testified further that the two soldiers "appeared to be in a drunk state" (R. 34) and that

"We moved toward the crowd of people where something was happening and we got to the scene just as an American guard, which was a Corporal, and a French civilian and two of my own staff and there were the two of the accused" (R. 16).

The corporal "held the revolver over them" and he and Swift took a knife away from each of the soldiers. They were then put in the back of a truck and taken away (R. 16,17,31,32,33). The knives had Arab markings on them, were dull along the edges but ran to sharp points. One knife showed "some red mark", but Swift could not "swear it was blood" (R. 17). Asked to identify the two soldiers who were "taken in custody" on 31 October 1943, Swift pointed out the two accused from among the ten colored soldiers who were lined up in the court room (R. 17). Witness testified that the two men who were apprehended were the same two that he saw before the stabbing incident (R. 19).

Accused McGee testified that he boarded a train at Mateur, Tunisia, on

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31 October 1943, and arrived at Khroub some time in the afternoon. He got off the train to use the latrine where he met accused Staley whom he had not known before (R. 24,27). When he left the latrine, the train with all accused's equipment aboard had departed (R. 24). He estimated that the train had stood in the station about 16 minutes before leaving (R. 27). He then went into the station and found the distance to Constantine, where he testified he hoped to overtake the train, was 12 kilometers (R. 24). In the station, Staley bought a knife and some souvenir cards (R. 28). From there the two accused went "up on the highway about a block or so from the village" to a point approximately a mile from the station when a British truck came along and accused were arrested (R. 24,28). As they were being taken away, a Frenchman "drove up, stood up in the seat and did his hand like that and drove up" (R. 24). McGee testified that when the Frenchman "looked" at him, he and his companion had been off the train for about an hour (R. 26). He denied that he had ever owned an "Arab" knife and testified he had not had a knife since he had been in Africa (R. 26, 29). He testified he never saw two knives on the afternoon in question and that his companion never "pulled" the knife he had bought out of his pocket (R. 29). He denied he was lying on the grass when the British sergeant came upon him, but said he "was already walking when he came up" (R. 30). McGee denied that he was drunk. He testified he had not had a drink since he "came out of the hospital" and replied in the affirmative when asked if he were "dead sober" on the day in question (R. 27,30). He testified that he did not see any other drunken colored soldiers that day (R. 27,28). He asserted that he did not know what offense he was charged with having committed until two days before the trial (R. 25).

Accused Staley made an unsworn statement through counsel that

"at the station at Khroub he bought this Arab knife referred to by McGee and also these cards as souvenirs from an Arab; five post cards. The American M. P. took the knife away from him when he was picked up on the road by the British Sergeant. The rest of his statement would be practically the same that has been told to the court by the other soldier" (R. 31).

4. It thus appears from substantial evidence that at the place and time alleged, accused, acting jointly and in pursuance of a common intent, committed an assault upon Bouhamdane Said, the person named in the Specification, by stabbing him in the abdomen, stomach and chest with a knife. It does not clearly appear which of the accused wielded the knife but it is not controverted that one of Bouhamdane's assailants held him while the other struck him with the weapon. The blows were so vicious that one wound penetrated to the victim's left lung. From the nature of the weapons used, the severity of the wounds inflicted, the absence of proof of any legal excuse, legal justification or provocation, and from the other attending circumstances, the court was justified in inferring that the assault was made wantonly, willfully and with malice aforethought. Had death ensued, the homicide would have been murder. Accused were properly found guilty of assault with intent to commit murder as alleged (MCM, 1928, par. 1491; Winthrop's, reprint, p. 688).

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One witness described the accused as very drunk and testified that they "didn't know what they were doing". Another testified the two soldiers were under the influence of intoxicating liquor and "appeared to be in a drunk state". On the contrary, accused McGee denied that he had had a drink on the day in question and accused Staley, in his unsworn statement, declared that McGee's version of the affair was substantially correct. It was for the court to determine whether accused were capable of entertaining the specific intent to commit murder at the time of the assault and its conclusion that accused were not too drunk to know and understand the nature and consequence of their conduct, has ample support in the evidence.

Accused denied that they committed the assault but conceded they were at the scene together and that one had a knife. The undisputed evidence shows that the assailants were colored soldiers, one tall and the other short of stature. Accused were seen walking along the Khroub station platform before the assault was committed. When a search was made for the assailants after the stabbing, accused were the only two colored soldiers seen. When the British sergeant asked them to go to the railroad station they refused. Later they were found near a crowd of Frenchmen and Arabs. When taken into custody each was armed with a knife, one of which bore a red stain. An Arab witness identified McGee as one of the assailants.

With all the circumstances, there is substantial competent and convincing evidence from which the court could properly conclude, as it did, that accused were the persons who assaulted Bouhamdane Said.

5. The witness Rousseau, who stated that he did not see the assault charged but was himself attacked shortly after that assault, testified that the attack upon him was made by colored soldiers other than accused, and that within 15 or 20 minutes after the attack he identified these men as his assailants (R. 6,7,8,9). After Rousseau had testified another witness, Sergeant L. A. Stansell, 715th Railway Operating Battalion, testified for the prosecution that after accused had been apprehended Rousseau identified them as the men who had attacked Rousseau (R. 10,11). Insofar as this latter testimony purported to show that accused were the persons who attacked Rousseau or who committed the assault charged, it was hearsay and, in accordance with authoritative holdings of the Board of Review (CM 187116, Martinovitch, Dig. Op. JAG, 1912-30, sec. 1300; Dig. Op. JAG, 1912-40, sec. 395 (22); NATO 423, Stroud; NATO 460, Trevino) was incompetent and inadmissible as substantive proof. Since it pertained only to the collateral fact as to the identity of the persons who attacked Rousseau, and in view of the other competent proof of identity of the persons who committed the assault charged, it does not appear that consideration by the court of the incompetent testimony could have injuriously affected the substantial rights of accused.

6. The charge sheet shows that McGee is 29 3/12 years old, was inducted into the Army of the United States 25 October 1941, and that Staley is 29 9/12 years old and was inducted into the Army of the United States 5 January 1942. Neither accused had any prior service.

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

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the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the sentences. Penitentiary confinement is authorized for the offense of assault with intent to commit murder here involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 455, Title 18, United States Code.

 Judge Advocate.
O. J. G. del Judge Advocate.
Forvon Simpson Judge Advocate.

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

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

Board of Review

NATO 1132

UNITED STATES)

FIFTH ARMY

v.)

Trial by G.C.M., convened at
Headquarters, Fifth Army, APO
464, U. S. Army, 23 November
1943.

Privates HOWARD (NMI) BUTLER
(34370122) and ROBERT L.
ARMSTRONG (31125395), both of
Company B, 30th Signal Con-
struction Battalion.)

As to each: Dishonorable
discharge and confinement for
life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

2. Accused were jointly tried upon separate Charges and Specifications
as follows:

BUTLER

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

Specification: In that Private Howard Butler, Company B, 30th Signal
Construction Battalion, did, at or near Aversa, Italy, on
or about, 30 October 1943, forcibly and feloniously, against
her will, have carnal knowledge of Rosa Di Luigi.

CHARGE II: Violation of the 93d Article of War.

Specification: In that Private Howard Butler, Company B, 30th Signal
Construction Battalion, did, at or near Aversa, Italy, on
or about 30 October 1943, unlawfully enter the dwelling of
Rosa Di Luigi, with intent to commit a criminal offense, to
wit, assault therein.

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ARMSTRONG

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

Specification: In that Private Robert L. Armstrong (then Technician Fifth Grade), Company B, 30th Signal Construction Battalion, did, at or near Aversa, Italy, on or about 30 October 1943, forcibly and feloniously, against her will, have carnal knowledge of Rosa Di Luigi.

CHARGE II: Violation of the 93d Article of War.

Specification: In that Private Robert L. Armstrong (then Technician Fifth Grade) Company B, 30th Signal Construction Battalion, did, at or near Aversa, Italy, on or about 30 October 1943, unlawfully enter the dwelling of Rosa Di Luigi, with intent to commit a criminal offense, to wit, assault therein.

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

3. The evidence shows that on 30 October 1943, Rosa Di Luigi was living in a small stone house at Grigiano, near Aversa, Italy with her two sons and a daughter (R. 6,7,8,9,12). The two sons, 17 and 20 years of age, respectively, slept in the kitchen on the ground floor (R. 7,9, 13). There was one entrance to the room, a door with a window near it (R. 6), but there was a larger door, about "50 meters" from the kitchen door, which "you have to come through before you enter the kitchen" (R. 11). Both doors were closed prior to the family's retiring that night (R. 7,9, 10,11), and the kitchen door was "fastened with a large wooden bolt about three inches in diameter" (R. 7). At about 0100 hours on the night of 30-31 October (R. 6,7,9,12), the two accused pounded on and forced the outer door open and then forced their way into the kitchen where the two sons were, breaking the bolt on the inner door and splitting the door and forcing it open (R. 7,8,10). Accused demanded a light "and before any light was made they cried out for women" (R. 7,10). Armstrong had a tommy gun and fired a shot into the wall (R. 7,8). They lit a candle and asked for wine (R. 7,10). When one of the sons explained that they had no

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wine, "the soldier with the gun hit" him "above the right eye with the butt of the gun and made it swell" (R. 7,10). Shortly thereafter, the mother, Rosa Di Luigi, hearing the shooting and worried about her sons (R. 13), came down an outside stairway and into the kitchen (R. 7,10,13). She "had on two undershirts" (R. 13), and when accused "saw her they demanded women" (R. 7,13). "There were more shots fired when" Rosa came into the room; the sister, "who was upstairs, tried to get away and they shot towards her" (R. 7). Butler made one of the sons go to the cellarway "to get them some wine" (R. 8) and made the other stay in bed (R. 10). Accused drank "half" of the wine (R. 13). Armstrong fired shots outside (R. 8), and fired one shot at a jug Rosa had in her hand, from a distance of one foot away (R. 7,11,13). They fired seven shots downstairs, making holes in the wall (R. 11); "relatives upstairs were making some noise and they fired in that direction" (R. 13). "They were talking between themselves for about half an hour" (R. 11); then Butler took Rosa outside (R. 7,11,13,14). Both the sons testified that when accused entered the house they were drunk (R. 9,18).

Rosa testified (R. 14) that Butler took her outside "into a passage leading to another room just outside the kitchen". He was armed, holding the gun with both hands, and pointing it towards her. He put the gun on the ground nearby, opened the door into the room, forced her to the ground, raised her clothing, and "met his own desires" (R. 14). He placed his body upon her body and had sexual intercourse with her. She "tried to put him off but he had the gun". He would not let her talk, and put his hand over her mouth. She bit his hand but did not draw blood (R. 14). Butler then took her back to the kitchen, where he and Armstrong talked together for a few minutes (R. 15). Then Armstrong took her into the same room, forced her to the ground, raised her clothes and had sexual intercourse with her. "I wanted to put him off. He is bigger and heavier than I and overpowered me" (R. 15). She attempted to cry for help and bit his hand when he put it over her mouth. When Armstrong had finished he took her back to the kitchen, whereupon Butler forced her to go to the wine cellar to get some wine. She did not want to go, but "he had the gun with him. He made me understand that he would kill me if I did not go with him***he made motions with the gun" (R. 15). When they reached the wine cellar Butler put out the light, "grabbed" her, put her on the ground, and again had sexual intercourse with her "the same way" (R. 15). After Butler finished, they returned to the kitchen and "the two soldiers talked together again in the kitchen" (R. 15,16). Then Armstrong took her outside in the courtyard, forced her to the ground "the same way" and for the second time had sexual intercourse with her. She was afraid of the two American soldiers, was "worried about my life" and permitted the acts of sexual intercourse "only by force" (R. 16). She testified that she had never seen the two accused before. She had heard from her sons that accused had been to her house and that they had been given a glass of wine. During the attacks she could not scream, nor answer her brother-in-law who lived on the other side of the courtyard, because they had their hands on her mouth. She was afraid for her life because "they had the gun all four times" (R. 16). She bit Armstrong's hand only the one time, and not the other soldier's.

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hand at all. They had their hands over her mouth each time (R. 17).

One of the sons, recalled as a witness for the defense, testified that he had been in the kitchen all evening with his brother. The two American soldiers would not let him get off the bed; "first one of them, then the other" kept him on the bed, and Armstrong pointed the gun at him all the time (R. 17). "The gun did not leave the kitchen". At one point Armstrong "stepped just outside the door and fired. He came right back inside the room" (R. 18). While Armstrong had the gun pointed at him, "at times he would be sitting in front of me pointing the gun at me. He would get up and move around but would always return to me***He told me to shut up and pointed the gun at me". As a result of the blow over the eye, the boy's "whole head hurt" and his "eye was swollen". He was afraid and was crying. "They had only the tommy gun. There was not a rifle or pistol there" (R. 19). The soldiers finally left the room at 0400 hours, when a whistle blew in the nearby American camp (R. 18).

A soldier testifying for the defense stated that he had been at the house of Rosa Di Luigi and had purchased wine there (R. 20). On two occasions he had seen both accused there buying wine from her. Mrs. Luigi lived in the house with two boys, a girl and a small baby; the two boys and the girl were present when accused secured wine (R. 20,21).

Accused Armstrong testified that he and Butler had been drinking that evening at a house where Butler had his clothes washed and that,

"We were on our way back to the camp and had to go through this courtyard. We decided we would get some more vino. We knocked on the door and entered the room. Inside I saw a jar of wine. We sat there drinking and I do remember firing a shot up the chimney. We were drinking and making a lot of noise. The people upstairs hollered and Mrs. Luigi went outside and I was with her. I took the gun. She was talking to them but I could not understand her. After awhile we went back inside. That is as much as I can remember. I cannot recall doing any other shooting" (R. 22).

He went out to the courtyard with her "just to see what the hollering was all about". He did not remember having intercourse with her at any time that evening. He denied that he took a gun and forced her to have intercourse (R. 22). He had been at a house "about 150 yards away" from the home of Mrs. Luigi, and it was necessary to enter the Luigi courtyard to get back to his camp, located "right in back of her home" (R. 22,23). When they arrived at the courtyard the outer gate was open "a little way***We pushed it the rest of the way open and went through" (R. 23). They stopped "to get some more vino" at the room where the boys were sleeping, knocked on the door, "went inside the room and sat down. She poured us some vino and I drank mine" (R. 23). There was a candle and a jug on the table (R. 23). He "might have fired the shot outside"; he and Mrs. Luigi were both standing in the door while she was talking to people up on a balcony. After the shot was fired "everything was quiet" (R. 24). They were

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drinking there "for quite a while"; someone went after the wine: "there were two or three pitchers full brought into the room**the pitcher was always full of wine". He could not tell what he did when he left the house and started for home (R. 24). Upon returning to camp he slept with two other soldiers in a truck, because the day before he had taken his tent down to burn out the ants and before he could get it up again it had started to rain. When asked what caused him to leave the house, he testified:

"One of the boys made a move. I guess Private Butler thought he saw a flash of a gun. He jumped in the direction of this boy leaving his tommy gun behind. He looked around and found a nickle plated gun. He grabbed the tommy gun and pulled the trigger. We put the candle out and I heard him say, 'I got it. Let's go'. I do not know anything about the pistol" (R. 25).

It was the first time he ever drank so much. He testified: "My mind was a blank space. I recall stopping in front of this building. I recall knocking. I do not recall seeing the jug" (R. 25). He did not know why Butler had his gun with him when he left the camp area; he guessed "he was supposed to carry it with him". Armstrong did not have a tommy gun, nor carry a side arm (R. 25,26).

Accused Butler made an unsworn statement as follows:

"I did not have intercourse with her at any time. I did not force her outside the house with the gun. I did not have her outside at any time while I was at her house. That is all" (R. 26).

A witness for the prosecution, called in rebuttal, testified that he slept "in the vehicle" the night of 30 October 1943 (R. 27). Armstrong had asked him earlier in the evening if he could sleep in the truck, because his tent had been rained out. He came in "late at night**He caused a slight disturbance and awakened us. I woke up and said something to him and he said, 'Go back to sleep'." He said nothing about having had any wine (R. 27).

4. It thus appears from substantial evidence that at the place and time alleged each of the accused forcibly and without her consent had unlawful carnal knowledge of Rosa Di Luigi, the woman named in the Specifications. She was threatened by the accused with a "tommy gun". Prior to the assaults it was discharged several times in her presence and on one occasion Armstrong shot a jug out of her hand when only one foot away from her. Each accused, after forcing her to the ground, had sexual intercourse with her twice. She tried to cry out but each assailant covered her mouth with his hand. She plainly had reason to be in fear of her life. The court was fully warranted in finding each accused guilty of rape and all elements of the offense are amply established by the evidence (MCM, 1928, par. 148b; Winthrop's, reprint, pp. 677,678).

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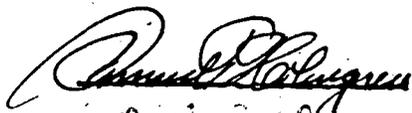
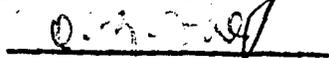
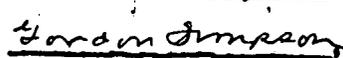
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The evidence also shows that each accused unlawfully entered the dwelling of Rosa Di Luigi and therein pointed a tommy gun at the inmates, terrorized them by discharging the gun promiscuously in and about the house, and brutally struck an occupant on the forehead with the butt of the gun. These acts were followed by the criminal assaults upon the woman. The court was amply justified in inferring from their conduct and the surrounding facts and circumstances that each accused entered the dwelling with the requisite concomitant intent to commit the acts shown by the evidence, any one of which would constitute the criminal offense of assault within the meaning and scope of the Specifications. The court was fully warranted in finding each accused guilty of the offense of housebreaking (MCM, 1928, par. 149e).

There is evidence that accused were drunk and Armstrong testified in effect that he was so drunk he did not recall having had intercourse with the woman. From the circumstances in evidence the court was fully justified in concluding that neither accused was drunk to such a degree that he was not fully responsible for his acts. Butler's denial that he had intercourse with the woman was a matter for consideration by the court.

5. The charge sheets state that Butler is 22 years old, was inducted into the Army of the United States 11 September 1942, and had no prior service; and that Armstrong is 30 years old, was inducted into the Army of the United States 17 June 1942, and served in the United States Navy from 13 August 1930, to 11 June 1934.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentences. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of rape and housebreaking, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year, rape by Section 22-2801, Title 22, Code of the District of Columbia, and housebreaking by Section 22-1801, Title 22, Code of the District of Columbia.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

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

Board of Review

NATO 1135

UNITED STATES

) FIFTH ARMY

v.

) Trial by G.C.M., convened at
) APO 464, U. S. Army, 25
) November 1943.

Privates FRANK MORNING
(32199336) and OSWALD J.
HAYWARD (33141127), both of
Company A, 386th Engineer
Battalion, and Private
EUGENE HAMMOCK (34063213),
Company B, 22d Quartermaster
Truck Regiment.

) As to accused Morning and
) Hammock: dishonorable discharge
) and confinement for ten years.
) As to accused Hayward: not
) guilty.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Frank Morning, Private Oswald J. Hayward, both of Company A, 386th Engineer Battalion, and Private Eugene Hammock, Company B, 22nd Quartermaster Truck Regiment, acting jointly, and in pursuance of a common intent, did, in the vicinity of Naples, Italy, on or about 26 October 1943, feloniously take, steal, and carry away 18 drums of 130 octane gasoline, containing about 55 gallons each, of the value of about \$170.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Private Frank Morning, Private Oswald

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J. Hayward, both of Company A, 386th Engineer Battalion, and Private Eugene Hammock, Company B, 22nd Quartermaster Truck Regiment, acting jointly, and in pursuance of a common intent, did, in the vicinity of Naples, Italy, on or about 26 October 1943, wrongfully and knowingly dispose of by selling 18 drums of 130 octane gasoline, containing about 55 gallons each, of the value of about \$170.00, property of the United States, furnished and intended for the military service thereof.

Accused Morning and Hammock pleaded not guilty to and were found guilty of the Charge and Specifications, except in each Specification the figures "\$170.00", substituting therefor the figures "\$162.00"; of the excepted figures not guilty, of the substituted figures guilty. Accused Hayward pleaded not guilty to and was found not guilty of the Charge and Specifications. No evidence of previous convictions was introduced. Accused Morning and Hammock were each sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentences, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement in each case and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that at about 1800 hours on 26 October 1943, a military policeman who was on duty at a "road block" about a mile north of the town of Marigliano, Italy, saw a 2½ ton, "6 x 6" United States Army truck marked "22nd QM, B24", driven by a negro soldier, turn off the highway onto a dirt road. Another colored soldier and a civilian were in the cab of the truck which was loaded with "fifty-five gallon drums". In the truck body there was still another negro soldier (R. 5,11). The military policeman made a report of the occurrence to the sergeant of the guard who shortly after 2000 hours, started out with four of his men to investigate. It was rainy; the ground was wet and the road muddy. They proceeded down the dirt road about four miles where tire tracks of a 2½ ton vehicle were observed leading off on a small roadway. Turning on the road which was nothing more than a cowpath, the sergeant and his party came to a farmhouse near which was standing an empty truck marked "22 QM" on one side of the rear bumper and "B 24" on the other. Walking around the vehicle the sergeant observed eighteen 55-gallon drums painted an "O.D." green and "marked 'Aircraft fuel, 130 octane' and on the bottom it had 'Gasoline' and down below that 'U.S. QM' and some numbers" (R. 5,6,7,9,11). One witness testified that according to the markings on the drums, the gasoline was property of the United States (R. 11). He took the cap off one drum and observed that the contents were "definitely gasoline"; he kicked all the other drums and ascertained they were also full (R. 6,11).

Accused Hammock was sitting behind the wheel of the truck (R. 7,9). The sergeant and his detail then knocked at the door of the house which "was opened just a bit and whoever opened the door tried to close it again" but the group "pushed" their way inside and observed accused Hayward drinking wine and accused Morning bending over a table with his hand on a pile of money in front of him. There was another pile of money at the other end

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of the table. In the room were also an old man, a young Italian soldier, an old woman and a sleeping baby (R. 7,8,9,10). One of the military policemen took the two piles of money which he turned over to an officer. When counted it amounted to 20,900 lire, valued at \$209.00 in United States money (R. 10,11).

It was stipulated that the value of "one 55 gallon drum and the contents therein, 130 octane gasoline, is the sum of nine dollars (\$9.00)" (R. 8).

Voluntary statements were made by each of the three accused early in the morning of 27 October 1943 (R. 14). Before talking to accused, the investigating officer testified he

"ordered some hot coffee and flap jacks as it was bitter cold that night and before I started to question them we had some hot coffee and flap jacks" (R. 12).

He testified further that he

"told them they had the right to make no statement at all if they desired. I told them that if they made a statement it could be used against them" (R. 12).

These statements were admitted over the objection of defense counsel that they "were taken under duress" (R. 13,14). The law member admonished the court that each statement would be considered only as to the accused who made it. He described the statements as "confessions" (R. 14,15).

In Hancock's statement, he said

"A fellow in my outfit named Clark told me to come around to the front gate at about 1800 hours Oct. 26th 1943. At this gate, at the docks, at Naples I saw Clark and an Italian civilian. I was driving a 2½ ton truck loaded with 18 eighteen barrels of 130 - octane gas. I was supposed to drive this gasoline to dump 752. Clark is the regular driver of my truck, I am the relief driver.

"Clark told me to let the civilian on the truck and we would both be able to make some money. I let the civilian on the truck. With him in the cab was a colored soldier that I never saw before and in the back of the truck another colored soldier climbed in. These two soldiers were the ones that were arrested with me.

"I figured these two soldiers were going to help the Italian. I never saw the Italian before either.

"I drove the truck to an Italian house; I was directed by the civilian.

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"Then the short colored soldier started unloading the gasoline. Then both colored soldiers went into the house. I stayed in the cab of the truck.

"Then an M.P. car drove up and asked me what I was doing here. I told him that I had driven a load of gasoline to the house.

"Then the MP's arrested the other soldiers and myself.

"This is the first time I ever drove gasoline to any other place except the regular dumps" (Ex. A).

In his statement, Morning told of meeting an Italian named Costello in a Naples bar in the afternoon of 26 October 1943. He stated that the Italian

"asked me if I wanted to make some money. I asked him how, and he told me by unloading some trucks. (I had met him once before, about 4 days before, in a house of prostitution. He had then asked me to unload trucks for money. I unloaded a truck that had mixed rations on it. I don't know the driver or where we went. I was paid \$50 for that night's work).

"Costello told me he would have a truck in front of the saloon at 6 PM that night and that I should meet him there. I went to Costello's house after we left the saloon & stayed there a half-hour. Later I met Pvt Hayward of my outfit and he agreed to help me.

"At 6 PM we met Costello. He was already in the truck & I got in the front with him. Hayward climbed into the back. I never saw the driver of the truck before.

"We drove thru Naples and then out of town, for about an hour. Costello was telling the driver where to go. We stopped in front of a house, and Costello got another Italian. We drove on to another town and picked up a second Italian. We then drove to a farm, stopped and unloaded the gasoline. We put the drums in the yard. Then we went inside the house and had a drink of wine. While we were drinking the MP's came in & arrested us" (Ex. C).

He stated further that he "was promised \$50 for the night's work" (Ex. C).

Hayward testified he was trying to get "a lift" back to his organization when he got into the truck; that he went to sleep and later Morning woke him up and invited him into a farmhouse to have a drink. He went in the house, had a drink, and noticed that the military policemen picked up some money. He had noticed the truck was loaded with "gas drums" (R. 17-20).

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Hammock and Morning elected to remain silent.

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4. It thus appears from substantial evidence that at the place and time alleged, Morning and Hammock, acting jointly and in pursuance of a common intent, wrongfully took, carried away and later disposed of 18 drums each containing about 55 gallons of "130 octane" gasoline, of the value of \$162.00, property of the United States, furnished and intended for the military service thereof. The markings on the gasoline drums and the other circumstances in evidence demonstrate clearly and satisfactorily the fact of Government ownership and that the property was furnished and intended for the military service of the United States. Accused Hammock had custody of the gasoline on the truck and was charged with the duty of delivering it to a designated dump; instead of delivering the gasoline as required, he drove his truck through Naples to a farmhouse in the country, where the gasoline was unloaded. According to his own statement this constituted an illegal taking of possession by him, and a trespass; that the taking was accompanied by a larcenous intent is fairly inferable from his prior and subsequent conduct and the other circumstances shown by the evidence (Wharton's Crim. Law, sec. 1197; 36 C.J. 784,785,786,751 and cases there cited; Dig. Op. JAG, 1912-40, sec. 452 (11)). Accused Morning, a knowing participant, was actually present at the taking and carrying away of the gasoline and is liable as a principal (Wharton's Crim. Law, sec. 1167). After Hammock had procured the gasoline and it had been unloaded at an admittedly unauthorized destination, Morning went in the nearby farmhouse where he was apprehended soon afterwards standing by a table on which there were 20,900 lire in Italian money. He had his hand on some of the money. In the same room with him were an Italian soldier and two adult civilians. The unexplained and clandestine delivery of the gasoline at a farmhouse more than four miles from a main highway, together with the other circumstances, is inconsistent with an honest purpose and gives rise to compelling inferences of guilt of larceny as well as wrongful sale of property of the United States furnished and intended for the military service. These inferences are strengthened by the statement of these accused in which each admits in effect the asportation of the gasoline, its delivery at a place other than a regular point of storage for Government property, and that their acts were motivated by a desire for financial gain. Concert of action between Morning and Hammock was clearly established; Hammock acted for Morning in procuring and taking possession of the gasoline, in like manner as Morning acted for Hammock in collecting the money. Both were principals in the undertaking and each is responsible for the acts of the other in furtherance of the common plan. The evidence excludes every reasonable hypothesis other than the guilt of these accused (MCM, 1928, pars. 149g,150i; 18 U.S.C. 550; CM NATO 779, Clark et al).

5. Accused were charged with both the larceny and the wrongful disposition by sale of the same Government property. There is no unreasonable multiplication of charges. The felonious taking of the property and its subsequent wrongful disposition are distinct offenses and properly so charged (MCM, 1928, pars. 27,150i; AW 94; Dig. Op. JAG, 1912-40, 452 (18)).

6. Objections were urged by defense counsel that the statements of the several accused were obtained by duress and for this reason were not

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admissible. Accused were fairly and adequately warned of their rights by the officer to whom the statements were made and they had been provided with warm food before they were interrogated. There is no evidence that any duress was imposed upon them at any time. Rather is the contrary made to appear. The objections were properly over-ruled.

7. The statements of accused did not amount to confessions since they did not contain acknowledgments of guilt. The law member inaccurately referred to these statements as confessions when they were received in evidence. It must be assumed that the court correctly construed the documents which on their face only purported to contain significant admissions as to the connection of the accused with the offenses charged (MCM, 1928, par. 114). Accused were not injured by the inaccuracy of the law member's terminology in describing the admitted evidence (AW 37).

8. The charge sheet shows that Morning is 24 years old, that he was inducted in the Army of the United States 7 February 1942, and that Hammock is 24 years old and was inducted in the Army of the United States 10 July 1941.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings as to each accused and the sentences. Penitentiary confinement is authorized for the offense of larceny of property of value in excess of \$50.00, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Sections 82 and 100, Title 18, United States Code.

 Judge Advocate.
O. J. G. de Judge Advocate.
Gordon Simpson Judge Advocate.

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

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

Board of Review

NATO 1151

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

EASTERN BASE SECTION)

v.)

Trial by G.C.M., convened at
Bone, Algeria, 28 November
1943.)

Technician Fifth Grade BRADDIE)
(NMI) HUTTO (34441317), 2619th)
Quartermaster Tank Truck)
Company.)

Dishonorable discharge, suspended,
and confinement for two years.)
NATOUSA Disciplinary Training)
Center, Casablanca, French)
Morocco.)

OPINION by the BOARD OF REVIEW

Holmgren, Ide and Simpson, Judge Advocates.

1. The record of trial in the case of the soldier named above having been examined in the Branch Office of The Judge Advocate General with the North African Theater of Operations and found to be legally insufficient to support the sentence in part, has been examined by the Board of Review, which submits this its opinion to the Assistant Judge Advocate General for the North African Theater of Operations.

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

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

Specification: In that Technician 5th Grade, then Private, Braddie Hutto, 2619th Quartermaster Tank Truck Company, did, in the vicinity of Saint Charles, Algeria, on or About 8 November 1943, with intent to do him bodily harm, commit an assault upon Captain C. F. Cole, Headquarters Squadron, 6th Armored Division, British North African Forces, by wilfully and feloniously striking and beating the said Captain C. F. Cole with his fists and using force upon the person of the said Captain C. F. Cole.

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

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: In that Technician 5th Grade, then Private, Braddie Hutto, 2619th Quartermaster Tank Truck Company, did, in the vicinity of Saint Charles, Algeria, on or about 8 November 1943, drive a government vehicle in a reckless manner which caused a near accident, and endangering the safety of the vehicle.

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specification, guilty of Charge II and Specification 3 thereunder, and not guilty of Specifications 1 and 2, Charge II. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge; forfeiture of all pay and allowances due or to become due and confinement at hard labor for two (2) years. The reviewing authority approved the sentence and ordered its execution but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated NATOUSA Disciplinary Training Center, Casablanca, French Morocco, as the place of confinement. The proceedings were published in General Court-Martial Order No. 141, Headquarters Eastern Base Section, 14 December 1943.

3. The evidence shows that at about 1700 hours (R. 21) on 8 November 1943, accused, driving a two and a half ton (R. 6,52) "6 wheeler" GCM truck on the road between Saint Charles and Gastonville, Algeria, with a similar truck in tow, its front wheels resting on the body of the first truck, overtook and passed a scout car driven by a British soldier with whom Captain C. F. Cole, Headquarters Squadron, 6th Armored Division of the British Army, was riding as a passenger. The road at this point was straight (R. 6,8). As accused's truck started to pass there was in view a three ton British "lorry" or truck approaching from the opposite direction at a distance of 600 to 800 yards (R. 8). In his truck with accused were two other American soldiers (R. 7;25,35). The "sustained speed limit" for trucks of the kind accused was driving was 30 miles per hour (R. 44).

Captain Cole testified that as accused passed the British car, the latter was traveling at about 30 miles per hour and that accused probably reached a speed of about 35 miles per hour (R. 6). In describing the position of the British truck advancing towards them, witness testified

"The American truck driven by the accused pulled out to over take me was going on slightly faster than mine took a long time to get past and he was quite anxious to do it but in point of fact he got up to half or three-quarter distance up ahead of my car when he had to pull to one side. He had a truck pulled on behind him which cut me right off the surface of the road" (R. 8,9).

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To avoid a collision the British scout car was forced to pull completely off the hard surface of the road onto a muddy shoulder (R. 10). In the words of the witness, his driver "avoided an accident by swerving off the road onto the verge which was mud purely by skillful handling" (R. 6). Under instructions from witness the driver of the British scout car pursued accused, passed his truck, blocked the road and caused accused to stop. Witness, who was in "battle dress" with his "pips" on his shoulders, demanded accused's name and unit. Accused, who had alighted, replied "I can't fuck around here, I must get to Bone", and returned to his truck and started away. Witness jumped on the running board of the truck. The British driver attempted again to block the road with his vehicle but did not succeed in doing so and drove on ahead (R. 7).

Captain Cole further testified that after the truck had gone about half a mile, accused

"stopped very suddenly, very shortly, in the straight stretch of the road and I got off the running board and he got off, he opened the door of his cab, jumped on the ground and hit me straightaway" (R. 7).

Accused struck witness "a matter of seconds" after he got off the truck, before witness had made any motion or gesture (R. 7,8,12). The first blow was a "very heavy" one on the chin and knocked witness "dizzy". Witness struck back but

"very shortly after I was down on the ground and when I was down, I had my head punched and forced in a pile of stones on the side of the road" (R. 8).

While witness was on the ground accused struck him "quite a number of blows". Accused then drove away but was subsequently overtaken (R. 8).

The driver of the British car, Trooper A. W. Jackson, Headquarters Squadron, 6th Armored Division of the British Army, testified in substantial corroboration of the testimony of Captain Cole (R. 14-17). He estimated the speed of accused's truck at the time it passed the British car to have been about 38 miles per hour (R. 15). He testified

"***all of a sudden, I see on my left this American truck coming and it kept getting closer and closer and in order to avoid running into it I had to go right off the road. So I brought my car to a stand still after skidding and then we stopped" (R. 15).

Accused testified that the British scout car slowed down and that accused then, at a speed of about 30 miles per hour, passed it. When thereafter the British car stopped accused's vehicle and the officer asked for his name and organization, accused "asked him the reason why he wanted it". Receiving no reply accused said he was in a hurry and drove on. The officer mounted the running board. Accused alighted and again asked the officer why he had been stopped. He testified:

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"He gave me no reason, no answer, and he raised his right hand as if to hit me. I pushed him back and he came back on me fighting. I struck him to protect myself, knocked him to his knees. He came back on me fighting again. I knocked him down and then turned and got in my truck and proceeded down the road and I came into St. Charles" (R. 47).

When accused struck the officer the latter "went over backward and he turned over". The officer did not strike his face in any rocks and accused knew he was not hurt badly for accused had not "hit him hard enough" (R. 49). The roads were slippery on the day in question. Accused had never been disciplined for a traffic violation (R. 48).

Technician Fourth Grade Frank Cisar, 2619th Quartermaster Tank Truck Company, testified for the defense that he was in the cab of accused's truck on the day in question. When accused alighted from his truck after the British officer had ridden on the running board, the officer, in apparent anger, "raised his hand" and accused "took a poke" at him knocking him to his knees. The officer "came up fighting" and accused knocked him down again but witness did not see accused strike the officer while the latter was on the ground. If this had occurred witness would have seen it (R. 27,28). Witness believed that accused drove very carefully at all times (R. 29). Witness did not remember seeing accused pass the British vehicle (R. 31). Private Stacey D. Vicars, 2619th Quartermaster Tank Truck Company, a garrison prisoner, testified for the defense that he also was in accused's truck at the time of the events described. Witness observed that accused passed the British scout car. Later, when accused and the officer were on the ground the officer made a motion with his hand as if to strike accused and the latter pushed the officer back and later knocked him down twice, but did not strike him when he was on the ground (R. 36,37,40). Accused did not drive recklessly at any time and did not force the scout car off the road (R. 38,40). Accused had a reputation in his company of being a careful driver (R. 39). The company commander of accused testified that accused was a careful driver and that witness had "never had any trouble with him" (R. 45).

4. There is substantial evidence that at the place and time alleged in Specification 3, Charge II, accused drove his government vehicle in a reckless manner by passing the British scout car when about to meet another truck and by cutting in on the scout car and, through danger of collision, forcing it off the road with consequent hazards to both vehicles and to the occupants. Thereafter accused aggressively and with his fists repeatedly struck the British officer named in the Specification, Charge I. From the nature and persistence of the assault the court was justified in inferring an intent by accused to do bodily harm as charged.

The record of trial is legally sufficient to support the findings of guilty.

5. The only question requiring special consideration is whether the sentence to confinement exceeds the maximum authorized limit.

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The maximum sentence authorized by Paragraph 104c of the Manual for Courts-Martial for an assault with intent to do bodily harm as alleged in Charge I and its Specification is dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year (Table of Maximum Punishments). The remaining offense, reckless driving of a motor vehicle, is not listed in the table of maximum punishments. Neither is it included in or closely related to any offense listed in that table. It is punishable, therefore, only as authorized by Federal statute. The first subparagraph of Paragraph 104c of the Manual for Courts-Martial provides:

"The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment for that offense, for any included offense if not so listed, and for any offense closely related to either, if not so listed. Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service" (Underscoring supplied).

The "statute" thus referred to is a statute of the United States of general or special application in the continental United States and includes the laws of the District of Columbia (C.M. 212505 Tipton). The offense of recklessly driving a motor vehicle, as here found, is identical in all material respects with that denounced by Section 40-605, Title 40 of the Code of the District of Columbia, as follows:

"(b) Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving".

The maximum punishment by confinement fixed by this statute for the "first offense" of reckless driving is confinement for three months (Sec. 40-605 (c) Title 40, D.C. Code).

The offense as defined by the District of Columbia statute covers the operation of "any vehicle" and therefore would cover the operation of the "government vehicle" described in Specification 3, Charge II. The statutory definition of recklessness includes, also, driving in such a manner as to "endanger any person or property" and corresponds, in this respect, with the allegation in the Specification that the driving was such as to cause a "near accident, and endangering the safety of the vehicle". The Specification does not allege nor does the proof show damage to government property through neglect and the Specification does not allege nor does the proof show a willful attempt to destroy government property. The offense found is therefore distinct from and is not closely related to the offenses of damage or injury to military property, willfully or through neglect, as denounced by Articles of War 83 and 84 or to the offense of willfully destroying public property cognizable under Article of War 96.

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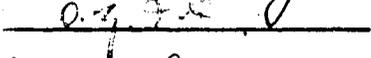
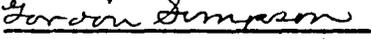
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The maximum sentence to confinement authorized for the offenses of which accused was found guilty is confinement at hard labor for one year and three months.

6. The court was legally constituted. Except as noted above no errors were committed during the trial which injuriously affected the substantial rights of accused. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty but legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and three months.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

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

1. There is transmitted herewith for your action under the fifth subparagraph of Article of War 50½ the record of trial by general court-martial in the case of Technician Fifth Grade Braddie (NMI) Hutto, 2619th Quartermaster Tank Truck Company, together with the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty but legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and three months. I concur in the opinion of the Board of Review and recommend that such portion of the sentence to confinement as is in excess of confinement at hard labor for one year and three months, be vacated. There is inclosed herewith a form of action designed to carry this recommendation into effect should it meet with your approval.



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

2 Incls.

Form of Action
Record of Trial

(Sentence vacated in part in accordance with recommendation of
Assistant Judge Advocate General. GCMO 7, NATO, 3 Feb 1944)

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