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JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD OF REVIEW
OPINIONS

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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 7 B.R. (NATO-MTO)
CM MTO 6427-CM MTO 7658

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AUTH: T JAG 4/15/46 BY: A.G.K.

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

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Judge Advocate General's Department

Holdings Opinions and Reviews

BOARD OF REVIEW

Branch Office of The Judge Advocate General

NORTH AFRICAN THEATER OF OPERATIONS

MEDITERRANEAN THEATER OF OPERATIONS

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Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
12 May 1945.

Board of Review

MTO 6427

UNITED STATES)

v.)

Chief Mate MORRIS I. LEIBY)
(Z 336 044), Boatswain VERNON)
A. FISHER (Z91 383), Purser)
FREDERICK VANDER BUNT)
(Z 438 178), and Carpenter)
EARNEST RICHARD GOETZ)
(Z237 742), all Merchant Marines,)
Steamship Horace Williams.)

XV AIR FORCE SERVICE COMMAND

Trial by G.C.M., convened at Bari,
Italy, 8 March 1945.

LEIBY: Fine of \$5,000.00, con-
finement for five years, and to be
further confined until said fine
is so paid, but not for more than
two years, in addition to the five
years already adjudged.

FISHER: Confinement for five years.

VANDER BUNT: Fine of \$3,000.00,
confinement for four years, and to
be further confined until said fine
is so paid, but not for more than
one year, in addition to the four
years already adjudged.

GOETZ: Confinement for three years.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

2. Accused were jointly tried upon the following Charges and Specifi-
cations:

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

Specification: In that Chief Mate Morris I. Leiby, Purser
Frederick vander Bunt, Boatswain Vernon A. Fisher and

(2)

Carpenter Earnest Richard Goetz, Merchant Marines, serving with the Armies of the United States in the field on board an Army Transport vessel, the S.S. Horace Williams, acting jointly and in pursuance of a common intent, did, on or about 21 January 1945 while on the high seas en route from Port of New York to Algiers, Algeria, feloniously take, steal and carry away 1100 pairs of Ladies Rayon panties of a value of about \$110.00, 36 bolts of white cotton material of a value of about \$72.00; 30 pairs of Ladies shoes of a value of about \$60.00; 30 pairs of Men's shoes of a value of about \$58.50; and 40 Men's suits of a value of about \$516.00, all of an aggregate value of about \$816.50, the property of the United States.

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

Specification 1: In that Chief Mate Morris I. Leiby, Purser Frederick vander Bunt, Boatswain Vernon A. Fisher, and Carpenter Earnest Richard Goetz, Merchant Marines, serving with the Armies of the United States in the field, on board an Army Transport vessel, the S.S. Horace Williams, acting jointly and in pursuance of a common intent, did, on or about 7 February 1945, while in the Port of Algiers, Algeria, knowingly, wrongfully and unlawfully attempt to sell 1100 pairs of Ladies rayon panties of a value of about \$110.00, 36 bolts of white cotton material of a value of about \$72.00; 30 pairs of Ladies shoes of a value of about \$60.00; 30 pairs of Men's shoes of a value of about \$58.50; and 40 Men's suits of a value of about \$516.00, all of an aggregate value of about \$816.50, the property of the United States, the said Morris I. Leiby, Frederick vander Bunt, Vernon A. Fisher and Earnest Richard Goetz, not having the lawful right to sell the same.

Specification 2: In that Chief Mate Morris I. Leiby, Purser Frederick vander Bunt, Boatswain Vernon A. Fisher and Carpenter Earnest Richard Goetz, Merchant Marines, serving with the Armies of the United States in the field on board an Army Transport vessel, the S. S. Horace Williams, acting jointly and in pursuance of a common intent, did, between the date of January 17, 1945 and February 8, 1945, while on the high seas en route from the Port of New York to Algiers, Algeria, wrongfully, unlawfully, fraudulently and in violation of Section 88 Title 18 United States Code, conspire to defraud the United States of 1100 pairs of Ladies rayon panties of a value of about \$110.00, 36 bolts of white cotton material of a value of about \$72.00; 30 pairs of Ladies shoes of a value of about \$60.00; 30 pairs of Men's shoes of a value

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of about \$58.50; and 40 Men's suits of a value of about \$516.00, all of an aggregate value of about \$816.50, the property of the United States.

Each accused pleaded not guilty to and was found guilty of the Charges and Specifications. Leiby was sentenced to pay to the United States a fine of \$5,000.00, to be confined at hard labor, at such place as the reviewing authority may direct, for five years, and to be further confined at hard labor until said fine is so paid, but not for more than two years, in addition to the five years hereinbefore adjudged; Fisher was sentenced to be confined at hard labor for five years; vander Bunt was sentenced to pay to the United States a fine of \$3,000.00, to be confined at hard labor for four years, and to be further confined at hard labor until such fine is so paid, but not for more than one year, in addition to the four years hereinbefore adjudged; and Goetz was sentenced to be confined at hard labor for three years. The reviewing authority, as to each accused, approved only so much of the finding of guilty of the Specification, Charge I, as involves finding that the accused acting jointly and in pursuance of a common intent did, at the time and place alleged, feloniously take, steal and carry away 250 pairs of ladies' rayon panties of a value of about \$25.00, three bolts of white cotton material of a value of about \$6.00, 20 pairs of men's shoes of a value of about \$39.00, and 30 men's suits of a value of about \$387.00, all of an aggregate value of about \$457.00, the property of the United States; only so much of the finding of guilty of Specification 1, Charge II, as involves a finding that the accused acting jointly and in pursuance of a common intent did, at the time and place alleged, wrongfully and unlawfully attempt to sell 250 pairs of ladies' rayon panties of a value of about \$25.00, three bolts of white cotton material of a value of about \$6.00, 20 pairs of men's shoes of a value of about \$39.00, and 30 men's suits of a value of about \$387.00, all of an aggregate value of about \$457.00, the property of the United States, the said Morris I. Leiby, Frederick vander Bunt, Vernon A. Fisher, and Earnest Richard Goetz, not having the lawful right to sell the same; and only so much of the finding of guilty of Specification 2, Charge II, as involves a finding that the accused acting jointly and in pursuance of a common intent did, at the time and place alleged, wrongfully, unlawfully, fraudulently and in violation of Section 83, Title 18, United States Code, conspire to defraud the United States of 250 pairs of ladies' rayon panties of a value of about \$25.00, three bolts of white cotton material of a value of about \$6.00, 20 pairs of men's shoes of a value of about \$39.00, and 30 men's suits of a value of about \$387.00, all of an aggregate value of about \$457.00, the property of the United States; designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Because of the position which must be taken by the Board of Review with respect to the jurisdiction of the court to try the four accused, only pertinent portions of the evidence are summarized and discussed, and no question, aside from that of jurisdiction, will be considered.

4. The evidence shows that the accused Leiby, vander Bunt, Fisher and Goetz were members of the United States Maritime Service (R. 73,74), and

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signed ship's articles of the Steamship Horace Williams, in the capacities respectively, of Chief Mate on 16 January 1945, Purser-Pharmacist Mate on 4 January 1945, Boatswain on 4 January 1945 and Carpenter on 10 January 1945 (R. 75). The Horace Williams was a Liberty cargo ship owned by the War Shipping Administration, an agency of the United States Government, and operated by Prudential Steamship Company, general agent (R. 72,82,83). The vessel was loaded in the Port of New York prior to 17 January 1945 with a general lend-lease cargo of commercial nature (R. 72) by American Export Lines, Incorporated, agents for the War Shipping Administration (R. 83,84). The initial cargo was purchased by the United States Treasury, shipped by the War Shipping Administrator for account of the Foreign Economics Administrator, and consigned to the French Committee for National Liberation (R. 72, 79,83; Exs. 13-23). Captain Jack Hollrock, Master of the vessel (R. 72,105, 120,139,141), testified that the cargo consisted of

"What is called a general cargo. French lend lease cargo consisting of farm machinery, bolts of cloth, electrical equipment, men's, women's and children's clothing, suits, dresses, skirts, clothing, and women's panties was one item" (R. 72).

Copies of part of the ship's manifest and bills of lading, admitted over objection by the defense (R. 79,86,87; Exs. 13-23) showed that the cargo included specifically

"Ship Horace Williams, kind of merchandise, 70 Cartons Women's Panties, Gross Weight 4900 lbs, \$9450; *** kind of merchandise 123 Bales Bleached Sheeting 72", 27697 lbs, \$16934, *** Kind of Merchandise, 475 cartons Women's shoes, 14250 lbs, \$23378, *** Kind of Merchandise 19 cases Men's low Leather shoes, 703 lbs. 34 cases of Men's 2 Pc suits 6800 lbs; *** 1309 bundles of paper bags" (R. 79; Exs. 13-18).

No cargo other than French lend-lease goods was aboard (R. 81).

The ship's company consisted of two French passengers, a crew of 42 officers and merchant seamen including accused, and a United States Navy gun crew of 12, consisting of one officer, two communications men and nine gunners (R. 73,139). No army personnel, munitions or arms were aboard. Upon being asked if he knew of his own personal knowledge the cargo of the other vessels in the convoy, Captain Hollrock testified:

"In convoy routing orders it just states whether they have general cargo, oil, explosives or what, that is given in case of attack, so that we know which ships are carrying explosives, etc" (R. 81).

The vessel was armed with two "3.50 millimeter, one 3" and eight .50 millimeter machine guns" (R. 73,124). The gun crew was assigned to defend the vessel against surface, submarine and air attacks (R. 139). At the wheelhouse was a covered space available for storage. The locker room in the bow

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of the ship, that is the forepeak, consisted of two floors and was used for storage and was also used by the carpenter in the performance of his duties. (R. 80) Neither the wheelhouse nor forepeak were customarily used for storage of cargo (R. 81).

The Steamship Horace Williams sailed from New York on 17 January 1945 bound for Algiers, Algeria (R. 72,112,139). Upon leaving the Port of New York, the ship formed a part of the New York section of a convoy of ten or twelve vessels which were accompanied by two United States destroyers. A rendezvous was made with the Norfolk or main section of the convoy and the ships, about 50 in number, proceeded, accompanied by one American destroyer as senior escort and four other destroyer escorts. (R. 73,139) When the convoy reached Gibraltar the Steamship Horace Williams proceeded independently to Algiers (R. 139) where it docked about 3 February (R. 134) and discharged most of its cargo (R. 73). About 8 or 9 February the ship sailed to La Goulette, Tunisia, and then to Tunis where it discharged the balance of its cargo. The vessel then sailed to Kourba, to Augusta, Sicily and then to Bari, Italy. (R. 73,80,134,139) It was about 309 miles from Algiers to Tunis (R. 134).

While in Algiers, Captain Hollrock was notified that the ship "was going to be turned over to the United States Army to make a shuttle run from Tunis to Bari" (R. 80). At Tunis on an undisclosed date he received a letter from a Lieutenant Freeman who was in Tunis, in which it was stated that Captain Hollrock was "assigned to the Army". At this time the ship was assigned to the shuttle run. It was not stipulated on the ship's articles or manifest that the vessel was a member of the Army Transport Service. No letters were given Captain Hollrock in New York about the Bari-Tunis shuttle run, "they didn't know about it in New York". (R. 82) At Tunis rock crushers, 75 tractors, two cranes and steel landing mats were put on the vessel and carried to Bari (R. 80).

Jose Sanchoyarto, able bodied seaman aboard the Steamship Horace Williams (R. 93), testified that he joined the ship on 6 January and talked with Chief Mate Leiby on 8 January (R. 96). Thereafter witness purchased for approximately \$500 a considerable quantity of women's panties, stockings, lipstick, men's suits and watches, which he stored in his quarters aboard ship (R. 97, 104). A few days later Leiby told Sanchoyarto that he (Leiby) had "a thousand one hundred ladies pants *** material, suits, and shoes, ladie's dresses, girl's dresses" (R. 98). About four or five days after sailing from New York, witness was relieved at the wheel by Leiby and instructed to carry six packages wrapped in dark colored paper, from the deck compartment to the wheelhouse. Witness did so. (R. 98,99) Two or three days later, pursuant to instructions by Leiby, witness carried about 20 more similar packages from the deck compartment to the wheelhouse (R. 99,100). That evening Sanchoyarto attended a meeting of accused Leiby, Fisher and Goetz, and "Angelo" (Angelo Sarli). Witness could not recall if vander Bunt was present. Leiby told Sarli to "keep quiet about anyone having been in the holds *** to keep his mouth shut, and that if he wanted something or other, it was to be found in the holds". (R. 100) After the meeting Sanchoyarto was told by Leiby not to be afraid because Sarli "wouldn't talk", and that "there was a lot of

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(6) money in the wheel house and fore peak" which would be disposed of in Algiers (R. 101).

Able Bodied Seaman Angelo Sarli, a member of the crew, testified that on 27 January 1945 he purchased a pair of shoes from accused Fisher for \$7.00 and wore them about two days. Sarli then returned the shoes to Fisher and asked him if they were stolen. Fisher admitted that they were, asked Sarli to say nothing about it and returned the \$7.00. (R. 105,106) On 29 January Sarli noticed that Leiby was at the wheel and saw Sanchoyarto leave the wheelhouse and remove bags from the number one hatch to the wheelhouse. Sarli relieved Leiby at the wheel at 1700 hours. (R. 106) Because of an odor of camphor or clothing preservative, Sarli had previously noticed bags of the same type under Sanchoyarto's bed in a room occupied by Sarli, Sanchoyarto and Ordinary Seaman John Zatkotvich, complained to Leiby and asked him to have them removed (R. 107,109,111).

On 29 January Leiby told Seaman First Class Eugene Tafrate, Jr., a member of the naval gun crew, that "if everything went all right" he would give Tafrate 2500 francs if he said nothing about Sanchoyarto storing under the wheelhouse "suits and things" which Sanchoyarto had bought ashore (R. 124). The day the vessel arrived in Algiers Leiby told Tafrate that his liberty would not cost him anything (R. 125). About 29 January Leiby told Seaman First Class Gilbert W. Hensch, United States Navy, that Sanchoyarto "had bought stuff ashore" and was going to put it under the wheelhouse. A few days later Leiby told Hensch that if the latter said nothing, Hensch's shore leave would cost him nothing. Hensch saw Sanchoyarto putting several paper bags under the wheelhouse. (R. 131,132)

On 3 February Sarli engaged in an argument with Leiby in the wheelhouse, as a result of which a meeting occurred that night (R. 107,108) attended by Sanchoyarto, Sarli, Zatkotvich and accused Leiby, Fisher and Goetz. Sarli and Zatkotvich were asked not to say anything. (R. 107,108,112) The discussion concerned cargo "stolen and put under the wheel house" (R. 109). "The whole platform for the Chief Mate was to keep your mouth shut" (R. 108). Leiby said that there was plenty of cargo in the hold, asked the men (Sarli and Zatkotvich) why they didn't help themselves and store it under the wheelhouse (R. 107,113). When Sarli suggested "they put all the stuff back and make a clean slate of it" accused Goetz said to "leave it go as it is and forget about it" (R. 113). After the meeting accused Fisher entered the mess hall where Sarli was seated. Fisher, who had been drinking, threw a marlin spike on the mess table and said to Sarli "you are a pretty big fellow but this will take care of you". (R. 108,109) Zatkotvich had also seen Sanchoyarto carrying bags and putting them under the wheelhouse late at night on two different occasions (R. 113).

Sanchoyarto testified further that about two days (7 February) after the Steamship Horace Williams arrived in Algiers on 3 February (R. 101,134), he was called to Leiby's stateroom. Two civilians were present who, Leiby said, "were to buy all the stuff that was on board". Leiby told Sanchoyarto to bring a package from the wheelhouse to Leiby's room. Leiby further said that "he had spoken to two other seamen about it" and that the three men

should be on board that night about 1930 hours "to help get the stuff off of the ship". Leiby said that he would take the Captain ashore "to get him off the ship". (R. 101,102) About 1930 hours Sanchoyarto went to the forepeak and met Fisher, vander Bunt and two seamen who were moving about 60 packages from the second to the first floor of the forepeak. The packages were similar to those Sanchoyarto had moved to the wheelhouse. The two seamen began to move packages from the wheelhouse to the forepeak. As the forepeak was full some of the packages were left on the deck. (R. 102) Sanchoyarto ran when the chief engineer passed by and later took the remaining packages in the wheelhouse and threw them in hold number four. Later that night Fisher told him to put any packages remaining on the deck in hold number four. The next day Leiby told Sanchoyarto not to say anything if anyone talked about it "because he (Leiby) had spent a lot of money and nothing was going to be said". After the ship left Algiers, "somewhere between Tunis and another little port", Sanchoyarto looked in the hold but the packages were not there. Leiby told him that Fisher finally had thrown the bags into the sea. (R. 103)

A day or two (7 February) before the ship left Algiers (R. 122) on 9 February (R. 134), accused Leiby and accused Fisher asked Able Bodied Seaman Enholm (R. 115,119), and accused Fisher asked Able Bodied Seaman Dziadzio (R. 120), both members of the crew, to move some gray paper bags, for which work Enholm and Dziadzio were to receive \$200.00 each (R. 115,120). Together with Sanchoyarto they moved about 30 or 40 (R. 117) paper bags, about two or two and a half feet long by two feet around, from under the wheelhouse and from the lower forepeak to the deck, and from there to the number one hold (R. 116-119,121). Enholm and Dziadzio did not know what was in the bags or whether they were ship's cargo (R. 117,122), but Dziadzio thereafter saw similar bags piled on the hatch (R. 122). Enholm saw the chief engineer rip open one of five or six of the bags and noticed that the contents were a roll of white cloth (R. 118,119).

Third Mate Henry Edward Stoiber testified that he was on watch in the chart room about 1930 hours, 7 February, while the Steamship Horace Williams was in the harbor of Algiers. Hearing footsteps on the flight deck, he investigated and saw Seaman Dziadzio. Investigating further he saw about 25 paper bags on the deck and saw Seaman Enholm taking more from under the wheelhouse. (R. 134) Later Stoiber saw Dziadzio carrying paper bags about three feet long, seven inches high and almost two feet wide, forward of the port anchor, and saw other similar bags on the port side of the boat deck. In the presence of an ordinary seaman Stoiber opened one of the bags laid down by Dziadzio and found it to contain white polo shirts (R. 135,138), similar to shirts he had previously seen in damaged packages of the cargo. Stoiber also met the chief engineer and they in turn saw accused vander Bunt and Goetz, and later accused Fisher, amidships on the starboard side of the vessel. (R. 135) The chief engineer opened one of the bags in Stoiber's presence, and it contained ladies' pink underclothing, similar in appearance to rayon slips (R. 138). Stoiber testified:

"Mr. Fisher came up and said something about putting this cargo back in the hold and forgetting everything. I said

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it is too late for that now, and he said I will go to see the Chief Engineer, Mr. Schnath and see that nothing is said or done" (R. 135).

"Around about 10 o'clock that evening I was sitting in the saloon, *** Mr. Fisher came in and *** said listen we are going to dump this stuff and *** any sone-of-a-bitch, who tries to stop us throwing the stuff over the side will be thrown over the side too, and specified the Chief Engineer, especially, and he repeated the same thing, because he had some drinks on then."

"he told me to keep my nose out of it, said something may happen to you. He then said well I am going to dump that stuff, I said you better not, leave it where it is, so he left. Then at about 4:30 I was sent for to come to the number 1 hatch, I went to the number one hatch and when I got there, I saw that all these bags I had seen on the boat deck and then on the forepeak had been put back in number one hold." (R. 136).

Being put in fear by Fisher's statement, Stoiber did not report the incident to the captain the next day (R. 137). He further testified that at 0430 hours in the morning there were about 60 of the bags, all the same size, in number one hold, but that at 0800 hours when he looked again, the bags were not there (R. 136).

Chief Engineer Charles W. Schnath testified that about 2000 hours 7 February 1945 while the Steamship Horace Williams was in the harbor of Algiers, he investigated a commotion outside his quarters and saw Sanchoyarto and Enholm carrying forward sacks or bags a foot or 16 inches in diameter, about 30 inches high and weighing between 35 and 50 pounds. When Schnath called to Sanchoyarto, the latter dropped the bags and ran aft. Schnath went forward, saw Stoiber, observed about four or five bags near the "off-bitt" and about three dozen sacks in the boatswain's locker. He also noticed a "bun-boat", with motor dead, being propelled by oars toward the ship. It was tied up under the bow of the vessel and two men left it and went ashore. (R. 141-143) Schnath further testified:

"All right, then I went up to my room, just as I was about to enter the room I met the Purser (vander Bunt) and I asked him what was going on or he asked me what was going on, and he says, well it doesn't amount to much, and as much as to say let it go it will get to the black market any how. I said I couldn't see it that way and went into the room, and in a few moments the Boatswain (Fisher) approached me and wanted to know what to do with it or what should be done with it, I said, let it lay as is, leave it lay where it is. He said, well you know they are all in on this, he said even the WSA, all the big shots,

he said do you want to see a couple of us go to jail, what kind of principles have you got. I said, by God, if you call that principles you certainly haven't got any. A little later on he advised putting it back in the hold, which I objected to, I said leave it where it is. Then Mr. vander Bunt, he was very anxious to see it put back in the hold, which I objected to. So, I kept my eyes on it, until about an hour later, that is around 11 o'clock, it was still there when I retired, I got up about 6:30 or quarter of 7 o'clock and come up on the boat deck and the bags were gone. I then went through all the holds and I couldn't find any of it, it was all gone." (R. 143)

"I opened three bags forward, which contained muslin or cambric, I opened another bag in the Purser's presence outside of my room, which contained silk or women's apparel, lingerie or something of that kind, kimonas." (R. 143)

On the ship during the voyage over to Italy (R. 16,27), Leiby twice asked to see Major Farley L. Berman, Headquarters, Eastern Town Command, Mediterranean Base Section, who was appointed to investigate an alleged theft of the cargo. Later, Major Berman warned Leiby of his rights under the 24th Article of War, told him that he need not make any statement which would tend to incriminate or degrade him, and that any statement he made could be used against him. Leiby replied that he "understood that from previous explanations". (R. 16) Leiby orally stated to Major Berman in substance that after leaving New York he inspected the cargo in the hold and found scattered about in the hold some loose cargo from boxes which had been broken by the stevedores while they were loading the ship. Leiby was "talked into" putting this loose cargo into large paper bags and disposing of it in Algeria. The men who persuaded him were the other three accused. About 30 paper bags were filled by the four accused. The loose cargo consisted of "Ladie's pants, Men's suits, Men's and Boy's shoes, and bolts of white sheeting". The four accused then moved the bags to the forepeak. Later Leiby got two seamen to assist him in moving the bags from the forepeak to beneath the covered wheelhouse and, after their arrival in Algiers, from there to the boat deck. The four accused hoped to sell these loose bags of cargo in Algiers for between \$16,000 and \$20,000. They planned to buy money orders and express checks with part of the money, and to turn another part of it into money exchanges in New York at a discount of about 50 percent. They had two prospective buyers, one of whom came aboard the ship to see samples of the merchandise and offered \$8,000 for the loose cargo they had stored in the bags. The deal "fell through" because the chief engineer discovered the bags on the ship the night delivery was to be made. (R. 24-28)

On 4 or 5 March Major Berman visited Leiby at the stockade in Bari, Italy, again warned him of his rights under Article of War 24 (R. 17) and told him that any statement he made could be used against him (R. 19). Leiby then made a statement (Ex. 3) which was, in substance, that the large paper bags containing, to the best of his belief, "between 250 and 500 pairs of ladies

(10)

panties, about 30 mens suits and about 20 pairs of men and boys shoes together with about 16 bolts of white cloth", were finally delivered to the French warehouse in Algiers. Leiby did not personally see or know of any of these large paper bags going over the side of the ship into the water.

On 21 February 1945 Major Berman interviewed accused Fisher to whom he gave a similar warning as to his rights as in the case of Leiby. Fisher then made a statement (Ex. 4) which was admitted in evidence (R. 30-35). In substance Fisher stated that at Leiby's suggestion Fisher, vander Bunt and Goetz agreed to take part of the cargo and resell it at the next port. While Fisher cut the wire bands of the boxes and bales, the other three accused piled the contents in paper bags. From number one hold they took 36 small bolts of white cotton cloth and 1100 "ladies pants", and from number four hold they took 30 pairs of ladies' black shoes, 30 pairs of men's low cut shoes and 40 men's suits. They put the bags in the forepeak which Goetz and Fisher used for their ship equipment. The night before the ship left Algiers the bags were moved from the forepeak to the deck by vander Bunt, Fisher, Sanchoyarto, Dziadzio and one Arne. This was done because vander Bunt and Leiby told them that arrangements had been made with two civilians who had been on the ship that day, and who were to pick up the bags that night. The following morning the 50 bags, less the ones which had been taken and stored under the wheelhouse by Leiby and Sanchoyarto, and which had been piled "by us" on the deck were, to the best of Fisher's knowledge, returned to the proper authorities.

In Tunis, Tunisia, Major Berman interviewed accused Goetz and similarly warned him of his rights (R. 50). He obtained a written statement from Goetz dated 21 February, which was admitted in evidence (R. 60; Ex. 8). Goetz stated in substance that he had read Fisher's statements dated 21 February and that both statements were substantially true and correct (one of Fisher's two statements was actually dated 20 February and was not admitted in evidence - Ex. 6 for identification only (R. 38-46)). Goetz' part in removing the merchandise about 28 January consisted in standing watch and taking the bags which were passed up to him. Although he did not know "exactly" what was in the bags he saw some white sheeting, men's low shoes, "ladies panties", and some men's wool suits in the bags. The bags were removed to the forepeak. Goetz always understood vander Bunt was to make the necessary contacts in Algiers to dispose of the merchandise. Either vander Bunt or Leiby told him it was possible to get about \$200 for one roll of white cloth and \$3 for one pair of "ladies pants". The day they sailed from Algiers, about 8 February, Fisher told Goetz that the chief engineer had discovered the bags the night before and that Fisher had thrown the bags back into number one hold. Goetz went up on deck and saw the bags piled up near number one hold and tied up in a rope net. Goetz had never received any money as a share in the sale of the merchandise "or as a price to keep from talking".

On 19 February, after having been warned of his rights by First Lieutenant John C. Worster, 192d Military Police Company, accused vander Bunt made a statement which was admitted in evidence (R. 9,61-69; Ex. 9). While at sea en route to Italy vander Bunt, after being warned as to his rights, made another statement to Major Berman dated 26 February, which was also admitted in evidence (R. 47,48; Ex. 7). The substance of the two statements was as follows:

About one week after they left New York Leiby showed him some "panties" and said that Fisher and Goetz, while securing the holds, had found some broken cases of "panties", shoes, suits and linen. He asked vander Bunt to "act as agent" and at first vander Bunt declined. However, after "remembering what every one said about part of the cargo going into the black market anyway", he accepted. That night the four accused filled about 30 large paper bags from broken cartons and carried them to the forepeak. If the "deal had gone through", the four accused planned to get the proceeds back to the United States by sending home money orders, having part of the money exchanged by a foreign office in New York and keeping the rest in francs until the end of the war. After arrival in Algiers vander Bunt made an appointment to meet a man with reference to the sale of the merchandise but the man did not keep the appointment. The next day Leiby told vander Bunt that he (Leiby) "had made a contact and that everything was arranged" except the price. At Leiby's request that he "go along to straighten it out" vander Bunt met "Messrs Rita & Albert (who frequent the Pijirale #2 Rue de Gueydon)". As there was some difficulty about the price Rita and Albert came aboard, inspected the merchandise and an agreement was made for a price of \$8000. Although Rita and Albert were to come the next night with a car, they did not appear and that night the chief engineer discovered the cargo on deck. Fisher suggested that the bags be dumped back into the hold but Leiby refused. Later that night Fisher told vander Bunt that all the bags were dumped into the hold. The following morning vander Bunt saw bags "going over the side and into the warshouse. That is the last I saw of it".

For the defense, Captain Hollrock testified that accused vander Bunt was an "excellent purser" and that accused Fisher was a "good Boatswain" (R. 149).

The four accused elected to remain silent (R. 148).

5. The question presented for consideration is whether the accused were within the jurisdiction of the court. The test of the jurisdiction of this court-martial to try accused depends upon whether the evidence supports the allegations in the Specifications that accused were "serving with the Armies of the United States in the field on board an Army Transport vessel, the S. S. Horace Williams". It may be noted that the reviewing authority in his action approved only so much of the findings of guilty of each Specification "as involves a finding that the accused acting jointly and in pursuance of a common intent did, at the time and place alleged", commit the various offenses described in the approved findings of guilty. It may be argued that the reviewing authority literally disapproved the findings of guilty insofar as they related to the allegation that accused were serving with the Armies of the United States in the field on board an Army transport vessel, the Steamship Horace Williams. However, from an examination of the whole record together with the staff judge advocate's review concerning the jurisdiction of the court to try accused, and his recommendations to the reviewing authority, it is evident that the reviewing authority intended to approve the court's findings in this regard. Therefore the Board of Review is of the opinion that inquiry as to whether accused were in fact serving with the Armies of the United States in the field as alleged, is necessary.

It is provided in Article of War 2 that:

"The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles:

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles".

Accused clearly were not "retainers to the camp". Examples of persons who accompany the Armies in the field are Red Cross workers and war correspondents (Dig. Op. JAG., 1912-40, sec. 359 (14); Bull, JAG, September 1942, sec. 359 (8a)). It was not alleged that the four accused were accompanying the Armies of the United States in the field, and from an examination of the evidence with reference to the status of accused, it may reasonably be concluded that the failure to so allege was not only intentional but justified. The basis of possible jurisdiction is therefore narrowed to the possibility that accused were serving with the Armies of the United States in the field within the meaning of Article of War 2 (d).

Charge I and its Specification and Specification 2, Charge II. Accused were tried for the commission of two offenses while on the high seas en route to Algeria, namely, the theft of certain Government property in violation of Article of War 93 (Charge I and its Specification) and conspiring to defraud the United States of the same property in violation of Article of War 96 (Specification 2, Charge II). The Steamship Horace Williams was a Liberty cargo ship owned by the War Shipping Administration, an agency of the United States Government, and operated by the Prudential Steamship Company, general agent. Its cargo comprised French lend-lease goods only, consisting of farm machinery, electrical equipment, bolts of cloth and men's, women's and children's clothing. Insofar as appears none of the cargo was intended for the military service of the United States or of any of its allies. The persons aboard were two French passengers, a crew of Merchant Marine officers and seamen including the four accused, and a United States Navy gun crew. The vessel was armed for defense against air, surface and submarine attack. The ship travelled in a convoy as far as Gibraltar and the convoy was escorted by American Navy destroyers. After reaching Gibraltar the vessel proceeded alone.

There was no evidence whatsoever that the Steamship Horace Williams was an Army transport vessel as alleged while on its way to Algiers, or that it was an Army ship of any description. No Army personnel, munitions, arms or military cargo of any nature were aboard. By virtue of Executive Order Number 9054, 7 February 1942, as amended by Executive Order Number 9244, 16

September 1942 (Note, 50 U.S.C. App. sec. 1295), the War Shipping Administrator is empowered to allocate vessels under the flag or control of the United States for use by the Army, Navy, other Federal departments or agencies, and the governments of the United Nations, but there is no evidence in the record of trial that the War Shipping Administrator had allocated the Steamship Horace Williams for the use of the Army. In view of the nature of the cargo, the contrary is apparent.

The status of merchant seamen has required frequent consideration. It has been held uniformly that crew members of a vessel owned and operated by the Army, such as Army transports, tugs, mine planters and similar vessels, are persons subject to military jurisdiction within the meaning of Article of War 2 (d) (Dig. Op. JAG., 1912-40, sec. 359 (11); Dig. Op. Jag., 1912-30, secs. 1322, 1334; Bull. JAG., December 1942, sec. 359 (11); Bull. JAG., April 1943, sec. 359 (11); Bull. JAG., January 1945, sec. 359 (13d)). As far as sea travel is concerned, in no instance does it appear to have been held that a crew member is serving with the Armies in the field where, as here, he was on a vessel not owned by or allocated to the Army, not under Army control, and not carrying military personnel or military cargo of any description. The instant case is readily distinguishable from NATO 1626, Harris. In that case accused was a Merchant Marine seaman and a member of the crew of a ship owned by the War Shipping Administration and operated by an American steamship company. There was evidence that at the time of the commission of the offense alleged the vessel, flying the American flag, was docked at Brindisi, Italy. She had been engaged in transporting "war materials" from North Africa to Bari, Italy. There was also testimony that the vessel had been chartered to carry British Army supplies to the Mediterranean front. At the time, American and British forces were in joint occupation of Southern Italy and were engaged in a unified and coordinated offensive against the enemy. The American forces so engaged included British and British Dominion units, and the lines of communication were maintained in common by American and British forces. The Board of Review properly held that under such circumstances accused was serving with the Armies of the United States in the field.

A civilian is presumed not to be a person subject to military law and the burden of proof is on the party asserting military jurisdiction (McCune v. Kilpatrick, 53 F. Supp. 80 as digested in 10 U.S.C. sec. 1473; See also Winthrop's, reprint, p. 100). An examination of the authorities with respect to civilians serving with or accompanying the Armies in the field shows that one standard has been applied. Their employment or presence must be directly related to the Army itself, such as the employee of an aircraft company who worked on British planes at an overseas aircraft depot, which was a wholly military installation in former enemy territory, the depot being occupied by Allied forces, and under the supervision of United States Army officers (In re Di Bartolo, 50 F. Supp. p. 929 as digested in 10 U.S.C. sec. 1473; Bull. JAG., September 1943, sec. 359 (12)); crew members of an Army transport or other vessels owned by the Army, or of a vessel carrying Army troops or supplies (see authorities supra). No such direct relation appears in the case under consideration.

Neither can it be said that because the vessel was traveling in a

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convoy escorted by United States Navy destroyers, accused were serving with the Armies in the field. There was no evidence from which it could reasonably be inferred that the other vessels were Army transports or Army vessels of any nature, or that they carried military personnel or military supplies. When asked if he knew of his own personal knowledge the cargo of the other vessels in the convoy in question Captain Hollrock testified:

"In routing orders it just states whether they have general cargo, oil, explosives or what, that is given in case of attack, so that we know which ships are carrying explosives, etc."

The answer to the question was clearly not responsive. It might have referred only to standard operating procedure with respect to convoys in general and not to this particular convoy. Even if it did, the answer does not establish that the other vessels in this particular convoy were Army ships or under Army control, whether they carried military personnel, and whether the supplies referred to were military supplies. Without expressing an opinion as to whether the mere presence of the ship carrying accused in a convoy containing vessels with Army cargo and personnel would bring accused within the category of those serving with the Armies in the field, there is no showing that the Steamship Horace Williams formed a part of the convoy because of reasons other than that of mere protection thereby afforded the vessel itself. There is no evidence that its presence in the convoy was related in any way to the prosecution of the war by the Army.

It may conceivably be argued that because accused were crew members on a vessel carrying French lend-lease goods, they were serving with the Armies in the field in that the furnishing of such goods to French civilians in the area concerned would contribute to their welfare, would partly tend to relieve the Army of the burden of clothing these civilians, and, therefore, would enable the Army to devote more of its attention to the prosecution of the war itself. There may be a tenuous connection between the furnishing of lend-lease goods to French civilians and a consequential benefit to the Army in terms of time, effort and personnel, but the connection is too remote to be considered a legal reality and too remote to furnish a basis for determining that accused were serving with the Armies in the field within the meaning of the Articles of War.

Specification 1, Charge II. What has been said above is equally applicable to consideration of this Specification which alleged a wrongful and unlawful attempt to sell Government property. The various acts of accused with reference to the offense alleged appear to have occurred after the ship reached Algiers about 3 February. The vessel sailed from Algiers about 8 or 9 February. Apparently contact with the prospective buyers was made before 7 February, and on 7 February the packages were gathered on the ship for delivery to the buyers. The evidence shows that while in Algiers Captain Hollrock was notified that the ship "was going to be turned over to the United States Army to make a shuttle run from Tunis to Bari." It must be concluded that the notice did not constitute an actual allocation but referred only to a future allocation. The ship was in Tunis when the captain was informed that he was

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"assigned to the Army", and it was there that the vessel was assigned to the shuttle run and to Army service. At Tunis the ship was loaded with Army cargo which was carried to Bari, Italy. Although it may well be that accused began to serve with the Armies in the field when the vessel was actually allocated to the Army in Tunis, it cannot be said that they were serving with the Armies at the time of the attempted disposal of the merchandise in Algiers.

The instant case is readily distinguishable from that of *In re Berue* in which, prior to the commission of the offense alleged the vessel was assigned by the War Shipping Administration to the Army by letter of allocation without the knowledge of accused, a merchant seaman. Accused boarded the vessel at an Army Port of Embarkation and served as messman. The vessel took on an exclusively Army cargo. Accused later committed the offense alleged while on the high seas (54 F. Supp. 252 as digested in 10 U.S.C. sec. 1473; Bull. JAG., April 1944, sec. 359 (12)). The case is also readily distinguishable from that of *Perlstein v. U.S.* (57 F. Supp. p. 123 as digested in 10 U.S.C. sec. 1473; Bull. JAG., October 1944, sec. 359 (13d)) in which accused worked under contract for a corporation which, in turn, under an Army contract, was engaged in salvage operations in a foreign port in Eritrea. Accused's own contract provided that his employment should terminate if the Army officer in charge should so direct, and that if he was discharged the company was to pay his transportation and subsistence back to the United States. Accused was discharged by the Army officer in charge and, while awaiting transportation home in Eritrea, committed the offenses alleged. Upon a writ of habeas corpus to obtain release from penitentiary confinement under sentence of an Army court-martial for the commission of such offenses, it was held that accused was accompanying the Army of the United States in the field in time of war, that such accompaniment continued while he was still in Africa and, by virtue of his contract, did not cease when employment ceased.

The fact that at the time of the commission of the offense alleged in Specification 1, Charge II, accused were in Algiers during a period in which that city was a supply base within an active theater of operations, and on the lines of communication of the Allied forces then engaged in a coordinated campaign against a common enemy in Northern Italy, is not material. The mere presence of a civilian in a place where an Army unit is situated in an active theater of war, does not constitute serving with the Armies in the field.

The question remains as to whether the allocation of the vessel to the Army in Tunis and accused's subsequent service with the Army acted retroactively as to court-martial jurisdiction with reference to the offenses committed before the vessel was so allocated. The question must be answered in the negative. It has been held that:

"Cases arising under A. W. 81 (relieving, corresponding with, or aiding the enemy) or under A. W. 82 (spies) may be tried by courts-martial, regardless of whether the offenders were subject to military law at the time the offenses were committed. And under A. W. 54 a soldier may be tried for fraudulent enlistment, though the act was committed prior

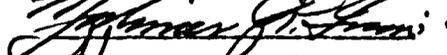
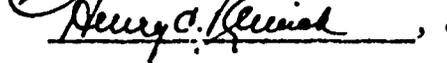
to his induction into the military service. But in the absence of statute the general rule applies that a court-martial has no jurisdiction of an offense committed prior to the entry of the offender into the military service" (Dig. Op. JAG., 1912-40, sec. 369 (2)) (Underscoring supplied),

and see the Manual for Courts-Martial, 1928, paragraph 10. Certainly no broader military jurisdiction is claimable against civilians than may be asserted against soldiers.

6. It was not alleged or proved that accused were by the law of war subject to trial by military tribunals (AW 12). Assuming that acts of accused to the detriment of the success of military operations would violate the law of war (Hamaond v. Squier 51 F. Supp. 227 as digested in 10 U.S.C.A. 1473), it is clear to the Board of Review that the detriment must be palpable and of such direct influence upon the military operations as to become a reality. A remote and conjectural detriment, the most that could be argued in this case, is not enough.

7. The Board of Review is of the opinion that under the circumstances of this particular case, the court-martial had no jurisdiction to try the four accused.

8. For the reasons stated the Board of Review holds that the record of trial is legally insufficient to support the findings and sentence as to each accused.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

MFO 6427 1st Ind.
Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
12 May 1945.

TO: Commanding General, XV Air Force Service Command, APO 520, U. S. Army.

1. In the case of Chief Mate Morris I. Leiby (Z 336 044), Boatswain Vernon A. Fisher (Z91 383), Purser Frederick vander Bunt (Z 438 178), and Carpenter Earnest Richard Goetz (Z 237 742), all Merchant Marines, Steamship Horace Williams, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings and sentence as to each accused, and for the reasons therein stated recommend that the findings of guilty and the sentences be vacated.

MTO 6427, 1st Ind.
12 May 1945 (Continued).

2. After publication of the general court-martial order in the case, 12 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:

(MTO 6427).



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

1 Incl - Record of trial and duplicate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
14 April 1945.

Board of Review

MTO 6436

UNITED STATES)

v.)

Private WILLIE MASON
(38 080 473), Company D,
98th Engineer General
Service Regiment.)

PENINSULAR BASE SECTION)

) Trial by G.C.M., convened at
) Leghorn, Italy, 2 March 1945.
) Dishonorable discharge and
) confinement for life.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

REVIEW by the BOARD OF REVIEW

Sargent, Irion and Remick, 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 Willie Mason, Company D, 98th Engineer General Service Regiment, did, at Borgo a Mozzano, Italy, on or about 17 October 1944, forcibly and feloniously, against her will, have carnal knowledge of Angela Pracchia.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court-martial for violating curfew regulations 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 the term of his natural life, all 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 for the prosecution shows that about 1800 hours on 17 October 1944, Angela Pracchia, a married woman of Campolatturesi, Borgo a Mozzano, Italy, Miss Rosi Plesente and one Florio Flosi, both also of Borgo a Mozzano, were on their way home from Lucca (R. 10,11,18,20). As they went toward "the house" they were stopped by an American colored soldier who wore a helmet and a field jacket with sergeant's stripes and carried a carbine. The soldier fired a shot into the ground (R. 11,12,20-23). Rosi testified that the soldier had been drinking (R. 24). When they told him that they were going home he pushed them into a barracks where there were several Brazilians. He threatened the Brazilians and "wanted to" (R. 12) kill them all because "he thought they were Germans" (R. 21). Angela, who did not understand English, asked the Brazilians for aid but they replied "No talk, he (the colored soldier) understands a lot of Italian" (R. 16). About five or ten minutes later the soldier, who still had his weapon, pushed the three people, Angela and her companions, out of the barracks. They asked the Brazilians to accompany them and two of them did so. (R. 12,16,21,25) Rosi testified that as they left the building the colored soldier fired another shot into the ground (R. 21) but Angela apparently did not hear the shot (R. 15). He said something in English and one of the Brazilians translated "He is going to take you to your house" (R. 12). Although Angela, Rosi and Florio wanted to turn to the right to go home the colored soldier threatened them with his rifle and made them go straight ahead. He kept pushing them along (R. 12,21,25) and was "pointing the rifle up" (R. 25). When they reached the railway crossing about 50 meters from the Brazilian barracks, the soldier pulled Angela by the arm to a place which was a few steps away from Rosi, Florio and the two Brazilians (R. 12,13,17,21,22).

Angela testified that she did not want to go, and that she was saying "no, no, no". The colored soldier kept saying "Yes" and was slapping her on the head with his hand (R. 13). She was calling to Rosi to come and free her but neither Rosi nor Florio did so (R. 13,18). The colored soldier asked her to lie down but she insisted that she did not wish to do so. He held her by the arm with one hand, attempted with his other to take off his jacket, and said "I will put a jacket there". Angela was saying "I won't put myself down". At first he put his weapon on the ground and then he slung it on his shoulder. (R. 14,17) He seized her by the hair, took her by one hand and tore off her "pants". She kept saying "no, no, no" and he replied "A little bit, a little bit". He lifted up her dress, took out his penis and said "Just a little, just a little". He then inserted his penis in her vagina and penetrated her person "Two or three centimeters". He and Angela were in a standing position (R. 14) at that time. He had one hand across her shoulders and around her back, and used the other hand to insert his penis. After his penis remained in her person for four or five minutes, he left her and went away. (R. 15) She did not help him in the act of intercourse. During the act he did not speak. (R. 18) The soldier, who spoke a little Italian, did not offer her money. She did not suffer any physical damage or contract any disease as the result of the incident. (R. 17,19) Angela further testified that the soldier was very dark, had big lips and was about five feet six inches in height (R. 15). She would not be able to identify him if she saw him again (R. 16).

Rosi testified that after the soldier took Angela a few steps away (R. 22), witness remained with the Brazilians and Florio (R. 23). One Brazilian said that he was going to send for "aid, automobile". The Brazilian "was saying when is that machine going to come". He also said not to talk because the colored soldier understood Italian. (R. 23) Rosi could hear several slaps but did not hear the colored soldier say anything. Angela, who was crying, was saying "'Will you look at what he is doing to me'". (R. 22,23) Rosi was frightened and asked a Brazilian if he "could possibly go over and free her" (R. 24). The Brazilians approached the soldier but he pushed them away (R. 25). It was so dark that Rosi could not see what was actually happening but she could see Angela and the colored soldier standing close together (R. 22). The soldier's back was toward the witness (R. 25). Angela and the soldier remained close together for five or ten minutes (R. 22) and then Angela returned crying (R. 27). The soldier departed with the two Brazilians and Angela, witness and Florio went home. On the way Angela told Rosi "all about it". (R. 23) Rosi further testified that the colored soldier was of medium height and very dark, had lips which "were a bit large" and a "somewhat large" face. She would not be able to identify him if she saw him again. (R. 25,26)

Staff Sergeant Charlie B. Burch of accused's organization, Company D, 98th Engineer General Service Regiment, testified that on 17 October 1944 the organization was stationed outside of Ardenza, Italy (R. 27). On that day witness took a detail, including accused, to the vicinity of Borgo a Mozzano, and that night they bivouacked about a quarter of a mile from the village (R. 28,30). When the men came in from work that evening accused was wet and had a cold. Witness gave him his (witness') field jacket "to keep him from catching pneumonia". The jacket bore the stripes of a staff sergeant. Burch saw accused leave camp that night about 1800 hours, carrying a carbine and wearing the field jacket. (R. 28,29) He next saw accused between 2000-2100 hours when two Brazilians came outside witness' tent and said that an American staff sergeant was in trouble. When Burch "got out the door he (accused) was calling from the door". Accused was then wearing witness' field jacket and carrying a carbine. (R. 29)

On 24 October 1944 Agent Alfred L. Galler, Criminal Investigations Division, Office of the Provost Marshall, received a complaint about an alleged rape which occurred about 17 October at Borgo a Mozzano, and investigated the incident (R. 31,32). He interrogated accused on 9 November 1944. He "referred to the 24th Article of War", advised accused that he need not say anything that would incriminate or tend to incriminate him, and informed him that he would not be compelled to answer any questions which would tend to degrade him. Accused replied that he understood. On 12 January witness again interviewed accused, gave him the same advice as he did on 9 November (R. 32,33) and told him that "anything he did say could be used against him in any future court action" (R. 34). Accused then made a statement and signed it in witness' presence. At the trial Galler identified the document as "the second statement made". (R. 32,33) The statement was admitted in evidence, the defense stating there was no objection thereto (R. 34), and was as follows:

"On 17 October 1944, I was with a group of twelve men from my company in a detail in charge of Sergeant BURCH. We were stationed near a small village about twenty miles above Lucca, Italy. Our camp was just south of town. About 1830 hours of that date, I left camp and met a Brazilian Sergeant, whose name and organization I do not know but who was standing on the main road not far from my camp. Together we went and got two (2) bottles of vino at a house on a hill in rear of where the camp was. We then went down from the house where we got the vino to the junction where the main road is. There we stood in front of the Brazilian barracks. I noticed two girls and an Italian man and a Brazilian with them coming towards us from the village. When we all met, the Brazilian with me started a conversation with the Brazilian who was with the two girls and the Italian. Then this Brazilian who was with me asked me if I wanted a girl and pointed to the smaller of the two girls. The Brazilian with me and I then started walking south on the main road. The two girls, the Italian man, and the other Brazilian, were walking together ahead of us. I had walked about fifteen (15) to twenty (20) yards when I fired one round from my carbine into the air while the others were in front of me. We continued walking until we arrived at a railroad crossing on the south end of town. There the two groups stopped and I went up to the girl that was pointed out to me. I pointed to some cane bushes near a picket fence and gestured for her to come with me. I did not grab hold of her, she came along with me after I asked her once. When we reached the spot to which I had pointed, I asked her to lie down but she pointed to the ground and said 'aqua'. I asked her where and she replied 'aqui'. She did not say that she didn't want to lie down but said again 'aqui'. I then started to have intercourse with her while standing up. I asked her to insert my penis to which she said something that I didn't understand. I took out my penis from my trousers and she took hold of it and then inserted it in her vagina. I do not remember tearing her drawers. We had intercourse for about ten (10) minutes when she asked me if I was 'finito' and I answered 'si'. I figured I was not able to 'come' and decided I couldn't do any good so I just quit. Then while I was buttoning up my trousers in front she walked back and re-joined her group. She did not talk during the act and the only thing she said during the time were the three words 'aqua, aqui, finito'. She spread her legs during the act when she found it difficult to insert my penis and even partly raised her right leg off the ground. When I came back to the crossing I found the girls and their party had already gone while the Brazilian

sergeant who was with me was still there waiting for me. He accompanied me to my camp and enroute I fired a second shot from the carbine I was carrying, this shot was also fired into the air. I returned immediately to my tent after shaking hands with the Brazilian sergeant. I then went to bed. Sometime later, Sergeant BURCH woke me and asked me if I had tried to rape any girl while I was gone from the area. I replied in the negative after which two British Officers who were with Sergeant BURCH then said that I 'was not the soldier'. I again fell asleep. Another short time later Sergeant BURCH again woke me and asked me what had happened. I told him that nothing happened and added that 'if you don't believe me I will show you where I was'. I then accompanied Sergeant BURCH, T. J. PATTERSON, and DAVID HUBBARD, to the spot where I had been with the girl. After Sergeant BURCH looked around a bit we then started back to camp when we met HUBBARD and PATTERSON who had been following us. All four of us then came back to camp. I had previously placed the carbine I was carrying that night among others in the tent. I did not enter the Brazilian barracks at anytime that night. I was wearing Sergeant BURCH'S field jacket that night and it had Staff Sergeant stripes on it. On 11 January 1945, I accompanied Sergeant BURCH, T. J. PATTERSON, and Agents Galler and O'Leary, to Borgo a Mozzano, Italy, and there in the presence of the others I identified the railroad crossing referred to as the crossing where I had been with the girl" (Ex. No. 1).

After making the statement accused took Galler and Burch to Borgo a Mozzano and showed them where the incident occurred. It was at a railroad crossing and within view of a Brazilian barracks. (R. 29,30,34,35) Asked if that was the place where he was with "the girl", accused replied in the affirmative and stated that he had intercourse with her (R. 35). On 11 January accused was in a line up with five other soldiers in the presence of Angela and Rosi. Rosi pointed to one of the soldiers, not accused, and said that she thought he was the man who had been with them on the evening concerned but she was not certain of the fact. (R. 35) because "it was too dark" (R. 36).

No evidence was presented by the defense and accused elected to remain silent (R. 36).

4. It thus appears from the evidence that at the place and time alleged accused had unlawful carnal knowledge of Angela Pracchia, the woman named in the Specification, by force and without her consent. Neither the victim nor her companion Rosi identified accused as the assailant, except that they described him as a colored American soldier. However, it is abundantly clear from the evidence, including accused's pre-trial statement, that he was in fact the perpetrator of the offense alleged. Both testified

that he wore a jacket and Angela testified that he wore sergeant's stripes thereon. Angela testified that he was armed with a musket or rifle and Rosi testified that he was armed with a carbine or small rifle. Accused was wearing a borrowed field jacket bearing the stripes of a staff sergeant and was carrying a carbine, both when he left camp that evening and when he returned. Except for the question of consent and the violence used, the circumstances of the assault as described by the witnesses for the prosecution, including the time and place thereof, were substantially similar to those described by accused in his pre-trial statement. It is apparent that the place subsequently pointed out to Galler and Burch by accused as the scene where the act occurred, was the same place described by the witnesses for the prosecution (MTO 6411, Steedley et al).

Accused, who apparently had been drinking, met Angela and her two companions who were on their way home. He fired a shot into the ground with his carbine, forced them into a Brazilian barracks where he threatened the Brazilians and wanted to kill them. He then pushed Angela and her two companions out of the building. Two Brazilians accompanied Angela and her friends at their request. Accused fired another shot into the ground, threatened the people with his weapon, and forced Angela and her friends to walk straight ahead when they desired to turn to the right to go to their home. He kept pushing them along and was "pointing the rifle up". There is evidence that when they reached a railroad crossing accused took Angela by the arm and pulled her a few steps away from the others. She objected and called for help. Accused kept slapping her on the head with his hand and told her to lie down but she refused to do so. He then seized her by the hair and tore off her underwear. Rosi, who was standing a few steps away heard several slaps and heard Angela's cries and remonstrances. The two Brazilians approached accused but he pushed them away. Accused lifted up Angela's dress, took out his penis, penetrated her person and indulged in intercourse with her for four or five minutes while both were in a standing position. When the woman returned to Rosi she was crying.

Accused in his pre-trial statement, admitted that he penetrated the woman's person and that he indulged in sexual intercourse with her, but stated that she consented to the act. The question of consent was solely one of fact for determination by the court which decided this issue against accused. Penetration having been accomplished, the fact that accused may not have had an emission is immaterial with respect to his guilt (MCM, 1928, par. 148b).

The evidence shows that the act of intercourse was accomplished while both accused and his victim were in a standing position. The woman testified that she repeatedly remonstrated with accused before the act was committed, and that she did not assist accused in the act itself. She did not expressly testify that she resisted him to the extent of her ability, that her resistance was overcome by force or prevented by fear, or that she did not consent to the actual act of intercourse. The position of the persons indicates lack of resistance and even submission. However, the evidence shows that accused was armed with a carbine, that he previously twice fired the weapon,

continually threatened Angela and her companions with it, and that he had the carbine in his possession during the commission of the act. These facts together with the other acts of violence visited upon the victim by accused, justify the inference that she did not in fact consent, and that any lack of or cessation of resistance was attributable to her fear of great bodily injury or death. It is rape, though a female may yield through fear. Such being the facts, rape was committed (Bull. JAG, December 1942, sec. 450 (9), pp. 363-364; NATO 3940, Maxey et al). The court properly found accused guilty of rape as charged.

5. The charge sheet shows that accused is 26 years of age and was inducted 13 January 1942. He had no prior service.

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

Edward H. [Signature] Judge Advocate.
[Signature] Judge Advocate.
Henry C. [Signature] Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
23 April 1945.

Board of Review

MTO 6478

UNITED STATES)

92D INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Rear Echelon, 92d Infantry
Division, 5 March 1945.

Private HOLBROOK DUNCAN)
(34 556 585), Company I, and)
Private First Class JOSEPH)
JONES (7 060 543), Company K,)
both of 370th Infantry Regiment.)

As to each: Dishonorable dis-
charge and confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

REVIEW by the BOARD OF REVIEW

Sargent, Irion and Remick, 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, on rehearing, upon the following
separate Charges and Specifications:

DUNCAN

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Holbrook Duncan, Company "I",
370th Infantry Regiment, and Private First Class Joseph
Jones, Company "K", 370th Infantry Regiment, acting jointly,
and in pursuance of a common intent, did, at Frati, Italy,
on or about 24 January 1945, forcibly and feloniously,
against her will, have carnal knowledge of Teresa Brunini.

JONES

CHARGE: Violation of the 92d Article of War.

286583

Specification: In that Private First Class Joseph Jones, Company "K", 370th Infantry Regiment, and Private Holbrook Duncan, Company "I", 370th Infantry Regiment, acting jointly, and in pursuance of a common intent, did, at Frati, Italy, on or about 24 January 1945, forcibly and feloniously, against her will, have carnal knowledge of Teresa Brunini.

Each accused pleaded "To the specification of the charge: Not Guilty. To the charge: Not Guilty". Each accused was found "Of the specification of the charge: Guilty. Of the charge: Guilty". No evidence of previous convictions was introduced. Each 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 under Article of War 48. The confirming authority, the Commanding General, Mediterranean Theater of Operations, confirmed the sentence as to each accused but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for each accused and forwarded the record of trial for action under Article of War 50½.

3. For the prosecution Teresa Brunini testified that she lived at Camaiore, Frati (Italy) (R. 8). She identified each accused at the trial (R. 9), and identified accused Duncan as the stouter of the two men (R. 12). She further testified that about 1730 hours 24 January 1945 both accused appeared at her home (R. 9). At least one of them had a carbine (R. 16). She and her father were in the house at the time. Accused Duncan entered, told her he was hungry and her father replied that they had nothing to eat. Duncan then said "Light, light" and her father answered "We have no light here. We use candles or gasoline!". Witness attempted to leave because she noticed that Duncan appeared to have been drinking. The soldiers went to the door, asked her where she was going and she answered "I am going to the toilet!". One accused talked to her "about mangiare" (eating) and said "I have come from the front and it is ten months since I last saw a woman. Tonight, I will come to your place!". She replied "I am not good for you; go to Camaiore. There is plenty of girls there!". He said "No, I have seen you and I am coming with you!". The other accused then said "You do as this boy wants you to do, otherwise we will kill you!". He closed and locked the door, put the key in his pocket (R. 9) and asked her to go with him to the canal (R. 10). Witness said she was cold and wanted to go into the house (R. 9). After they reentered the house her father opened the window and began to call. One accused pushed him and said "No, no!". The people who lived next door heard her father's shouts and came to the house. One soldier asked "How is it that there are so many people about?", and witness said that the people who had just arrived were her relatives. One accused "got the people together, made them all go up the stairs *** and closed them into a room". (R. 10,16) He returned and witness, who was then alone in the kitchen with the two soldiers, was afraid and called for help (R. 10). One accused moved a sack of flour and a small bundle from the table (R. 10,11) and Jones then seized her and flung her on the table (R. 11). They told her that she had to do what they wanted, that they were not going to harm her and that she was to be good. She struggled and tried to push them away. (R. 12,13).

She testified further that "the stouter of the two (Duncan) mounted me and attempted to rape me". He then got off and Jones got on top of her and tore off her drawers. She screamed that he was hurting her. When Jones "saw that he could not manage, and was forcing himself", he said "'Oil, oil, olive oil'". When witness pretended she did not understand him, Jones arose and began to look in the kitchen cupboard. Duncan then got on top of her again and she begged him to let her alone. Jones found a bottle and lifted it up but she said "'That is bad, that is soda for making soap'". Jones had taken down his trousers. When Duncan was still on top of her, she heard a knocking on the door, and said to Duncan "'Let me alone, let me alone'". The knocking was repeated and as Jones was pulling up his trousers the door was broken open. Both accused raised their hands above their heads and witness ran to escape. The carabinieri who were outside told her to keep calm. (R. 11) Witness further testified as follows on direct examination:

"Q. Getting back to this point where you're on the table, and first one soldier and then the other soldier is on you. Was there, at any time, a penetration made?

WITNESS: I think so, but with the fright and the confusion --I was also struggling all of the time, trying to fling them away.

"Q. Will you state whether or not both soldiers made the penetration or only one soldier.

A. I am not sure. I think only one. First, that night, there was always one or the other on top of me, and I was attempting all of the time to throw them away.

"Q. Can you identify which soldier it was that made the penetration?

A. I think it was the stouter of the two." (R. 12).

Witness then identified Duncan as the accused who, she believed, penetrated her person (R. 12).

About 1730 hours that evening Sergeant James E. Benoit and Private Emmett Russell, 92d Military Police Platoon, were on patrol in Camaiore with the carabinieri when they met three civilians on the street. The civilians stated that they were looking for the police and said two soldiers were up in a house in the hills "bothering a girl". (R. 17,28,29) Benoit, Russell and the police went up to the house. A scream was heard and a girl inside said "'Mama mia'". Russell knocked on the door, which was locked, but it was silent within and no one answered. Russell kicked in the door and the two accused and "the girl" were found inside. The girl ran outside and began to scream. One accused had a rifle or carbine in his hand and Russell took it. Benoit took the rifle of the other soldier which was in a corner (R. 17,18,29). Jones' trousers were open. When questioned, accused said they came to the house to have a can of rations cooked and that they did not know the people who lived there. (R. 17,29) The two accused and the girl were taken to the office of the provost marshal (R. 29,30).

The following morning Benoit took the girl to a stockade where accused and eight other soldiers were present. She identified Jones as the thin soldier and Duncan as the fat one. (R. 18,19)

About 2130 hours on 24 January Teresa was examined by Captain Earl Hawkins, 317th Medical Battalion, who was the officer of the day at the Clearing Station. Her external genitals were reddened and there was a small fresh tear in the lower posterior portion of the vagina. The inner surface of the vagina was reddened and tender. Spermatozoa was found in a smear taken of the secretions and the posterior portion of the vagina. When she was first brought in the girl was timid and was crying. She was somewhat resistant and "tender" when the examination began but finally became cooperative. Asked if she gave "evidence of having been a virgin", Captain Hawkins testified "I found no such evidence on examination". The tear in the lower posterior portion of the vagina could occur as the result of penetration or attempted penetration. Under normal conditions it was not possible for the spermatozoa to be where it was found without penetration having occurred. (R. 21,22)

On 24 or 25 January (R. 23,25; Exs. A,B), First Lieutenant Ralph W. Rhodes, Corps of Military Police, 92d Military Police Platoon, interviewed accused and read and explained to them the 24th Article of War. He told them that they could remain silent and that "if they elected to speak, the words they said could be used for or against them in court". (R. 23) Each accused then made a statement and signed it in Lieutenant Rhodes' presence. The statements were given voluntarily and no promises of reward or threats were made. Both statements were admitted in evidence, the defense stating that there was no objection thereto. (R. 24,25; Exs. A,B)

Duncan's statement was as follows:

"We went up on the hill and me and Jones met his girl and he decided he was going to get him some, while he was up there. So he told me to watch the rifle. Then I set down there and watched the rifle while he went up the hill, I told him that I'd wait for him there ten, twenty or half an hour and I told him I was going down the hill. I showed him the house and said I'd be waiting for him when he got down there.

"I went down there to this house and I walked up to the door and I spoke, this girl she walked out by me then I asked her where was she going, she told me she was going to the toilet. When she came back she stood on the steps and I told her I'd like to talk with her and I ask her, her name. I told her my name. I told her I was up front nine (9) months and just came back for a rest and was going back tomorrow and asked where was her husband, she says she she didn't have any but her sweetheart was working in Viareggio. I ask her did she like me and she said 'No(').

"At that time Joseph came down and he ask me for the bottle I give it to him and he drank and I drank and I handed the bottle back and he finished it and threwed the bottle away. In the meantime I was holding her hand and Joseph felt of her leg. I pushed him away and told her he was bad and Joseph told her he was bad and I was good and he told me to take her on inside and fuck her or take her on down the hill and I told him 'No()', and he said ah man you too easy with these Italians. So we closed the door and locked it and he put the key in his pocket. He went down the path I'd say about fifty (50) yards and turned around and came back and I took the key away from him. I kissed her, she was crying at the time and the Italians was looking and I told him to 'Via'. Then they left.

"I opened the door and me and her and Joseph went inside the house when we got in there he put his can on the table and he put his rifle on the table and I put mine up side a bicycle what was laying in there. Then he told the people to go up stairs and he went up behind them and I stayed down there with the girl, while Joseph was upstairs I told her to kiss me and she kissed me again then Joseph came back downstairs, 'He said lets get this pussy. Joseph set her on the table and I pushed Joseph out of the way and I stood between her legs and she was doing a whole lot of crying, I had my dick out, my dick didn't get hard. Joseph said let me get it so I moved and let him in. Joseph said he didn't have a hard on and he said it was small so he started looking for some oil and he picked up a bottle and she said it wasn't oil, was something bad in that bootle. Joseph couldn't find no oil so she did a lot of crying and said that was enough and told us to stop. So Joseph told her she was going to fuck tonight less we're going to kill her father. I told her Joseph was bad and if she didn't like for her mother and father to be dead to give me some. She didn't say anything, she just kept on crying. So I found that I couldn't get a hard on and I put it back in my pants and lighted a cigarette. I started walking around in the room smoking and Joseph was trying. She was laying up on the table and crying with Joseph on top of her. So I say to Joseph, 'Haven't you got it yet?' He said, 'No, when she cries, my dick won't get hard'. I said, 'I think that I can get it now'. I throw the cigarette in the fire and I went on top. I failed again. I couldn't get up a hard on and I stayed on top two or three minutes.

"Somebody knocked and I got off and grabbed my rifle and said, 'Who's that!' They didn't answer, they kicked the door and there was the MP's. Joseph's pants was unbuttoned when the MP's walked in there. They told us, lets go." (Ex. A).

(32)

Jones' statement was as follows:

"After I left my girl, I went to look for Duncan and I looked in two or three house for him but he wasn't there. Coming down the road to the fourth house, I saw him standing on the steps talking to a girl. I walked up there and I noticed she had tears in her eyes, and he told me he was trying to hav(e) a sexual intercourse and I said 'OK' and patted her on the hips. I said, 'She is fat', then I went in the house I saw an old man and old woman in there. They spoke and I spoke, he told me to sit down. I put my hat on the table and my rifle on something like a cabinet; I set my can of food on the cabinet by my rifle.

"Then I came back outside when Duncan and the girl were standing and I noticed that Duncan and her were kissing but she wasn't resisting; I asked him to give me the bottle. I drank half of it and gave him the other half. While I was drinking she was crying and telling him she was a good Signorina and in Camaiore were lots of Signorinas. I says, 'Oh Hell, go ahead on in and get the pussy.(') I said, 'She is going to cry cause they all cry when you ask them'. I then said, 'I'll help you get it'. I told her that I was mean and he was good and that I'b been up on the front a long time and she got scared and she said something about killing her father and mother. Then I thought and said, 'That is a good idea', and I told her, 'Yeah', if she didn't I'd kill her mother and father. She started crying and said, 'No'. Then the old man came to the door and when he left, I pulled the door to and locked it and put the key in my pocket. Duncan said, 'No give me the key'. I said, 'No, you're too easy with these people'. Then I handed him the key, he unlocked the door and we went inside and I latched the door.

"He was talking to her and she was crying. Then pretty soon the people next door came over and I unlatched the door and let them in and took everybody upstairs cause they were afraid. They was afraid because they were afraid that I would shoot them. There was a door at the steps and I shut it, but didn't lock 'em in. I came back downstairs.

"Then we both started talking to her and I took her and sat her on the table and then I moved everything off the table. Then she started hollering, 'No!', 'No!' Duncan told her would she like for her mama and papa to be killed and she said, 'No'. He said, 'Give me some then?' Then she said, 'No' and struggled. I made a lunge for my rifle like I was going to go up and kill her mother and father, and she said, 'No' and started crying. Then Duncan tried an intercourse with her but his penis wouldn't get hard and I told him, 'hell', if he wasn't going to get it, let me get it. I tried

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and I kissed her and she struggled; my penis wasn't hard so I told him to go ahead on, I couldn't get it. He tried again and while he was trying I was looking for some olive oil. Then he couldn't so then I took her pants off and I tried again, but I couldn't, so I quit. He tried for a long time and I don't know whether he got it or didn't get it, I don't know.

"Then a lots of noise at the door, he jumped and I jumped, she jumped off the table. Before we could unlatch the door, the MP's had broken in. When they came in with a pistol and told us to put our hands up, Duncan had his rifle in his hand, when he saw it was the MP's, he didn't shoot. Then Duncan set his rifle down and we put our hands up. Then the old people came from upstairs, all the old people. The MP's searched us and asked me what I was doing with my pants open. I didn't say nothing. I started fixing my clothes. Then the MP found a key in my pocket, then she ran outdoors and started crying. The MP's had to run to get her.

"I was then brough(t) into MP Headquarters" (Ex. B).

For the defense accused Duncan testified with reference to the circumstances under which he gave his pre-trial statement. He testified that he was questioned by a captain at the military police station who told accused that "my story wasn't nothing, said I had to get a better story". The captain said further that accused Jones "had done laid his cards on the table, *** I got to come out and tell the truth or I would be sunk". (R. 41) Jones later told witness that the captain said Jones would get six months and that witness would get 60 years (R. 41,42). The captain made no promises to witness (R. 41).

Accused Jones testified that before he was questioned the 24th Article of War was read and explained to him (R. 43). A captain and a lieutenant (Lieutenant Rhodes) told him that Duncan had told the whole story, but that they wanted to hear what Jones had to say. Jones replied that he did not care what Duncan had said, that he (Jones) would tell the truth. One officer said that witness might just as well tell the truth because witness would get six months and "someone" would get 60 years. (R. 42)

4. It thus appears from the evidence that at the time and place alleged accused Duncan and Jones assaulted Teresa Brunini, the woman named in the Specification. Armed with carbines or rifles both accused entered her home where Duncan indicated that he wanted sexual intercourse with her. When she told him to go to Camaiore where there were plenty of girls Jones told her to do what Duncan wanted or they would kill her. The girl's father called for help and when the neighbors arrived Jones forced them upstairs and shut them in a room. He returned to the kitchen, cleared the table and flung the girl on it. Duncan lay on top of her and "attempted" to rape her. He then arose and Jones got on top of her and tore off her drawers. The girl was crying and screamed that he was hurting her. Jones "could not manage", arose and

searched for olive oil. Duncan again lay on top of her and the girl, who was still crying, begged him to leave her alone. Jones took down his trousers and Duncan remained on top of her for two or three minutes. Both accused threatened to kill her parents if she did not yield. During the entire incident she struggled and tried to push them away. When the two military policemen and the carabinieri arrived the girl was heard to scream and say "Mama mia". The door was locked and one military policeman broke it open. When they entered the house the girl ran outside. Jones' trousers were open. The victim testified that although she was not certain of the fact, she believed one accused actually penetrated her person and further testified that she thought it was Duncan. The testimony of the victim as to the circumstances of the assault was substantially corroborated by each accused in his pre-trial statement. Each accused admitted that he attempted to have sexual intercourse with her but failed because he was unable to have an erection.

The medical evidence plainly showed that penetration was in fact accomplished. The woman's external genitals were reddened and a small fresh tear was found in the lower posterior portion of the vagina. The inner surface of the vagina was reddened and tender, and spermatozoa was discovered in smears taken from the secretions and the posterior portion of the vagina. Captain Hawkins, who examined the woman, testified that under "normal conditions" it was not possible for the spermatozoa to be where it was found without penetration having occurred.

Penetration having been established the question as to which accused actually accomplished it was immaterial. The facts and circumstances, including the pre-trial statement of each accused, amply show that they acted jointly and in pursuance of a common intent. It is clear that they were looking for a woman and invaded the victim's home with that intent. Each rendered active aid and assistance to the other during the assault and at least one accused penetrated the woman's person. As an aider and abettor each was guilty as a principal (MTO 6411, Steedley and Willis). Both accused were properly found guilty of rape as charged.

5. Each accused in his pre-trial statement made reference to the acts of the other accused in the commission of the crime. These statements were admitted in evidence unconditionally. The court should have been advised not to consider the statements in so far as they involved the acts of the accused who was not the author of the statement. However, the acts related by each accused in regard to the other were substantially admitted in the statement of the other accused and the Board of Review is of the opinion that the substantial rights of either accused were not injuriously affected thereby.

6. Accused were formerly jointly tried on 11 February 1945 on the Charge and Specification on which Duncan was here arraigned. Each was found guilty and sentenced to be hanged by the neck until dead. On 19 February 1945 the reviewing authority disapproved the sentence as to each accused, ordered a rehearing and referred the Charges for trial to the present court which heard the case 5 March 1945. The present court was composed of officers who were not members of the court which first heard the case, and neither accused was tried for any offense of which he was found not guilty by the first court (MCM,

1928, par. 89, p. 80). Upon the rehearing no sentence in excess of or more severe than the original sentence was enforced (MCM, 1928, par. 87b, pp. 73, 74).

7. The charge sheets show that accused Duncan is 23 years of age and was inducted 20 November 1942, and that accused Jones is 24 years of age and enlisted 18 June 1940. Neither accused had prior service.

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

Edward W. Hays Judge Advocate.

(sick) _____, Judge Advocate.

Harry C. Reisch, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
23 April 1945.

Board of Review

MTO 6478

UNITED STATES)

92D INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Rear Echelon, 92d Infantry
Division, 5 March 1945.

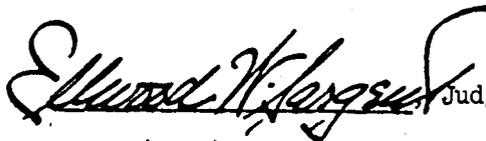
Private HOLBROOK DUNCAN)
(34 556 585), Company I, and)
Private First Class JOSEPH)
JONES (7 060 543), Company K,)
both of 370th Infantry Regiment.)

As to each: Dishonorable dis-
charge and confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

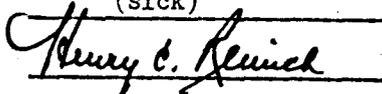
HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

The record of trial in the case of the soldiers named above has been examined by the Board of Review and held legally sufficient to support the sentences.

 Judge Advocate.

(sick) _____, Judge Advocate.

 Judge Advocate.

MTO 6478

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
23 April 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private Holbrook Duncan (34 556 585), Company I, and Private First Class Joseph Jones (7 060 543), Company K, both of 370th Infantry Regiment, attention is invited to the foregoing holding by the Board

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CONFIDENTIAL

(37)

MTO 6478, 1st Ind.
23 April 1945 (Continued).

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 50¹/₂, 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:

(MTO. 6478).



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

(Sentence as to each accused as confirmed ordered executed.
GCMO 68, MTO, 23 Apr 1945)

CONFIDENTIAL



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
21 April 1945.

Board of Review

MTO 6525

UNITED STATES

v.

Corporal SHELTON McGHEE, SR.
(34 529 025), 3823d Quarter-
master Truck Company, 133d
Quartermaster Battalion
(Mobile).

PENINSULAR BASE SECTION

Trial by G.C.M., convened at
Leghorn, Italy, 3 February
1945.
Death.

REVIEW by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

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

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

Specification: In that Corporal Shelton McGhee, Sr., 3823rd Quartermaster Truck Company, 133rd Quartermaster Battalion (Mobile), did, at Livorno, Italy, on or about 15 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician 5th Grade George W. Brown, 3823rd Quartermaster Truck Company, 133rd Quartermaster Battalion (Mobile), a human being by shooting him with a pistol.

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

Specification: In that Corporal Shelton McGhee, Sr., 3823rd Quartermaster Truck Company, 133rd Quartermaster

Battalion (Mobile), did, at Livorno, Italy, on or about 15 December 1944, draw a weapon, to wit a pistol against First Lieutenant James A. Green, 3823rd Quartermaster Truck Company, 133rd Quartermaster Battalion (Mobile), his superior Officer, who was then in the execution of his office.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. All members of the court present concurred in the findings and the sentence. 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, Mediterranean 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 for the prosecution shows that on 15 December 1944 accused and Technician Fifth Grade George W. Brown (the deceased) were members of the 3823d Quartermaster Truck Company, 133d Quartermaster Battalion, and were stationed at Leghorn (Livorno), Italy (R. 8,9). About 1130 hours 15 December accused, Brown, Private John F. Jones, Company A, 8th Replacement Depot, and other soldiers were playing dice by the gate to the company area, near the guard shack. The men were using one dice and were playing "head-up" dice or "high dice". (R. 9,16,25). The guard "broke * * * up" the game and the men then went behind the guard shack and played for several minutes (R. 9,10,16,17). Jones, who lost ten dollars, stopped playing and three more men also dropped out of the game. Accused and Brown played about 15 minutes longer and Brown won all accused's money (R. 25). Accused said "nobody takes nothing from me" and Brown replied "I took these" or "I took this" (R. 10,14,17). Accused then left the group and walked toward the company area saying "No man takes nothing from me" (R. 10,17,25,26). When accused was about 25 or 30 feet away from the group he turned, reached inside his coveralls and drew out a "P-38" pistol from his bosom, pointed it at Brown and fired one shot. Brown fell to the ground (R. 10,11,14,17,18,21,22,25-27,29) Just before the shot was fired Brown was looking away from accused, down a highway. The side of his body was toward accused and his hands were down by his sides. (R. 26,27,29) After he fell, accused walked toward Brown and fired about four or five or more shots at him as he lay on the ground (R. 11,14,15,18,19,22,23,27,28). When he reached Brown's body accused kicked him twice on the right side of the head, put his left hand in the left hand pocket of his trousers and said that he was going to kill everyone (R. 11,14,19,28,30). The group scattered and ran (R. 12,19,23).

First Lieutenant James A. Green, accused's company commander, saw accused near the dispatch office about 1130 hours (R. 35,36). He had a "P-38" pistol in his hand and Lieutenant Green saw him put a cartridge in the chamber. Lieutenant Green walked toward him and asked "What are you doing with the gun?" Accused, who appeared to be very excited,

replied "Nobody's going to take this gun from me. I killed one man, and I'll kill you". When the officer said "I don't know of any reason I wish the gun", accused again said "I'll kill you". He then raised and cocked the pistol, stepped backward and pointed the weapon at Lieutenant Green, who turned and ran toward the gate. As he ran he looked back and saw accused pointing the pistol at him and pulling the trigger. (R. 37) At the time Lieutenant Green was dressed in "OD" uniform and a field jacket, and had the bars of a first lieutenant on his shoulders, cap and collar (R. 38).

Brown, who was conscious and bleeding in the abdomen, was taken to the 64th General Hospital in a truck by Jones and some other soldiers (R. 12,20,28). He was given plasma treatment but stopped breathing about five minutes after his arrival. He died at 1205 hours, 15 December (R. 31-33). There was one bullet wound in his side and eight in the front of his body. The wounds were severe and caused his death. (R. 32, 33) Jones identified Brown at the hospital (R. 28,29,34,35).

One witness testified that to his knowledge accused and Brown were friends (R. 14). Jones testified that he had known Brown about two years, that he had never known him to carry a weapon of any kind and that he was not carrying a weapon that day (R. 30). Asked if Brown owned any weapons Jones testified that he had two (R. 30,31). Another witness testified that he had not seen Brown do anything (R. 22). Jones testified further that "we just drunk a quart of cognac that day" (R. 30). Although the liquor belonged to Brown (R. 25), he (Brown) did not drink any of it but accused "took a drink or two" (R. 30).

For the defense Private Richard R. Lipscomb of accused's organization, testified that accused and Brown were on friendly terms and were together the evening before the shooting (R. 38,39). Technician Fifth Grade Harold Smith of the same organization, testified that he knew of no quarrels between the two men. He testified that Brown owned a pistol (R. 39,40). Second Lieutenant Robert C. Schaut, mess officer and platoon leader in the organization, testified that he had known accused "since the first part of June", and that he would rate him very satisfactory if not excellent as a soldier. He performed his duties well and witness never had any trouble with him. (R. 43,44)

Accused testified that about noon the day of the homicide he was in Brown's tent with some other soldiers. He told Jones that he (accused) had bought a P-38 from a soldier two evenings before. Jones asked to see the weapon and accused showed it to him. Brown said "Let me show you guys a gun", pulled up a plank from the floor and took out a box in which there were two pistols. Brown then suggested that they obtain a drink and they went to an Italian bar which was off limits. Brown bought a glass of anisette and accused purchased a bottle of cognac but did not break the seal. They brought the liquor to the guard shack where several of the soldiers started to play dice with one die. The man who rolled the highest number would win. After the guard told them to move to the rear of the guard shack they did so. There they began to play with two dice and accused lost all his money. (R. 42) Accused

(42)

testified further that he borrowed \$15 from a soldier named Cooper and "ran it up" to about \$50. They were playing for \$5 a roll and the other players "got broke". Accused had \$30 in his hand and Brown had \$50 "to shoot". Accordingly, accused put down \$5. "I puts \$10. down, and picks \$5. I put down the \$10 and pick up \$5, and left \$25 in my hand". Brown said "Want to fade it?" When accused said "I am fading it", Brown replied "You are not", and said "You all go ahead and play". Accused said "You are taking it?", whereupon Brown answered "Well, if you call that taking it, then I am taking this". Accused walked away from the game, turned around and saw Brown standing. Accused walked on about two paces, turned around again and saw that Brown "was doing like that" (indicating). (R. 42) Accused testified

"I don't know if he had his hand in his bosom, and several times I had seen him— He had a gun, and I didn't know if he was going to shoot me or what, and I guess I lost my mind or something because I took out the gun and pulled the trigger" (R. 42).

Accused testified further that he thought Brown was reaching for a firearm (R. 43) and

"Never do know if he would shoot at anybody and if he could shoot you, he— and if you don't beat him— well—" (R. 42).

Asked why he thought Brown would shoot him accused testified:

"Well, Sir, if a fellow takes something from you and tells you that he has got that, and is taking that, I think he is capable of doing anything. If a fellow is almost— The way I figured, he knew that I had a gun cause he had seen it, he had seen my gun. The way I figured—I don't know—I figured the only thing I figured is that he was intending to shoot me" (R. 43).

4. It thus appears from the evidence that at the time and place alleged accused killed Technician Fifth Grade George W. Brown, the person named in the Specification, Charge I, by shooting him with a pistol. Before the homicide accused and Brown were engaged in a dice game with other soldiers. After several of the players dropped out of the game Brown won all accused's money. Accused said that no man could take anything from him, left the group and repeated his remark as he walked away. When he was about 25 feet from the men he turned around, drew the pistol from his clothes, aimed it at Brown and fired a shot. After Brown fell to the ground accused walked toward him, fired several more shots into his body, and kicked him twice in the head. Then he threatened to shoot others.

Accused testified in substance that when he turned after walking away from the group he saw Brown make a movement, thought that Brown was going to shoot him, and fired first in order to beat him to the draw. None of the witnesses to the shooting corroborated accused's version thereof. There was evidence that when accused first fired Brown was looking away from him, down a highway, that the side of his body was toward accused, and that his hands were down by his sides. There was evidence that he did not have a weapon in his possession and that he did not threaten accused in any manner. The credibility of accused as well as the weight to be given his testimony was within the discretion of the court which rejected accused's version of the homicide and determined the issue of self-defense adversely to him. In this, it was warranted. Further, the purported conduct of the victim during the game and afterward, as stated by accused, was not such as to form reasonable grounds for a belief by accused that he was in imminent danger or that his resort to firearms was necessary in self-defense. Deceased's conduct offered no provocation sufficient in law to reduce the degree of the homicide.

The homicide was without legal justification or excuse. Malice was inferable from the use of a deadly weapon in a willful, deliberate and vicious manner, the statement by accused just before the shooting that no man could take anything from him, the fact that he fired several shots at the victim when the latter was lying wounded on the ground in a helpless position and obviously unable to harm accused, and by the fact that after he ceased firing accused twice kicked the victim in the head. The evidence furnished a reasonable basis for the inference that accused shot Brown because he was angered by the fact that Brown won all his money in the dice game. Accused was properly found guilty of murder in violation of Article of War 92 as charged (MCM, 1928, par. 148a; MTO 6165, Brooks).

It also appears from the evidence that at the time and place alleged accused drew a pistol against First Lieutenant James A. Green, the person named in the Specification, Charge II, who was a superior officer and then in the execution of his office. When, shortly after the shooting, the officer questioned accused about his use of the pistol, accused threatened the officer, raised and cocked the pistol which he had just loaded, pointed it at the officer and pulled the trigger. The officer was accused's company commander and was wearing his insignia of rank on his cap, shoulders and collar. There was no evidence which indicated that accused did not recognize him. Accused was properly found guilty of drawing a pistol against his superior officer in violation of Article of War 64 as charged (MCM, 1928, par. 134a, pp. 147, 148).

5. The charge sheet shows that accused is 28 years of age and was inducted 6 February 1943. He had no prior service.

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6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92.

Edward H. Berg Judge Advocate.
William P. Smith Judge Advocate.
Henry C. Blumick Judge Advocate.

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
21 April 1945.

Board of Review

MTO 6525

UNITED STATES)
)
 v.)
)
 Corporal SHELTON MCGHEE, SR.)
 (34 529 025), 3823d Quarter-)
 master Truck Company, 133d)
 Quartermaster Battalion)
 (Mobile).)

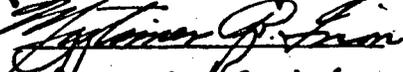
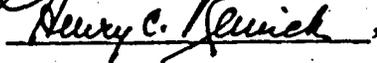
PENINSULAR BASE SECTION

Trial by G.C.M., convened at
Leghorn, Italy, 3 February
1945.
Death.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

 , Judge Advocate.
 , Judge Advocate.
 , Judge Advocate.

MTO 6525
1st Ind.
Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
21 April 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Corporal Shelton McGhee, Sr. (34 529 025), 3823d Quartermaster Truck Company, 133d Quartermaster Battalion (Mobile), attention is invited to the foregoing holding by the Board of Review that the record of

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MTO 6525, 1st Ind.
21 April 1945 (Continued).

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:

(MTO 6525).



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

(Sentence ordered executed. GCMO 67, MTO, 21 Apr 1945)

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leave from his organization at La Goulette, Algeria from about 30 June 1943 to about 8 July 1943, to the prejudice of good order and military discipline.

He pleaded guilty to the Specification "except the words 'with knowledge of the fact that his organization was about to participate in an amphibious combat operation and with intent to avoid the said amphibious combat operation, unlawfully and deliberately'. To the excepted words, Not Guilty" and guilty to the Charge. He was found guilty of the Specification "except the word, 'Algeria', substituting therefor the word, 'Tunisia'. Of the excepted word, not guilty; of the substituted word, guilty, and Guilty of the specification as amended" and guilty of the Charge. 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 thirty (30) years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence and ordered it executed but suspended execution of the dishonorable discharge until the soldier's release from confinement and designated the MTOUSA Disciplinary Training Center as the place of confinement. The proceedings were published in General Court-Martial Orders No. (627,) Headquarters (Peninsular Base Section), 9 April 1945.

3. Two extract copies of morning reports of Battery B, 32d Field Artillery Battalion, one for the period ending 2400 7 July 1943 and the other ending 2400 21 August 1943, were introduced in evidence without objection by the defense. The respective entries are as follows:

(7 July 43)

"7004530 Thacker, Jack Pvt
Duty to AWOL 1031 as of 30 Jun 43" (Ex. 1).

(21 Aug 43)

"7004530 Thacker, Jack Pvt
AWOL to S/D 1st US Inf Div Cas Det
1200 as of 8 Jul 43" (Ex. 2).

It was stipulated on behalf of the prosecution that on the above stated dates accused was a member of Battery B, 32d Field Artillery Battalion, and that on 30 June 1943 this organization was located in the vicinity of La Goulette, Algeria (R. 6).

4. Accused testified that in June 1943 he was a member of the howitzer section of Battery B, 32d Field Artillery Battalion. Between 10 and 24 June 1943 his organization was bivouacked near Oran, Algeria, during which period he, with his section, engaged in amphibious training operations and waterproofed all vehicles and equipment in the battery (R. 14). He was assigned to the "LCI" which was commanded by his company commander and went from Oran to the staging area in the vicinity of La Goulette on that landing craft. He did not see their equipment after it was loaded on ship at Oran. After landing in the vicinity of La Goulette he knew he was at a staging area but he was not restricted to the area (R. 15) and never received any notice that he was alerted

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for an invasion (R. 12). All members of his organization knew there would be an invasion "sometime" but they did not know when and "there was all kinds of rumors that there wasn't going to make an invasion because we went through one campaign. We didn't think we could make another" (R. 15). Accused further testified that

"When we landed in Tunis we went to an area there, an open field. It was the 30th of June if I remember right, that date. We didn't have no equipment. We loaded the equipment on boats before in Oran, before we came to Tunis. So then in the afternoon they were sending trucks down to the base going swimming, sending for guys to take showers. So me and these other fellows, you got the names over there, we walks up to Tunis. We drove by Tunis before and we was almost there before but we didn't see Tunis. So we wanted to see the town. We went up there that day and at night we thought we'd come back. We was drinking heavy. On the way back we meet a civilian fellow who seemed to be in the whisky business. He invited us to his house. We stayed in the house three days and a half. The next day we went back to our bivouac area and when we got there we were told they had pulled out. I was in B Battery and they had already gone on. We went down to the docks to the intersection and the three of us got out, Kordek, Hammer and me" (R. 11).

He had no permission to leave the area. After returning from Tunis, Hammia, Kordek, and accused separated from their other three companions and went to the docks where boats were being loaded. A sailor took them out to six different ships in the port but they were unable to find their organization. Accused further testified that

"After we couldn't find it, we came by and went on this tower where they send signals out to the boats and we tried it; the fellow on duty tried to find our boat from there but he couldn't find it * * *"

and that

"We come back down and we went up and stayed with this British unit the rest of the night, I didn't know what unit it was, and they told us there was a convoy at Bizerte supposed to go out and they told us our boat probably would be in Bizerte. The Navy Lieutenant took us to Bizerte in the jeep. We never found the boat. We came back to the same place and this Captain told us to go to the rear echelon" (R. 12,13).

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"A captain" at the rear echelon of the 1st Division, which was in that vicinity, told them to remain there until he found out where their outfit was going and that he would then send them to join it (R. 13). Accused further testified that he landed in Sicily about 14 or 15 July with the rear echelon of the 1st Division. He never did rejoin his own organization because about six days after landing in Italy he was injured in a bombing raid and was evacuated to a hospital. He has been in the Army five years and is now classified for "limited assignment". He further testified that he was capable of performing full duty and that "I would like to get reclassified and get out of the replacement depot and get in some outfit" (R. 14).

As will be hereinafter more particularly set forth, the president of the court, at the close of the prosecution's case, stated that additional evidence was required.

5. After accused concluded his sworn statement the defense announced that the defense rested. Thereafter the following transpired:

"President: At the termination of the last hearing, the last session of this case, the court directed that certain evidence be secured for the court establishing whether or not the 1st Division made the invasion of Sicily; whether or not the 1st Division was engaged in active training immediately prior to making such invasion.

Prosecution: Yes, sir.

President: Produce the evidence.

Prosecution: The prosecution offers in evidence and asks that it be marked the Court's exhibit 1 the deposition of Captain Francis E. Silva, Jr., Battery B, 32nd Field Artillery Battalion, APO #1, U. S. Army. Is there any objection by the defense to the introduction of this deposition.

Defense: The defense will make certain remarks at the closing" (R. 16).

The defense did not at any time make "certain remarks" which may be construed as consenting to the introduction of this evidence.

The deposition referred to was introduced in evidence as "Court's Ex 1". In that deposition Captain Francis E. Silva, Jr., 32d Field Artillery Battalion, testified that during the month of June 1943, Battery B, 32d Field Artillery Battalion, of which he was executive officer, was engaged in "Training for amphibious operations" in preparation for an amphibious landing on enemy shores, and that

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"Private Thacker was a member of one of the howitzer sections of the Battery and as such received instructions in waterproofing the howitzers and section equipment. He also participated in several practice landing aboard LCTs and LSTs".

On 24 June the Battery, less those assigned to the "Later Day Convoy", embarked at Arzew and Port Aux Poules and sailed to an assembly area in the vicinity of La Goulette, Tunisia. Prior to that date sailing lists, assigning members of the battery to various landing craft, were posted. On this trip accused accompanied the battery commander aboard an "LCI". Witness further testified that

"From speaking to the men prior to the time any definite orders were received by the organization, I learned that all were convinced that we were to participate in another invasion and the only question seemed to be the time and place and concerning these, many wagers were made within the organization";

that

"When I arrived at La Goulette on 2 July 1943, the Battery Commander told me that all men of the organization except those on my LCT had been warned of the restriction by him at a roll call formation";

and that

"All personnel were restricted to the limits of the area until reembarkation";

and that "The organization left Africa on 5 July 1943 and landed in Sicily on 10 July 1943". Witness further testified that he had known accused for approximately two years prior to June 1943 and rated his military efficiency as "Good". Accused "had been a corporal twice, but had been broken both times for inefficiency, after having been AWOL".

6. Immediately following introduction of the evidence set forth in the last preceding paragraph the following transpired:

"Defense: * * * In view of what has transpired before this court, the defense feels that he has no alternative but to introduce that (a stipulation as to the statement of Private Goodfellow) inasmuch as it does not in any way support the position taken by the accused taken on the stand under oath. If the prosecution is willing to stipulate, the defense is willing to introduce that" (R. 21).

Thereupon, it was stipulated on behalf of the defense that if Private Albert Goodfellow, 32d Field Artillery Battalion, were present in court he would testify that

"I left the organization's bivouac area in the vicinity of La Goulette, Tunisia, on 30 June 1943. I met Pvt Thacker outside the area and remained with him for the rest of my absence. Seven of us, including Pvt Thacker, went back to La Goulette on or about 5 July 1943 and found that the organization had moved. Hooper, Busell, Lloyd and I went to the harbor at La Goulette and contacted the port authorities who provided us with an LCA which took us to our respective vessels. I didn't see Thacker, Kordek, or Hammer, after we had left them at the staging area" (R. 22).

7. The legal evidence, including admissions by accused, together with his pleas of guilty to absence without leave, thus shows that during the early part of June 1943 Battery B, 32d Field Artillery Battalion, of which accused was a member, was engaged in a program of amphibious training in the vicinity of Oran, Algeria. After completion of this training all vehicles were waterproofed and loaded on landing craft. Accused's organization then sailed from Oran and landed at a staging area in the vicinity of La Goulette, Algeria. All members of the organization knew that there would be an invasion "sometime". At this staging area accused absented himself without leave from his organization and, together with other members of his battery, went to Tunis. He did not return to the staging area until on or about 8 July. At the time of his return his organization had sailed. The evidence clearly establishes accused's unauthorized absence for the period alleged. It is a matter of judicial knowledge within this theater that elements of the 1st Infantry Division participated in amphibious operational landings in Sicily about 10 July 1943.

8. The specification of which accused was found guilty, with immaterial exceptions and substitutions, alleges, in pertinent part, that he "with knowledge of the fact that his organization was about to participate in an amphibious combat operation and with intent to avoid the said amphibious combat operation" did absent himself without leave from his organization, "to the prejudice of good order and military discipline". This offense was alleged to be a violation of Article of War 96. The specification does not expressly allege that the acts of accused amounted to desertion and does not, in the verbiage of Article of War 28, allege that accused quit his organization with the intent to avoid "hazardous duty" or to shirk "important service". However, if there be need for authority that an "amphibious combat operation" is both important service and hazardous duty such authority is abundantly available (CM 151672, Lytle; CM 224805, Conlon; NATO 2277, Disher). In his review of the record of trial the staff judge advocate correctly characterized the offense found as desertion.

The circumstance that the specification was laid under Article of War 96 in lieu of Article of War 58 is not material (NATO 2876, Gay). There is no ambiguity or contradiction in the specification as to the acts of accused. The characteristic elements of the offense, properly laid under Article of War 58, were not changed by the erroneous substitution of a different

Article of War. As was said in the Gay case, supra, it is likewise true in the instant case that

"Where * * * the specification upon which accused was found guilty is unequivocal in its appropriate allegations, the mere designation of the general Article of War instead of the specific one, cannot be of material consequence or affect the legal consequences incident to the finding of guilty of that offense".

Nor does the absence of an express finding of the word "desert" and of an express finding that the amphibious combat operation was "hazardous" or "important", alter the legal effect of the findings of guilty. The following, from an opinion in a case in which it was alleged that accused was "under the influence of intoxicants * * * thereby rendering himself unable to fully perform his duties" in violation of Article of War 96, states the legal principles involved:

"Specifications 2 and 3 do not, in the verbiage of Article of War 85, allege that accused was 'found drunk' but each alleges that he was 'under the influence of intoxicants * * * thereby rendering himself unable to fully perform his duties'. The Manual for Courts-Martial defines the drunkenness denounced in Article of War 85 as

'any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties' (MCM, 1928, par. 145).

Terms such as 'under the influence of intoxicants' and 'intoxication' have long been held to be synonymous with drunkenness (Winthrop, reprint, page 612, Footnote); and under both Specification 2 and Specification 3 it is specially alleged that the influence of intoxicants was such as to render accused unable fully to perform his duties. This averment was tantamount to alleging intoxication sufficient sensibly to impair the rational and full exercise of his mental and physical faculties. The term 'found drunk' is an equivalent of the term 'was drunk' (NATO 1045, McLachlen). There is no legal connotation in the term 'found drunk' which is not connoted in the allegations here in question. The intentment of the statute may not be circumscribed by the euphemisms in pleading. The Specifications were sufficient fairly to apprise accused that he was charged with being drunk on duty and there can be no doubt that the court did in legal effect find that on both occasions alleged accused was found drunk on duty" (Op. AJAG, NATO 3553, Whatley).

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The intendment of Articles of War 28 and 58 may not be circumscribed by the omission of legal conclusions and the euphemisms in pleading. The specification in the instant case effectively charged accused with the offense of desertion as defined in Article of War 28 in violation of Article of War 58. Under the findings of guilty accused will be "deemed a deserter" (AW 28). Therefore, the offense charged was capital.

An examination of the papers accompanying the record of trial discloses that by second indorsement dated 2 November 1944, the commanding officer, 1st Replacement Depot, informed the Commanding General, Replacement Command, Mediterranean Theater of Operations, that accused was charged with absenting himself without leave to avoid hazardous duty, "a capital offense which cannot be tried by deposition". Because the witnesses were presumably present with accused's organization, the 32d Field Artillery Battalion, it was recommended that accused be returned to his organization for trial. Accordingly, by third indorsement dated 16 November 1944, the Commanding General, Replacement Command, forwarded the papers to the Commanding General, Mediterranean Theater of Operations, and requested that authorization be granted to transfer accused to a stockade in the vicinity of his organization, and to forward the file to accused's organization for the preferring of charges, and investigation thereof under Article of War 70. By fourth indorsement dated 24 November 1944 the Commanding General, Mediterranean Theater of Operations, returned the file to the commanding officer, 1st Replacement Depot, stated that "an appropriate specification may be drawn under the 96th Article of War for the offense alleged herein which will permit the trial of accused * * * by deposition without the legal difficulties involved in charging him with desertion under the 58th Article of War (See Sec 416 (5), Dig Ops 1912-40)".

An "appropriate" specification alleging aggravated absence without leave violative of Article of War 96 and not charging the elements of desertion, as suggested by the theater commander, could of course have been drafted. One form of such a specification might have alleged mere absence without leave "with intent to avoid embarkation for a sea voyage", a duty not necessarily hazardous or important of itself as thus charged. The gist of the opinion cited (Sec 416 (5) Dig. Ops. JAG, 1912-40) was that a march alleged to have been important service was not such in fact, and that although a specification charging a quitting of his organization by accused with intent to "shirk important service, to wit," the march, did not charge desertion within the purview of Article of War 28, the acts alleged might properly have been charged as absence without leave aggravated by intent to avoid the march order and avoid the duty described, in violation of Article of War 96.

9. The Manual for Courts-Martial, 1928, provides that:

"Under express consent of the defense made or presented in court, but not otherwise, a court may admit deposition testimony not for the defense in a capital case. Except when express consent is required as just noted, failure to object to the introduction of a deposition on the ground that it was not authorized by A. W. 25 or was not taken before a proper officer or on reasonable notice

may be regarded as a waiver of the objection"
(underscoring supplied) (par. 119a).

There is nothing in the record of trial to indicate that the defense expressly consented to the use of the deposition of Captain Silva. At most the defense failed to object to its use. Under the above quoted provisions of the Manual a failure to object to the introduction of a deposition on the ground that it was not authorized by Article of War 25 may not be regarded as a waiver of the objection. The fact that the deposition was introduced by order of the court does not alter the error committed. In fact, as is hereinafter shown, such action of the court tends to establish the aggravated nature of the injury which has been done to the substantial rights of this accused.

10. As accused pleaded guilty to the offense of absence without leave there can be no doubt as to the legal sufficiency of the record to sustain findings of guilty of that offense. The question as to whether or not the evidence, exclusive of that contained in the illegally admitted deposition, would, under other circumstances, be legally sufficient to sustain the findings of guilty of desertion is one which is not free from doubt. However, under the view which the Board of Review takes of the record as a whole a decision of that question is not considered necessary.

After the prosecution had rested its case, and prior to accused's testimony, the president of the court stated that

"The court definitely wants the following evidence brought into this case: The date or dates this organization participated in the Sicilian campaign, if it did so participate; Did or did not this organization put to sea under combat load conditions prior to the 8th of July 1943; Was or was not this organization actively prepared in pre-invasion training and amphibious rehearsals in Tunisia for approximately one month prior to July 8th, 1943. These elements are so essential to establishing the guilt or innocence of the accused that the court will not render a verdict until it has considered them" (underscoring supplied). (R. 7)

As accused had pleaded guilty to the offense of absence without leave, and the prosecution had unquestionably established that offense, it is obvious that the court considered this additional evidence to be necessary only for the purpose of establishing the intent which motivated accused in leaving his organization without permission. It was after accused concluded his sworn statement that the following transpired as noted above:

"President: At the termination of the last hearing, the last session of this case, the court directed that certain evidence be secured for the court establishing whether or not the 1st Division made the invasion of Sicily; whether or not the 1st Division was engaged in active training immediately prior to making such invasion.

Prosecution: Yes, sir.

President: Produce the evidence" (R. 16).

As the request, or demand, for additional evidence was renewed after accused had concluded his statement, it is clear that the court, or at least the president, did not consider that the evidence, including accused's admissions, together with the plea of guilty to absence without leave, was sufficient to establish that accused absented himself without leave from his organization "with intent to avoid the said amphibious combat operation". With the exception of the stipulated testimony of Private Goodfellow, which is wholly without probative value in establishing the prosecution's case, no evidence other than the illegal deposition was introduced after the above quoted demand of the president was made.

The evidence contained in the deposition was material to the issue of accused's intent. Had this evidence been legally admitted, it would have justified the court in finding that at the time accused absented himself without leave all personnel of his organization were restricted to the staging area; a material fact which was denied by accused in his sworn statement. Also, this testimony strongly indicates that it was a matter of common knowledge in accused's organization that an invasion of enemy shores was imminent.

In CM 190259, Sheffield, the Board of Review said:

"It cannot be contended that members of the court were not unduly influenced by the testimony as to Rathel's trustworthiness and truthfulness when the members themselves drew this testimony from the witnesses on their own initiative. Neither can it be successfully argued that the court did not give substantial corroborative weight to the incompetent evidence of Pettis' actions at the rehearsal, in view of the convincing nature of this evidence and the fact that the court, after the conclusion of the case for the defense, recalled Captain Moore and had him repeat the details of those acts. The Board of Review can reach no conclusion other than that the conviction was induced by the incompetent testimony. Such being the case it must be said that the errors injuriously affected the substantial rights of the accused within the meaning of the 37th Article of War".

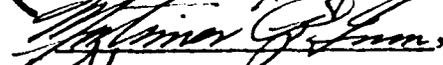
In CM 202250, De Ramos, the Board said:

"In the present case, since one member of the court thought the prosecutrix's reputation for veracity to be of sufficient importance for him to ask questions about it, that member at least must have considered the answers which he elicited to be of some weight. Whether other members so thought it

is impossible to tell, but, for all that is known, the vote of the member who asked the questions about Rosa's veracity may have determined the finding of the court against accused. The Board therefore concludes that the testimony of Dr. Rillo as to the prosecutrix's veracity was injurious to the substantial rights of accused"

By like reasoning, since one member of the court, apparently acting for "the court", demanded that the deposition of Captain Silva be introduced in evidence, and that deposition was in fact introduced as "Court's Ex 1", the inference that at least that member's vote was influenced by this illegal evidence is inescapable. His vote may have turned the scale against accused on the issue of intent. The record of trial established beyond question that, as to the finding of guilty of desertion, the illegal evidence introduced in this case injuriously affected the substantial rights of accused (AW 37). The error does not vitiate the finding of guilty of the offense of absence without leave which is necessarily included in the court's findings (CM 242082, Reid).

11. The court was legally constituted. Other than noted, 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 only so much of the findings of guilty as involves findings that at the time and place alleged accused absented himself without proper leave from his organization and remained so absent for the period alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

MTO 6543

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
 14 May 1945.

TO: Commanding General, MTOUSA, APO 512, 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 Jack Thacker (7 004 530), casual attached 385th Replacement Company, 6th Replacement Battalion, 1st Replacement Depot,

CONFIDENTIAL

MTO 6543, 1st Ind.
14 May 1945 (Continued).

together with the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that at the time and place alleged accused absented himself without proper leave from his organization and remained so absent for the period alleged, in violation of Article of War 61, and legally sufficient to support the sentence. I concur in the opinion of the Board of Review and recommend that so much of the findings of guilty of the Charge and its Specification be vacated as finds accused guilty of an offense other than absence without proper leave from his organization, at the place and on the date alleged, and for the period alleged, in violation of Article of War 61, and that all rights, privileges, and property of which accused has been deprived by virtue of the findings so vacated be restored.

2. There is transmitted herewith a form of action designed to carry the foregoing recommendation into effect should it meet with your approval.



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

Assistant Judge Advocate General

2 Incls.

- Incl. 1 - Record of trial, MTO 6543
- Incl. 2 - Draft of action

(Findings vacated in part in accordance with recommendation of
Assistant Judge Advocate General. GCMO 76, MTO, 17 May 1945)

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Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
26 May 1945.

Board of Review

MTO 6637

UNITED STATES)

v.)

General Prisoner WERNER E.)
SCHMIEDEL, formerly Private,)
7 O41 115, 403d Replacement)
Company, 18th Replacement)
Battalion, 2d Replacement Depot,)
and Private JAMES W. ADAMS)
(6 956 616), Company M, 157th)
Infantry Regiment, 45th Division.)

ROME AREA, MEDITERRANEAN)
THEATER OF OPERATIONS)

Trial by G.C.M.; convened at)
APO 794, U. S. Army, 26 March)
1945.)

SCHMIEDEL: Death.)
ADAMS: Dishonorable discharge)
and confinement for life.)
U. S. Penitentiary, Lewisburg,)
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

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

Specification: In that General Prisoner Werner E. Schmiedel, formerly Private, 403 Replacement Company, 18th Replacement Battalion, 2nd Replacement Depot, and Private James W. Adams, Company M, 157th Infantry, 45th Division, acting jointly and in pursuance of a common intent, did, at Rome, Italy, on or about 10 October 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation, kill one Eolo Ferretti, a human being, by shooting him with a pistol.

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

Specification 1: In that General Prisoner Werner E. Schmiedel, formerly Private, 403 Replacement Company, 18th Replacement Battalion, 2nd Replacement Depot, and Private James W. Adams, Company M, 157th Infantry, 45th Division, acting jointly and in pursuance of a common intent, did, at Rome, Italy, on or about 10 October 1944, by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Eolo Ferretti, Camillo Bocchini, Antonio Ferretti and Alfredo Venanzoni, money and personal papers of some value, the property of the said Eolo Ferretti, Camillo Bocchini, Antonio Ferretti and Alfredo Venanzoni.

Specification 2: In that General Prisoner Werner E. Schmiedel, formerly Private, 403 Replacement Company, 18th Replacement Battalion, 2nd Replacement Depot, and Private James W. Adams, Company M, 157th Infantry, 45th Division, acting jointly and in pursuance of a common intent, did, at or near Capua, Italy, on or about 17 September 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person and presence of Sergeant Stefan Pawluk, an automobile, one wallet, 18,000 lire, one Egyptian pound sterling, one wrist watch, two rings, three gold chains, four gold coins, one cigarette case, one cigarette holder, and one pistol, of a total value in excess of fifty dollars, property of the said Stephan Pawluk.

ADDITIONAL

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

Specification 1: In that General Prisoner Werner E. Schmiedel, formerly Private, 403rd Replacement Company, 18th Replacement Battalion, 2nd Replacement Depot, and Private James W. Adams, Company M, 157th Infantry, 45th Division, acting jointly and in pursuance of a common intent, did, at or near Sparanise, Italy, on or about 7 September 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Salvatore Starace, 125,000 lire, the property of the said Salvatore Starace.

Specification 2: (Nolle prosequi.)

Specification 3: In that General Prisoner Werner E. Schmiedel, formerly Private, 403rd Replacement Company, 18th Replacement Battalion, 2nd Replacement Depot, and Private James W. Adams, Company M, 157th Infantry, 45th Division, acting jointly and in pursuance of a common intent, did, at or near Formia, Italy, on or about 17 September 1944, by force and violence and by

putting him in fear, feloniously take, steal, and carry away from the person of Private first class Willie L. Traugher, a military police brassard and a pistol, of some value, property of the said Private first class Willie L. Traugher.

Specification 4: In that General Prisoner Werner E. Schmiedel, formerly Private, 403rd Replacement Company, 18th Replacement Battalion, 2nd Replacement Depot, and Private James W. Adams, Company M, 157th Infantry, 45th Division, acting jointly and in pursuance of a common intent, did, at or near Formia, Italy, on or about 17 September 1944; by putting him in fear, feloniously take, steal, and carry away from the person of Sergeant Donald Tinkham, a military police brassard; and a pistol of some value, property of the said sergeant Donald Tinkham.

Schmiedel was also tried upon the following Charge and Specification:

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

Specification: In that General Prisoner Werner E. Schmiedel, formerly Private, 403rd Replacement Company, 18th Replacement Battalion, 2nd Replacement Depot, did without proper leave, absent himself from his station at or near Aversa, Italy, from on or about 2 September 1944 to about 3 November 1944.

A nolle prosequi was entered with respect to Specification 2 of additional Charge I. Each accused pleaded not guilty to and was found guilty of the original Charges and Specifications and additional Charge I and Specifications 1, 3 and 4 thereunder, and accused Schmiedel pleaded not guilty to and was found guilty of additional Charge II and its Specification. All members of the court present concurred in the findings of guilty of original Charge I and its Specification. No evidence of previous convictions was introduced. Each accused was sentenced to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority 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, Mediterranean Theater of Operations, on 21 April 1945, confirmed the sentence as to each accused and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$. On 21 May 1945 the confirming authority, the Commanding General, Mediterranean Theater of Operations, in the case of Private James W. Adams only, commuted the sentence so confirmed to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and suspended the order directing execution of the sentence as commuted pending review under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on 2 September 1944 accused Schmiedel was a general prisoner in confinement at the Disciplinary

Training Stockade, Peninsular Base Section, about two miles south of Aversa, Italy. He was formerly a private and a member of the 403d Replacement Company, 18th Replacement Battalion, 2d (Replacement) Depot. On 2 September accused Schmiedel left the stockade without authority and did not return. (R. 8-10, 103; Ex. 1) He was apprehended at Rome on 3 November 1944 (R. 73-75). (additional Charge II and Specification).

Accused Adams was a private and a member of the 157th Infantry, 45th Division (R. 103). Schmiedel was taller than Adams who was of a stouter build and blond (R. 22,24,49,52,54,57). Schmiedel at times used the name of Robert or Roberto Lane, and Adams was also known as "Jim" or "Jimmie" (R. 69,74,97,98). Admitted in evidence were two photographs which, it was stipulated, were "pictures of Private Anthony Tavolieri who was killed on a previous occasion" (R. 39; Exs. 2a,2b).

About 2000 hours 7 September 1944, in the vicinity of Sparanise (Italy), Salvatore Starace of Naples, Italy, and six passengers were driving toward Rome when a vehicle, larger than a "jeep", passed Starace and cut in front of him. Someone, by means of a flashlight, indicated that he was to stop. Starace drove on but stopped after the vehicle again passed and stopped in front of him. (R. 11,13,14,16,17,19) Tavolieri and both accused got out of the car in front and went to Starace's vehicle. Tavolieri and Adams wore military police brassards and Schmiedel wore the stripes of a sergeant. Each of the three had a Mauser pistol. (R. 11,13-16,17-20) They asked Starace and a passenger named Gennaro Di Domenico of Naples for their permits, and examined them. Tavolieri searched Starace, took 125,000 lire from his possession and gave the money to Schmiedel. Tavolieri then took 5,000 lire from an Italian soldier who was another of Starace's passengers. While Tavolieri was searching the men, Schmiedel and Adams were pointing their pistols at them. The personal papers were returned to the owners thereof and Tavolieri and both accused then departed. (R. 11-20) Starace testified that when both accused were pointing their pistols at him he felt "Demoralized; dead and alive" (R. 13). Both Starace and Di Domenico identified Adams and Schmiedel at the trial (R. 10,11,18). (Specification 1, additional Charge I).

About 1730 hours 17 September 1944 Sergeant Stefan Pawluk, II Corps, driver for a General Anders of the Polish Army, was driving a Cadillac automobile toward Rome. Beyond Capua, a vehicle occupied by "five American soldiers" passed Pawluk, pulled up in front of him and made him stop. (R. 21,99) In the vehicle, which was "somewhat larger than a jeep", were both accused, Tavolieri, Giovanni Cito, who was an Italian boy 16 years of age, and a man named "Joe" (R. 22,97-99). Tavolieri, who had a lieutenant's bar on his cap, and "Joe" went to the Cadillac. Both were armed. Tavolieri ordered Pawluk to get out of the car and when the latter refused, Tavolieri became very angry, "put a bullet in the chamber" and pointed the "gun" at him. (R. 22,99) Finally Pawluk got out and entered the other vehicle which was then driven away. Both accused and Cito were in this machine and Tavolieri and "Joe" followed behind in the Cadillac. (R. 22,23,99) Adams kept a revolver pointed at Pawluk's chest. The two cars proceeded for eight or ten kilometers and then turned off into the country and stopped. (R. 23) Pawluk testified that the

driver of the vehicle in which he was forced to ride was not in court. This driver got out and came around to where Pawluk was sitting. He took from Pawluk's possession, among other articles, a gold watch, two rings, three chains with crosses thereon, four pounds in gold, one pound Egyptian paper money, 18,000 lire, and a cigarette holder. (R. 24,27,28) A Smith and Wesson pistol which belonged to Pawluk was in the Cadillac (R. 26,27). Adams then left the vehicle and the driver told Pawluk to get off. When Pawluk refused the driver shoved him out of the car. Both Adams and the driver were holding revolvers close to his head. (R. 24) They ordered him to go toward some bushes and the driver tried to kick him. Adams kept his revolver at the chest of Pawluk who started to walk slowly backward. Adams and the driver followed and struck him four times on the chest with their revolvers. When he reached the bushes Pawluk stopped and the driver seized him by the arm and indicated that Pawluk was to turn around. Pawluk pulled away. Adams and the driver exchanged revolvers and Adams then started to go around Pawluk's left side. Pawluk pleaded with them to spare his life and went down on his hands and knees. (R. 25,26) Suddenly Pawluk ran away in a zig-zag manner. At least six shots were fired at him by Adams and the driver as he ran and he heard the bullets pass him. (R. 26,27) Pawluk identified Adams at the trial (R. 21) but could not definitely identify Schmiedel (R. 21,24,25,27). (Specification 2, original Charge II).

About 2030 hours 17 September 1944 Sergeant Donald Tinkham and Corporal Willie L. Traugher, both of the 52d Military Police Company, were patrolling a highway from Formia to Rome as the result of a certain report which had been received (R. 28,29,35,36). When a weapons carrier passed they "flagged it down" and it stopped. When Tinkham and Traugher reached the vehicle they saw Tavolieri who was dressed as a lieutenant and who had what appeared to be a .45 caliber pistol in his hand. He was wearing a military police brassard. There were five men in the vehicle, all dressed as American soldiers, and a "tommy gun" was on the floor. (R. 29,30,34,36,37) Tavolieri asked "what was up" and Tinkham said "That's what I am asking you". Tavolieri then said that he "was MP's escorting troops from Rome to Naples". (R. 30) Suddenly Adams placed a "gun" at Traugher's back and "Lane" (Schmiedel) put a "gun" in Tinkham's back. Tavolieri stood up in the weapons carrier holding a different pistol in his hand and told Tinkham and Traugher that they would not get hurt if they did not move. Adams then took Tinkham's .45 caliber pistol, brassard, flashlight and ammunition, and Traugher's pistol, holster, brassard and white line. (R. 30-34,36-39) When the "guns" were in their backs Tinkham, according to his testimony, felt "gone" and thought that he and Traugher would be shot (R. 32), and Traugher, according to his testimony, was nervous and frightened (R. 37). Tinkham told Tavolieri that he (Tinkham) was to go home on rotation in two days and that he "would like to take the boat". Adams, who told Tavolieri that the two military policemen would not tell the truth, ordered Tinkham and Traugher "to get our ass on the back end of the weapons carrier and go for a ride". (R. 32) Tavolieri said "I must be getting soft hearted *** I am going to let them go" (R. 37). He told Adams and Schmiedel to fix the "bikes" of the two men so that they could not be operated, and both accused went to the machines. Three shots were fired and after the two accused returned the weapons carrier was driven away. Two of the tires on Tinkham's

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machine were "shot down" and one of Traugher's. The aerial and radio on Traugher's machine were also broken. (R. 32,37) Both Tinkham and Traugher identified Schmiedel and Adams at the trial (R. 28,29,35,36). (Specifications 3 and 4, additional Charge I).

About 2030 hours 9 October 1944 accused Schmiedel and Adams entered a wine shop or restaurant at 223 Via Principe Amedeo, Rome. Maria Ferretti, her husband (Eolo Ferretti) and her father-in-law, Antonio Ferretti, were present. Schmiedel was dressed as a military police sergeant and Adams was dressed as an ordinary soldier. Both had "guns" in their hands. They pointed at the padlocked cash drawer behind the counter and Schmiedel pulled the handle. After remarking that some glasses were dirty they departed. (R. 62,65,66)

On 10 October 1944 General Prisoner Robert F. Hundley met Schmiedel and Adams in Rome and Adams offered him a place to sleep. The three started to go to the house occupied by both accused. (R. 39-41) Schmiedel was armed with a .38 caliber pistol and Adams had a "birretti". Shown a .38 caliber Smith and Wesson revolver (later admitted in evidence as Exhibit 4), Hundley testified that this weapon was similar in appearance to the one Schmiedel had that evening. (R. 42) Both accused were sober (R. 43,45). They said they wanted some money and decided to go to the wine shop at 223 Via Principe Amedeo and "hold it up". They asked Hundley to stand outside the door (R. 41) but he said he did not wish "to get in any trouble" (R. 42). Accused entered the shop and Hundley went up the street. When Hundley was about a block away from the wine shop he heard one pistol shot fired in the direction of the shop. (R. 42,45) When Hundley saw accused the next morning Adams asked him where he went and said they "got \$15" (R. 43).

When accused entered the wine shop, about 2030 hours 10 October, the following persons were present: Antonio Ferretti, his son Eolo Ferretti (the deceased) who was 44 years of age and had two children, Eolo's wife Maria, Libero Galletti, Alfredo Venanzoni, Pasquale Romano, Camillo Bocchini and Pietro Bonza (R. 47,51,52,56,60,63,66). Both accused were armed (R. 57,61, 62,65,66) and Schmiedel wore a military police arm band and sergeant's stripes (R. 50,52,53,60). Adams remained in front of the closed door and Schmiedel came forward with a pistol in his hand. He ordered those present to put up their hands, forced them to line up in front of the ice chest, and pointed his pistol at them. Antonio Ferretti was on the opposite side of the room. Schmiedel ordered the people to show their documents and to throw their wallets on the table. Adams came forward and began to take the wallets and the money therein. (R. 48,52,53,55-57,60,61,66) Antonio Ferretti, who thought accused were actually military policemen, told the others "Boys, show them your documents" (R. 60,66) and said "Oh, they are nice boys" (R. 53). When one of the men took out his wallet "a few hundred lire notes showed" and Adams snatched the wallet from the man's hand "like a rapacious bird". When Antonio observed Adams' action he said to Schmiedel "'Now, look here Sergeant, you don't want documents; its money you are after'". (R. 61) Schmiedel went over to Antonio and told him to produce his pocketbook. Antonio replied "What am I going to give you? I have no money or documents" (R. 67). Schmiedel, who was holding in his left hand "the big gloves of the military policemen" (R. 61), slapped Antonio with the gloves on the left side of his

face (R. 47,51,53,60,67). At this moment Pasquale Romano turned and "looked as if to reprove this action" (R. 51,53,55,61). Schmiedel jumped to the middle of the room and fired one shot. The bullet grazed Romano's head and struck Eolo Ferretti in the abdomen. (R. 49,51,53,55,57,58,61,64,67) Eolo, who had his hands in the air when he was hit by the bullet (R. 67), screamed and fell to the floor. Camillo Bocchini tried to help Eolo arise but he was forced to let him go "when the pistol was waved in my face". Antonio went over and put his hand on his son Eolo but Schmiedel pulled his hand away. (R. 49,53,57,61,67) Adams then seized the remaining money and wallets which were on the table, put them in his shirt, and both accused, holding their weapons in their hands, backed to the door and ran out of the shop (R. 49,54,57,58,61,63,67). Accused did not succeed in obtaining Antonio's wallet (R. 63). When shown a .38 caliber Smith and Wesson revolver (Ex. 4), Galiati, Bocchini, Venanzoni, Antonio and Maria Ferretti testified that it was similar in appearance to that which Schmiedel had in his possession that evening (R. 48,55,58,61,62,68). Galiati's wallet contained papers, photographs and 5,500 lire (R. 48-50) and Bocchini's contained 8,700 lire, his identity card, photographs and other documents (R. 53,54). Venanzoni's pocketbook contained, among other articles, 2,300 lire (R. 58), and in deceased's wallet were his identity card, photographs, papers and 50,000 lire (R. 68). Galiati, Bocchini and Venanzoni testified that they were afraid when the pistols were pointed at them (R. 48,54,57). Antonio and Maria Ferretti and Venanzoni identified both accused at the trial (R. 56,61,65). Galiati identified Schmiedel but testified that he did not remember Adams (R. 47). Bocchini also identified Schmiedel (R. 51,52). Although he "didn't notice" Adams (R. 52), he testified that Schmiedel's companion was not as tall as Schmiedel, was stouter and blond (R. 52-54). Eolo Ferretti died about 2300 hours, 10 October (R. 87).

About 12 October 1944 Fausta Piva of 7 Via Equizia, Rome, first met Schmiedel, whom she knew as Robert Lane. Schmiedel lived at her house. She met Adams about 15 or 16 October and both accused spent that night in her home. The following morning after both accused departed, the woman cleaned the room and found several articles therein which she identified at the trial. She testified that Schmiedel had brought the articles to the house. Shown a Smith and Wesson .38 caliber revolver (Ex. 4) she further testified that she had seen the weapon in Schmiedel's possession. (R. 69-73) At the trial Galiati and Venanzoni identified certain articles found by Fausta Piva as being in their respective wallets on the evening of 10 October, and deceased's wife, Maria, identified other articles found by Fausta Piva and testified that they were in her husband's wallet. The various articles were admitted in evidence. (R. 48,49,58,68,71,72; Exs. 5,6,7)

On the morning of 3 November Agent Eugene F. Land, Criminal Investigations Division, stationed at Rome, was looking in Rome for a man named Roberto Lane. Schmiedel passed Land on the street and Land looked at a photograph he had of Lane and recognized him to be Schmiedel. He followed Schmiedel into an establishment known as Rocky's bar where Land took out his "gun" and ordered Schmiedel to put up his hands. Schmiedel did so and when Land searched his person he found under his jacket a loaded .38 caliber Smith and Wesson revolver. Land arrested him. (R. 73-75) The revolver was admitted in evidence at the trial (R. 97; Ex. 4). On 17 October 1944 Doctor Giovanni De

(66)

Vincentis of Rome performed an autopsy on the body of deceased (Eolo Ferretti) (R. 77,78). He found a bullet wound, the point of entry of which was between the eighth and ninth ribs. The bullet was found in the body. The bullet caused a rupture of the spleen and left kidney and an internal hemorrhage which resulted in death. (R. 78,79,86) The fatal bullet was identified by Doctor De Vincentis at the trial (R. 79) and it was admitted in evidence (R. 84; Ex. 10).

On 10 December 1944 Agent Henry L. Manfredi, Criminal Investigations Division, fired three test bullets from the .38 caliber Smith and Wesson revolver (Ex. 4) which was taken from Schmiedel (R. 89,90). Agent John Kritko, Criminal Investigations Division, Provost Marshal General's (MTOUSA) office, testified that he was a firearm technician, that for six and a half years he was a member of the identification section of the Ohio State Bureau, that he had received Army training on firearm identification and had conducted over 134 firearm identification tests (R. 92). He had studied the Smith and Wesson revolver (Ex. 4) and had microscopically examined the fatal bullet and the three test bullets fired by Manfredi. He testified that in his opinion the four bullets "were all fired from the same weapon". (R. 93, 94) Kritko also fired two bullets from Exhibit 4 and found that the two bullets "compared with the evidence bullet" (R. 94,95). He further testified that in his opinion the fatal bullet was fired from the .38 caliber Smith and Wesson revolver (Ex. 4) and that there was no possibility that his conclusion was erroneous (R. 95).

Major Willard L. Stobaugh, Field Artillery, Headquarters, Mediterranean Theater of Operations, investigating officer, testified that on 16 March 1945 he interviewed accused Adams. Schmiedel was present at the time. Witness read Article of War 24 to both accused and Adams said he would like to make a statement. Witness explained the 24th Article of War to Adams, informed him that any statement he made would have to be voluntary in character and that if he did make a statement it could be used against him. Adams then made a statement, signed it in witness' presence. The statement was identified by Major Stobaugh at the trial and was admitted in evidence only as against accused Adams, over the objection of the defense. (R. 130-134; Ex. 15) It was as follows:

"I Pvt James W. Adams ASN 6956616 Co M 157th Inf 45 Div. APO #45 have been warned of my rights under the 24th Article of war by the investigating officer Williard L. Stobaugh, Maj F.A. ASN. O-357196 and without threats or promises, durress or coercion, and knowing that any thing that I may say may be used against me, do hereby make the following Statement; one night Lane and I were drinking in a rest(a)urant and Lane told me he was broke and needed Some money. So we decided to go out and rob an Italian Some where. As we were walking along the street we Saw a rest(a)urant that we figured might have a little money in it. So we went into the rest(a)urant and pulled out our guns. Lane was carrying a .38 Smith and Weston Revolver. I had an Itialian Berret(t)a. There were about 5 or 6 Itialians in the rest(a)urant, we

were making them line up so we could take their money when Lane's gun went off accident(al)ly, the bullet hit the Ice box in the back of the rest(a)urant and ricocheted and hit one of the Italians that was standing beside me. We then left the rest(a)urant with the wallets we had taken from the Italians and went to the house where we stayed. The total from all the wallets was a little over \$15.

"After Saying this I have nothing to Say about the other crimes. 15 March, 1945" (Ex. 15). (original Charges I and II and their Specifications).

For the defense Kritko testified that Exhibit 4 was a "single action" weapon and that if it were "cocked back", it would require about three pounds of pressure to discharge the revolver. A "blow" would cause the weapon to discharge. There was no safety mechanism on the weapon. Asked if "a blow would set off any gun" Kritko testified in the affirmative. (R. 120-122)

Camillo Bocchino, recalled as a witness for the defense, identified a photograph of the interior of the wine shop (Def. Ex. B) and testified that he was standing against the ice box and had his hands up in the air when the pistol was discharged. Adams and Schmiedel were in the center of the room at the time and Adams was picking up the pocketbooks. Schmiedel was standing near Antonio Ferretti. Witness testified further that he was on Eolo's left. "I was here (indicating), then the dead person here, and then Libero Galieti was further on (indicating)". Pasquale Romano was standing "a little side-ways" with respect to Schmiedel, and was not standing near Romano. When Romano saw Schmiedel strike Antonio Ferretti with the gloves, Romano turned his head. Schmiedel jumped to the middle of the room toward Romano and fired. Romano was wounded and Eolo fell to the floor. Schmiedel then moved further into the center of the room and indicated that no one was to move. Adams continued to gather up the pocketbooks and placed them inside his jacket. Both accused then backed out of the door. (R. 122-124)

Pasquale Romano testified for the defense that he had seen Schmiedel before. Witness identified him at the trial and testified further that he did not know Adams "very well". (R. 125) On the evening of 10 October, when "they" entered the restaurant, Schmiedel told the people to get up and they were lined up against the ice box. Antonio Ferretti, believing that the two men were military policemen, said "'These are all nice boys *** we know them'". (R. 126) When Schmiedel slapped Antonio twice on the face, witness turned his head. Schmiedel lunged in witness' direction, pointed his "gun" at him and fired. Witness was wounded "lightly" on his left forehead. Romano further testified that the barrel of the "gun" actually touched witness' head. He could not say whether the injury he received was the result of the barrel hitting his head. Only one shot was fired. (R. 126,127)

Doctor Augusto Sbarigia, a surgeon and a member of the staff of St. Giovanni (St. John's) Hospital, Rome (R. 86,124), testified for the defense

that he examined a wounded man (Romano) at the hospital on the evening of 10 October. Witness dictated a statement to his assistant and then signed the document. The statement, identified by witness at the trial and admitted in evidence, referred to Romano's injury as follows: "'A glance wound caused by a firearm on the left forehead region'". (R. 124,125,129; Def. Ex. C)

Doctor De Vincentiis, recalled as a defense witness, testified that the fatal bullet entered deceased's body on the front left side and, "slightly inclined downwards", proceeded toward the back. It was found in the muscles of the lumbar region, in the side of the backbone, between the second and third vertebrae. The point of entry was higher than the place where the bullet was discovered. The obtuse angle of declination, compared with the line of the backbone, was between 45 and 50 degrees. (R. 128,129)

Accused Adams made an unsworn statement. He stated that on the night of 10 December (10 October) he and Schmiedel had been drinking. They entered one restaurant and then started home with another soldier (Hundley). When they came to another restaurant both accused entered and pulled out their "guns". The other soldier remained outside. As Adams was taking a wallet from one of the men "the shot went off", and the bullet passed in front of Adams who was standing at an angle, "kind of facing the man that was hit". The man who was hit seized his side and shouted. Adams picked up the wallets which were on the table and both accused departed. (R. 120)

Accused Schmiedel also made an unsworn statement. He had been drinking rather heavily during the afternoon and early evening of 10 September (10 October). Schmiedel stated further that

"we were walking down the street and we decided to go into this restaurant. We came into the restaurant and we pulled out the gun, and I was sort of waiting around."

Schmiedel, who had obtained the Smith and Wesson revolver that afternoon from an Englishman, did not know "the operation of a 38". He was waving the weapon around "and somehow it went off accidentally". He did not know what caused the discharge of the revolver, but remembered the man shouting and the firing of the shot. "After that we fled". (R. 130)

4. It thus appears from the evidence that at the time and place alleged accused Schmiedel, a general prisoner, went absent without leave from the Disciplinary Training Stockade, Peninsular Base Section, and remained absent until he was apprehended at Rome, Italy, 3 November 1944. The evidence is legally sufficient, as to accused Schmiedel, to support the findings of guilty of additional Charge II and its Specification (absence without leave in violation of Article of War 61).

It also thus appears from the evidence that at the times and places alleged both accused, by the threatening use of firearms and by putting the victims in fear, took from the persons of Starace, Tinkham and Traugher, the property alleged to belong to each. The evidence is legally sufficient

to support the findings of guilty of robbery in violation of Article of War 93. (additional Charge I, Specifications 1, 3 and 4).

The evidence is also legally sufficient to support the findings of guilty of robbery in the case of Pawluk (Specification 2, original Charge II). Although Pawluk definitely identified Adams, he was not able to identify Schmiedel with any degree of certainty. However, Giovanni Cito, the Italian witness, testified that Schmiedel was one of the occupants of the vehicle which Tavolieri forced Pawluk to enter, and in which the victim was driven to the country where he was then robbed at gun point by Adams and the unnamed driver. The evidence shows that Tavolieri, Adams, Schmiedel and their companions were on a wrongful joint venture, and that they had the common intent to commit robbery when they forced Pawluk to stop his car. It is clear that under the circumstances Schmiedel was an aider and abettor with respect to Adams, Tavolieri and the driver, who were the more active participants in the commission of the offense alleged. As an aider and abettor Schmiedel was clearly chargeable as a principal. The few omissions and variances in the proof as to the nature of the articles taken were immaterial. (MTO 6411, Steedley and Willis and authorities cited therein).

With reference to the original Charge I and its Specification (murder in violation of Article of War 92) and the original Charge II and Specification 1 thereunder (robbery in violation of Article of War 93), it appears from the evidence that on the evening of 9 October both accused, who were armed, entered the wine shop at 223 Via Principe Amedeo, Rome, Italy. Schmiedel pulled the handle of the cash drawer but the drawer was padlocked. They then departed. The following evening they told Hundley that they were going to "hold *** up" the wine shop. They entered the shop with drawn pistols and Adams remained at the door while Schmiedel came forward, ordered those present to raise their hands and forced them to line up against the ice box. Schmiedel ordered the people to show their documents and throw their wallets on the table. Adams then came forward and began to collect the wallets and the money therein. Antonio, who was standing on the other side of the room, thought accused were actually military policemen, told the others to produce their documents and said that accused were "'nice boys'". However, after observing Adams' actions Antonio remonstrated with Schmiedel and said that Schmiedel was not looking for documents but for money. Schmiedel then went to Antonio and asked him for his own wallet but the latter replied that he had no money or documents. Schmiedel then struck him twice in the face with a heavy pair of gloves. This incident caused Romano to turn his head in the direction of Antonio. One witness testified that Romano "looked as if to reprove this action". When Romano turned his head Schmiedel jumped to the center of the room and fired one shot. The bullet grazed Romano's head, struck Eolo Ferretti in the abdomen, and Ferretti fell to the floor mortally wounded. There was evidence that the barrel of the gun struck Romano's head. When Bocchini attempted to assist Eolo a pistol was "waved" in his face, and when Antonio crossed the room and put his hand on his son, Schmiedel pulled his hand away. After the shot was fired Adams picked up the remaining wallets which were on the table and then both accused, holding their pistols in their hands, walked backward to the door and ran out of the shop. Eolo died as the result of the bullet wound about 2300 hours, 10 October 1944. The wallets taken were those

of Bocchini, Venanzoni, Eolo Ferretti and Galieti.

The following excerpt from the Manual for Courts-Martial, 1928, is pertinent:

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony" (par. 148a, pp. 163,164).

There was no evidence whatsoever which indicated that Schmiedel, when he fired the fatal shot, acted in self-defense or under legal provocation, and such was not contended by the defense. The evidence indicates that the hands of the various victims were raised in the air at the time, and Romano had merely turned his head. Schmiedel, in his unsworn statement, claimed that the gun accidentally discharged. Accused's contention was a question of fact for the determination of the court which decided the issue against him. There was ample basis in the evidence for an inference that the weapon was fired intentionally and with the purpose to kill. The homicide was without legal justification or excuse. Malice was inferable from the willful, deliberate and vicious brandishment and use of a deadly weapon, and from the fact that accused was engaged in the intentional commission of a felony, namely, robbery. The evidence is legally sufficient to support the findings of guilty of murder with reference to accused Schmiedel.

With respect to accused Adams, the evidence shows that this accused was admittedly engaged with Schmiedel in a planned and felonious joint venture, namely robbery. Although he did not fire the fatal shot, Adams took an active part in the robbery. Holding his pistol in his hand he came forward and began to pick up the wallets which were thrown on the table by the victims. After the shot was fired, Adams' actions effected the successful completion of the joint enterprise in that he picked up the remaining wallets, stuffed them in his shirt and, holding his pistol in his hand, backed out the door with Schmiedel who also held a drawn pistol. Adams was responsible for all that Schmiedel did.

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

common design, although not specifically contemplated by the parties" (29 C.J., pp. 1073,1074).

"If the unlawful act agreed to be done is dangerous, or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design. Accordingly, one person may be held liable for the homicidal act of another, where such act results from their combined efforts to commit robbery" (25 Am. Jur., Homicide, sec. 66).

The evidence is legally sufficient to support the findings of guilty of murder with respect to accused Adams.

The evidence was also legally sufficient to support the findings of guilty of both accused as to the robbery of deceased, Bocchini and Venanzoni. Although accused were charged with and found guilty of robbing Antonio Ferretti, among others, the evidence affirmatively shows that his wallet was not taken. However, the error in the findings in this regard is of no material consequence.

5. Accused were not charged with the robbery of an Italian soldier of 5,000 lire, but evidence thereof was admitted showing that such robbery occurred at the same time and as part of the same transaction in which Salvatore Starace was robbed, as alleged in Specification 1, additional Charge I. Nor were accused charged with robbery of Libero Galieti, although evidence was admitted which showed that Galieti was robbed of his wallet containing 550 lire and other articles, at the same time and as part of the same transaction in which other Italians were robbed, as alleged in Specification 1, original Charge II, and Eolo Ferretti was killed, as alleged in the Specification, original Charge I. These unalleged acts were separate offenses for which accused were not on trial. The general rule as to the admissibility of such evidence has been expressed as follows:

"When two or more offenses are part of the same transact(i)on, every element of the defendant's conduct in that transaction may be shown for the purpose of illustrating the motive or intent in committing the act which is the basis of the charge. It is essentially *res gestae*" (Wharton's Crim. Ev., Vol. 1, sec. 347, p. 506).

Respectively occurring at relatively the same time and forming part of the transactions which are the bases of the offenses charged, evidence of those unalleged acts was admissible in each instance to establish the intent and motive of accused (MCM, 1928, par. 112b; Dig. Op. JAG, 1912-40, sec. 395 (7); Wharton's Crim. Ev., Vol. 1, secs. 346,347; 22 C.J.S., sec. 663).

6. The defense objected to the admission in evidence of Adams' pre-trial

statement, contending that Adams mentioned Schmiedel throughout the statement and that an extra-judicial statement made by one accused was not admissible in evidence against another joint accused, and also because Adams was in "close arrest" when he made the statement. The law member in overruling the objection properly stated that the statement would be admitted in evidence as against Adams only. Adams was properly advised of his rights before he made the statement and there is no indication in the evidence that the statement was other than voluntary. The objection by the defense to the admission in evidence of the document was without merit.

7. The charge sheets show that accused Adams is 23 years of age and enlisted 26 December 1939. Accused Schmiedel is 22 years of age and enlisted 18 June 1940. Neither accused had prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of either 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 sentences. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Walter R. Quinn, Judge Advocate.
Walter C. Garrison, Judge Advocate.
Nancy C. Kluick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
26 May 1945.

Board of Review

MTO 6637

UNITED STATES)

v.)

General Prisoner WERNER E.)
SCHMIEDEL, formerly Private,)
7 041 115, 403d Replacement)
Company, 18th Replacement)
Battalion, 2d Replacement Depot,)
and Private JAMES W. ADAMS)
(6 956 616), Company M, 157th)
Infantry Regiment, 45th Division.)

ROME AREA, MEDITERRANEAN
THEATER OF OPERATIONS

Trial by G.C.M., convened at
APO 794, U. S. Army, 26 March
1945.

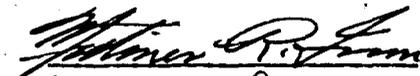
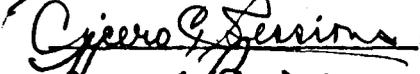
SCHMIEDEL: Death.

ADAMS: Dishonorable discharge
and confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

The record of trial in the case of the soldiers named above has been
examined by the Board of Review and held legally sufficient to support the
sentences.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

MTO 6637

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
26 May 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of General Prisoner Werner E. Schmiedel, formerly
Private, 7 041 115, 403d Replacement Company, 18th Replacement Battalion,

(74)

MTO 6637, 1st Ind.
26 May 1945 (Continued).

2d Replacement Depot, and Private James W. Adams (6 956 616), Company M, 157th Infantry Regiment, 45th Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentences, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentences.

2. Attention is invited to Radiograms W 63075, 4 April 1945, and W 72599, 25 April 1945, from The Judge Advocate General concerning this case.

3. 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:

(MTO 6637).



ELLWOOD W. SARGENT
Colonel, J.A.G.D.

Acting Assistant Judge Advocate General

(As to accused Schmiedel, sentence ordered executed. As to accused Adams, sentence as commuted ordered executed. GCMO 82, MTO, 28 May 1945)

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
2 May 1945.

Board of Review

MTO 6638

| | | |
|------------------------------|---|------------------------------|
| UNITED STATES |) | 92D INFANTRY DIVISION |
| |) | |
| v. |) | Trial by G.C.M., convened at |
| |) | Rear Echelon, 92d Infantry |
| Private CHARLES H. JEFFERIES |) | Division, 28 February 1945. |
| (33 181 343), Company F, |) | Death. |
| 366th Infantry Regiment. |) | |

REVIEW by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

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

Specification: In that Private Charles H. Jefferies, Company "F", 366th Infantry, did, at Barga, Italy, on or about 22 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premedi(t)ation, kill one Alfredo Bechelli, a human being by shooting him with a rifle.

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

Specification 1: In that Private Charles H. Jefferies, Company "F", 366th Infantry, did, at Barga, Italy, on or about 22 December 1944, with intent to do him bodily harm, commit an assault upon Pfc James Livingston, Company "F", 366th Infantry, by shooting him in the leg, with a dangerous weapon, to wit, one (1) rifle.

Specification 2: In that Private Charles H. Jefferies, Company "F", 366th Infantry, did, at Barga, Italy, on or about 22 December 1944, with intent to do him bodily harm, commit an assault upon Pfc John B. Walker, Company "F", 366th Infantry, by shooting him in the shoulder, with a dangerous weapon, to wit, one (1) rifle.

Specification 3: In that Private Charles H. Jefferies, Company "F", 366th Infantry, did, at Barga, Italy, on or about 22 December 1944, with intent to do him bodily harm, commit an assault upon Pfc Mansee Bonnett, Company "F", 366th Infantry, by shooting him with a dangerous weapon, to wit, one (1) rifle.

Specification 4: In that Private Charles H. Jefferies, Company "F", 366th Infantry, did, at Barga, Italy, on or about 22 December 1944, with intent to do her bodily harm, commit an assault upon Silvana Bechelli, by shooting her with a dangerous weapon, to wit, one (1) rifle.

Specification 5: In that Private Charles H. Jefferies, Company "F", 366th Infantry, did, at Barga, Italy, on or about 22 December 1944, with intent to do her bodily harm, commit an assault upon Giaconda Bonini, by shooting her with a dangerous weapon, to wit, one (1) rifle.

Specification 6: In that Private Charles H. Jefferies, Company "F", 366th Infantry, did, at Barga, Italy, on or about 22 December 1944, with intent to do her bodily harm, commit an assault upon Alda Bonini, by shooting her in the leg with a dangerous weapon, to wit, one (1) rifle.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, Mediterranean 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 22 December 1944 members of a squad of Company F, 366th Infantry Regiment, were billeted and living with an Italian family in a house at Barga, Province of Lucca (Italy). The detachment, of which Sergeant John A. Williams was in charge, consisted, among others, of Staff Sergeant Joe W. Wynn, Sergeant Sterling P. Booker, Private First Class Mansee Bonnett, Privates Richard Turner, John B. Walker and James Livingston, and accused. The Italian civilians present in the house at about 1630 hours 22 December included Vittoria Bechelli, her 16 year old daughter Silvana Bechelli, her small son Alfredo Bechelli, Giaconda Bonini, her infant daughter Alda Bonini, and Angelo Bertoncini. (R. 8-11, 13,19-25,27,29,30,33-40) About 1630 hours Sergeant Wynn heard some shots

outside, went to the window to see where they were coming from, and was told by Turner that accused was on the side of the hill, firing his rifle. When accused entered the building Wynn asked him if he had been firing, and when accused answered affirmatively, Wynn asked him at what he was firing. Accused replied that he was testing his rifle, whereupon Turner said to accused, "you better watch that stuff. One of these days I'll zero my 60mm mortar on you". (R. 10) Wynn testified that Turner and accused "had a few words", which consisted of "just mean talking. One said, 'I'll zero my rifle in on you,' and the other one said that he wouldn't do it'" (R. 10,13,14,17). While accused and Turner were arguing, Sergeant Miller E. Johnson called from the command post in reference to his rifle and Wynn went outside to see if he could find it (R. 10,17). When he came back to the building accused was sitting down in front of the fire with his rifle. Thereupon Wynn took the rifle away from him, not only because of accused's argument with Turner, but also because "we never did use our rifles unless we was going out on post". (R. 10,13,14,16,17) Accused voluntarily gave his rifle to Wynn, who did not have to use force to obtain it: "I just walked up to him, and he had the rifle laying in his lap, and I walked up to him and said, 'Give me the rifle,' and reached down and got it out of his lap" (R. 14).

Because accused was "getting loud in the house", and was disorderly, Wynn called the platoon leader at the command post, told him that accused was acting queerly (R. 10,14,23), and was directed to send accused to the command post (R. 17,22). Wynn then returned to accused his equipment and his rifle (R. 17). Shortly thereafter Williams arrived at the house to take accused to the command post (R. 11,22,27). While accused was getting his equipment together he had an argument with Private Livingston, "passing a few words backwards and forwards", and telling Livingston that "one day he would get him" (R. 18,19,22-27). Wynn knew of no prior difficulty between accused and Livingston (R. 20). Sergeant Booker testified that there were "just some things" that accused and Livingston "didn't agree on" and that "they got angry with each other, and that is why we had to send him (accused) away" (R. 26,27). During the argument Wynn saw accused bring his rifle to port arms. Not knowing what accused was going to do, and in order "to get his mind off what he was doing", Wynn struck accused and took his rifle from him by force. (R. 14,15,17-19,22,23,27,28) Wynn removed the ammunition and returned the rifle to accused (R. 18), who then left with Williams for the command post (R. 11,15,16,22,25,27,28). A few minutes later Williams returned, saying that accused had gone on alone (R. 27). The remaining members of the squad prepared to eat supper and sat down at the table. The Italian family was present in the room but did not eat with the troops. (R. 11,16,21,25,29,30,34-36,38)

Wynn testified that about half an hour after accused left for the command post, "just about the time we finished eating supper," he "saw the door ease open. I looked up, and before I could say anything, Pvt Jefferies began to shoot". (R. 11,16) Accused stood in the doorway and fired seven or eight rounds into the room (R. 25,40). Walker was hit in the chest or shoulder (R. 11-13,25,26). Livingston was hit in the arm and in the leg (R. 11-13,18,25,26). Bonnett received a "blast" in the eye and was wounded on the back of his leg (R. 21,25). Silvana Bechelli was wounded in both

knees and several shots went through her stomach (R. 34,35,11-13,26,38). Giaconda Bonini was wounded slightly on the right hip (R. 34,35,38) and Alda Bonini, the baby Giaconda was holding in her arms, was also wounded (R. 34, 35,38). Vittoria Bechelli's small son, Alfredo Bechelli, was killed. Vittoria testified that she thought "the first shot struck him, because when I turned my eyes, I saw him laying on the ground. I picked him up, and he drew his last breath in my arms". (R. 34,35,39,40) The bullet passed from one side of the body to the other and "went through his heart" (R. 35). Accused was the only one who fired a weapon (R. 37). Bertoncini testified that when accused fired the rifle witness jumped out of the window and then returned to the house when he heard "screams and calls for help". There he saw "all the wounded people" and Vittoria Bechelli "with her child in her arms, dead". (R. 38) After the shooting ended, Wynn went outside and he and "the platoon leader went back up the hill to the CP and got Pvt Jefferies" (R. 11,12).

About 1645 hours 22 December 1944, Technician Third Grade Chauncey I. Charity, Medical Detachment, 366th Infantry, examined the body of Alfredo Bechelli. He testified that the only sign of injury on the child was a bullet wound "in the left side, fourth rib, coming in on the right around the fifth rib", penetrating completely through the body. Bleeding had ceased, there was no pulse, and the body was lifeless. Charity pronounced the baby dead. (R. 7-9) Silvana Bechelli and Giaconda Bonini were given aid and "treated by the American medics" (R. 12,35).

No evidence was introduced by the defense and accused elected to remain silent (R. 41).

4. It thus appears from uncontradicted evidence that at the place and time alleged accused shot with a firearm and killed Alfredo Bechelli, the person named in the Specification, Charge I, and that he wounded Privates James Livingston and John B. Walker, Private First Class Mansee Bonnett, Silvana Bechelli, Giaconda Bonini and Alda Bonini, the persons named in the Specifications, Charge II, by shooting them with a firearm.

The evidence shows that preceding the homicide accused had been firing his rifle and that when he returned to the house where he and other members of his squad were living with an Italian family, he engaged in an argument with a fellow-soldier who berated him for his carelessness in so doing. A noncommissioned officer named Wynn took accused's rifle away from him but, after being advised that accused was to go to the battery command post, returned it to him. While accused was gathering his equipment he became involved in another argument, this time with Livingston. Accused advanced upon Livingston, with his rifle at port arms, and threatened that "one day he would get him". Wynn struck accused and took his rifle away from him, but shortly thereafter returned it to him, and accused left the house for the command post. Approximately half an hour later, while the squad members were at dinner and other Italian civilians standing about in the room, accused returned to the house, stealthily opened the door and fired seven or eight shots into the room. The three soldiers and three Italian civilians, named in the Specifications, Charge II, were wounded. From the suddenness and

violence of the assaults, and from the use of the firearm, the court was justified in inferring an intent by accused to do bodily harm as alleged.

Alfredo Bechelli, a small child, was struck by a bullet which pierced his heart and he died a few moments later in his mother's arms. On searching for a motive for accused's conduct, the evidence presents a reasonable basis for an inference that accused was angered with his fellow soldiers and with Livingston in particular because of the arguments that he had had with them, and that he returned to the scene with his weapon ready to fire, determined upon revenge. He had previously threatened that "one day he would get" Livingston. One shot from his weapon wounded Livingston and one shot killed Alfredo Bechelli, an innocent bystander.

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not" (MCM, 1928, par. 148a, p. 163; see also Winthrop's, reprint, 1920, p. 673) (underscoring supplied).

Neither Turner's threat to "zero" a mortar on accused, nor Livingston's exchange of angry words with accused, nor Sergeant Wynn's striking accused and forcibly taking his rifle a half hour before the shooting, amounted to legal provocation or justified his resort to the firearm. It is clear that when accused fired he was not in danger of losing his life or of incurring serious bodily harm at the hands of Livingston or any other person.

Malice aforethought is abundantly evident from his apparent anger and resentment, and the deliberate, wanton, cold-blooded use of a deadly weapon in a deadly manner. Callous indifference to the life of his victim or vicious malice characterized the behavior of accused. The homicide was without legal provocation, justification or excuse. Accused was properly found guilty of murder as charged (MCM, 1928, par. 148a).

5. The record contains no direct evidence that the weapon used by accused was a rifle, as is alleged in the Specifications. However, the evidence does show that the accused left the building with his rifle shortly before he fired the shots, and that the shots were fired from a firearm. No issue was raised by the defense as to the nature of the firearm used, and no objection was raised to references to accused's use of a rifle, by the trial judge advocate in his questions to the witnesses (R. 12,39,40). The court could reasonably infer that the weapon used by accused was a rifle, but any variance or omission in this respect between the allegations and the proof is not substantial and accused could in no manner have been injured or misled thereby (AW 37; NATO 696, Pokorney; MTO 5917, Jones).

6. The charge sheet shows that accused is 21 years of age and was inducted 13 April 1942. He had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92.

Edward H. [unclear] Judge Advocate.
Walter J. [unclear] Judge Advocate.
Nery C. [unclear] Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
2 May 1945.

Board of Review

MTO 6638

UNITED STATES)

92D INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Rear Echelon, 92d Infantry
Division, 28 February 1945.
Death.)

Private CHARLES H. JEFFERIES
(33 181 343), Company F,
366th Infantry Regiment.)

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Judge Advocate.
 Judge Advocate.
 Judge Advocate.

MTO 6638

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
2 May 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private Charles H. Jefferies (33 181 343), Company F, 366th Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50¹/₂, you now have authority to order execution of the sentence.

(82)

CONFIDENTIAL

MTO 6638, 1st Ind.
2 May 1945 (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:

(MTO 6638).



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

(Sentence ordered executed. GCMO 94, MTO, 22 Jun 1945)

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
11 May 1945.

Board of Review

MTO 6640

UNITED STATES)
)
 v.)
)
 Private HENRY W. NELSON)
 (35 726 029), Company A, 371st)
 Infantry Regiment, and Private)
 JOHN T. JONES (38 315 973),)
 Battery B, 599th Field Artillery)
 Battalion.)

92D INFANTRY DIVISION

Trial by G.C.M., convened at
Lucca, Italy, 17 March 1945.
As to each: Death.

REVIEW by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

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

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

Specification: In that Private John T. Jones, Battery "B" 599th Field Artillery Battalion, and Private Henry W. Nelson, Company "A" 371st Infantry, acting jointly, and in pursuance of a common intent, did, at Massa Macinai, Italy, on or about 29 January 1945, forcibly and feloniously, against her will, have carnal knowledge of Ireni Rossi Martini.

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

Specification 1: In that Private John T. Jones, Battery "B" 599th Field Artillery Battalion, and Private Henry W. Nelson, Company "A" 371st Infantry, acting jointly, and in pursuance of a common intent, did, at Massa Macinai, Italy, on or about 29 January 1945, by force and violence

and by putting him in fear, feloniously take, steal and carry away from the presence of Luigi Decanini a watch, two rings, two bicycles, the property of Luigi Decanini, value about \$70.00.

Specification 2: In that Private John T. Jones, Battery "B" 599th Field Artillery Battalion, and Private Henry W. Nelson, Company "A" 371st Infantry, acting jointly, and in pursuance of a common intent, did, at Massa Macinai, Italy, on or about 29 January 1945, with intent to do him bodily harm, commit an assault upon Attilio Rovai by shooting him in the eye with a dangerous weapon, to wit, a carbine.

Each accused pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence was introduced of one previous conviction of Nelson by summary court-martial for wrongfully driving a motor vehicle in excess of 30 miles per hour speed limit in violation of Article of War 96, and of one previous conviction of Jones by summary court-martial for failure to repair at the fixed time to the properly appointed place for a march in violation of Article of War 61. Each was sentenced to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority disapproved so much of the finding of guilty of Specification 1 of Charge II as to each accused as involved a finding that the "value of the property alleged therein was in excess of \$20.00", approved the sentences, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, Mediterranean Theater of Operations, confirmed the sentence as to each accused and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that accused Nelson is a member of Company A, 371st Infantry Regiment and accused Jones is a member of Battery B, 599th Field Artillery Battalion (R. 31). About 2030 hours 29 January 1945 they went to the house of Paolini Minconi at Massa Macinai, a town about four and one half miles from Lucca (Italy), and asked him for something to drink. As he had nothing to give them, they asked him to find something for them. Minconi then went with Jones to Lucca and procured a bottle of "grappa". They returned to Minconi's house where the accused remained about 15 minutes and then left, proceeding in the direction of Lucca. On the main road to Lucca, about half a mile from Minconi's house, was the home of Angelo Martini, and about a mile from Minconi's house was the house of Luigi Decanini. Accused Jones had been to Minconi's house once before. (R. 7-10)

Angelo Martini lived at Massa Macinai in a household which consisted of himself, his wife Ireni Rossi Martini, his thirteen-year old daughter Anna Martini, two sons, one of whom, Alberti Martini, was six years old, and a young boy named Silvio Georgio (R. 10,11,13,14,16,19,20,23,24). Shortly after 2200 hours (R. 13,16) 29 January, whilst the Martini family was sitting downstairs by the fire, two colored soldiers knocked on the door and, when Angelo asked who was there, one of them replied "'the Police', 'American Police'" (R. 11,12,14,20). Angelo opened the door and the two

soldiers entered. One was armed with a carbine. One was accused Jones. (R. 12,14,20) When they indicated that they wanted to go upstairs, Silvio took a light and went upstairs with them. In one of the rooms upstairs a ladder led to an attic room which was closed and locked. Attilio Rovai, a next-door neighbor of the Martinis, had some of his belongings stored in the room. The soldiers said "'Aperta', 'Aperta', 'open', 'open'", and when Silvio was unable to open it fast enough for them they fired a shot into the ceiling. (R. 12,14,21,23) Then the soldiers came downstairs, went back upstairs again, and once more returned to the ground floor (R. 12). Keeping the carbine pointed at Angelo and Silvio the soldiers pushed them outside the house and "lined them up". At that point Attilio Rovai, who had been summoned by Angelo, came to the house and tried to enter. He was "shoved outside" and the soldier with the carbine fired three shots at him as he stood on the steps. The second shot hit Attilio in the eye. He tried to run away but the soldier with the carbine caught hold of him, brought him inside the house to the room where Ireni was and made him sit down. The soldier looked at the eye, and said there was "nothing much wrong" with him. (R. 12, 14,21,23,24)

Ireni had meanwhile remained inside the house with her daughter Anna and her son Alberti. Anna testified that after the shots were fired at Attilio her mother moved away from the door toward the fireplace and as she did so accused Jones gave Ireni "two slaps in the face because she was screaming. This soldier gave my mother another slap and she fell to the floor still screaming". (R. 14,21) Ireni testified that while one of the soldiers was firing at Attilio the other one (Jones)

"had caught me and flung me onto the floor. I got up and went over to the fire place with my children, my little boy and my girl of thirteen. One of the soldiers came over to me and put his hand on my leg. I tried to get away, I tried to get out of his road and he gave me a slap in the face. I then again tried to get out of his road and he again gave me a slap in the face and I fell to the floor. While the soldier pushed me and I fell to the floor he held his hand over my mouth so that I could not scream for help and my girl of thirteen began to scream for help. At the same time I found myself with something cold at my throat" (R. 14).

She did not know what this was, but "it seemed" to her "like a knife" (R. 15). The soldier removed the object from her throat, and, Ireni testified:

"I said don't kill me. The soldier said that he would if I did not let him do as he wished so I let him do as he wished because I was afraid the soldier would kill me. The soldier then took my drawers off and did as he wished with me. When the soldier was finished, he got up, went to the door and met the second soldier who had the gun. He took the gun from the second soldier and the second soldier came into the room. I had got up and was standing

beside the table. *** I was so frightened that when he came in the room and spoke to me I laid down and let the second soldier do as he wished with me. When the second soldier was finished, he got up and shook my hand and said good-bye and closed the door" (R. 14,15).

Each soldier inserted his penis in her (R. 15).

Attilio testified that while one of the soldiers was forcing him to sit down in the chair one soldier

"was on top of the woman (Ireni) and the other one was standing guard. When the first soldier was finished *** with the woman, he got up, took the gun off the second one and the second soldier went with the woman *** the first soldier who had been with the woman lit a match and looked at my eye and said there was nothing wrong with my eye also" (R. 23,24).

Witness managed to leave the house while "one soldier was still lying on top of the woman" (R. 24).

Anna testified that when the first soldier (Jones) "finished with" her mother, he got up, took the carbine from the other soldier and held it. pointed at Attilio while the other soldier "went with my mother. When this second soldier was finished with my mother *** the first soldier wanted to come again with my mother but the second soldier gave him a push and sent him away" (R. 21,22). She testified that by being "with" her mother she meant that the soldiers were "lying on top of" her (R. 22).

The soldiers remained at the Martini house about 15 minutes (R. 13). After they had gone Ireni looked for the light that had been burning, but was told by her children that one of the colored soldiers had put it out (R. 12,15). Angelo, Ireni and Attilio were unable to identify accused (R. 10, 11,13,22). Ireni testified that one of the soldiers at her house that night "went by with Paolini (Minconi) one day" (R. 16). Anna Martini, Ireni's daughter, identified accused Jones as one of the two colored soldiers who came to her house. She testified: "I had not seen him before but when he lit the match to look to the wounded man's eye, I looked him in his face and I have had his face before me all this time". (R. 20,22)

The evidence further shows that on 29 January 1945 Luigi Decanini was in his house with his wife Ida (R. 26,27,29). About 2230 hours, while Luigi was downstairs and his wife was upstairs in bed, two colored soldiers opened the door and entered the room downstairs. One of the soldiers was accused Jones (R. 26,27). The other soldier pointed a carbine at Luigi and indicated by signs that he should go upstairs to his wife's bedroom. The two soldiers followed him into the room, and Luigi testified,

"The soldier that had the carbine made signs for me to take my wrist watch off. The other soldier (Jones) lifted two rings that were on the dressing table. The soldier with the carbine fired a shot into the radio" (R. 27-30).

Witness did not give them permission to take the rings "but they took them just the same". The soldiers left shortly thereafter and Luigi "then noticed that there were two bicycles missing" (R. 27,28,30). Ida testified that one ring had a value of about \$150, the other one from \$70 to \$80, and that the watch cost about \$90. to \$100 (R. 30). Both Luigi and Ida identified accused Jones in court as one of the colored soldiers who was at their house (R. 26, 27,29,30).

About 1615 or 1645 hours 30 January 1945 Ireni Rossi Martini was examined by Captain Paul M. Lass, Medical Corps, at the 170th Evacuation Hospital, near Lucca. Captain Lass testified that Ireni "had been brought in by the MPs the purpose being to find out whether she had been raped and I was asked to examine her to tell whether or not there was actual penetration". His examination revealed that there was "evidence of violence". He found fresh superficial scratch marks, which appeared to have resulted from struggling, on the right thigh above the knee, on the right buttock, and on the right leg between the ankle and the knee. There were also newly incurred bruises with discoloration of the left upper eyelid. A pelvic examination was made, which was "negative for gross injury. However, there was evidence of occasional human spermatozoa found in the vaginal secretions". (R. 17,18)

Attilio Rovai testified that the second shot from the soldier's carbine struck him from the side and that he "lost" his eye (R. 23,24). On 30 January 1945 he was examined at the 170th Evacuation Hospital by Major Vernon D. Stephens, Medical Corps, the eye, ear, nose and throat surgeon at the hospital. Major Stephens testified that Attilio had a severe avulsion of the left eye, the examination revealing a perforating wound of the left eyeball with partial avulsion of the left lower eyelid. The condition of the pupil of the eye was such that it was necessary to remove the pupil and what was left of the eye and the lower part of the lid. In Major Stephens' opinion the wound had been incurred within the preceding 24 hours and was caused by a rifle bullet. (R. 24-26)

Each accused made pre-trial statements which were admitted in evidence over the objection by the defense that each accused was not warned of his rights prior to the signing of his statement (R. 32,35,43). With regard to the statement of accused Jones the evidence shows that (on 31 December or 1 January), about three days after he had been apprehended at Pietrasanta, he was questioned by First Sergeant Nicholas F. Piazza and Private First Class Dominic J. Maglione, both of Company C, 101st Military Police Battalion, and a Sergeant Stack (R. 31-33,42). Maglione told Jones that he did not have to make a statement or sign anything and that anything he said or did would be held against him (R. 33). No promises or threats were made and Jones was in no way coerced. Maglione testified that he told Jones at the beginning it was not necessary for him to make a statement, and witness believed that the statement was voluntarily made. (R. 32,33,42,43) Jones "told the whole story" to Piazza, who asked him if he desired to add or subtract anything from the statement and Jones stated that there was nothing that he wanted taken out and that it was "all right the way it was" (R. 42, 33). He was then brought before Second Lieutenant E. M. Elston, Company C, 101st Military Police Battalion, who asked him if he understood the statement

and Jones answered affirmatively. Sergeant Stack again asked him if he wanted any change to be made in the statement and Jones replied that it was as he had made it. He then signed the statement and Lieutenant Elston witnessed his signature. The officer testified that he did not hear the sergeants warn accused of his rights under Article of War 24 but that no threats were made, or promises given or force used. (R. 39-41) The statement of Jones reads as follows:

"On January 29, 1945 at approximately 1800 hours, I picked up a colored soldier in the town of Viareggio and took him with me in my truck toward Pietrasanta. On the way we stopped at a bar and had a few drinks. In the bar, we got to talking and decided to go to Lucca. After we got to Lucca, we could not find anything and then I told the soldier whose name I did not know, that I knew a place where we could get a drink of grappa. We went to a small town to the house of an old man who I knew and asked for some grappa. He said that he did not have any but knew where he could get some. I went with him to another house and we returned with the grappa to his house. We stayed there for about 25 or 30 minutes more and then this other soldier, whose name I found is Nelson, left. We went up the road a short distance and Nelson told me to stop the truck. He got out of the truck and told me to get out also. I told him I didn't want to get out because we had to get back to camp. Nelson then said 'get out, get out you're going with me'. Since he had the rifle, I went with him. We went to a house and he knocked on the door. The person inside said something and then Nelson said, 'Open the door Peasano' The door was then opened and we went inside. Nelson then chased the men out with his rifle. After he got them out, he started shooting. After he stopped shooting, he came back into the house. I was standing in the doorway and I do not know what happened when he went into the house. In a few minutes, Nelson came out and said 'let's go'. We went to the truck and drove off.

"We went a short distance up the road and stopped again. After we stopped he said 'Let's go into this house'. He pushed on the door and it opened and he said 'Let's go upstairs'. We went up stairs and there he said something to the man about the radio and then Nelson fired a shot into the radio. Nelson then took a wrist watch from the arm of the Italian man. Then he said 'Let's go'. We went downstairs and Nelson told me to take the bicycles and put them on the truck. I told him that we didn't need any bicycles because we couldn't do anything with them. He said 'Get them and put them on the truck, we can sell them'. We then got into the truck and left for Pietrasanta.

"We went to the home where the other soldier, Nelson, had been staying in Pietrasanta. Here we both took the bicycles off the truck and brought them into his house. I then turned the truck around and went back to my camp" (Ex. A).

With regard to the statement of accused Nelson the evidence shows that Piazza, Stack and Maglione, pursuant to information furnished by Jones, went to a house where it was believed that Nelson was staying and searched the rooms. A carbine hung on the wall in one room. Piazza removed the clip and the round that was in the chamber, approached the bed where Nelson was sleeping and pulled the sheet off, telling him to get up and that he was under arrest. Nelson replied "What the hell you want", whereupon Piazza told him "to shut up and don't say a word for anything that he said or did would be held against him". (R. 34,42) Nelson was taken to military police headquarters in Lucca (R. 42) and about 2 or 3 (February) was in the 170th Evacuation Hospital (R. 35) where he made a statement to Piazza which was witnessed by Captain Hnat, Medical Corps (R. 34,36). No promises or threats were made by either Piazza or Maglione and Nelson was in no way coerced (R. 34,43). Piazza testified that "Nelson made the statement of his own free will" (R. 34). Maglione testified that he told Nelson at the beginning it was not necessary for him to make a statement, and witness believed that the statement was voluntarily made (R. 34). Captain Hnat, in whose presence Nelson signed the statement, testified that before Nelson affixed his signature the military police informed him "that he was making a statement and that anything in the statement that he did not think was right that he could scratch it out and if it wasn't right he did not have to sign it". After the reading of the statement was concluded they asked him if it was all right and if he understood it, and he replied that he understood it and it was all right. Captain Hnat was of the opinion that the statement was voluntarily made by Nelson, and that Nelson knew what he was doing. (R. 36-38) The statement of Nelson reads as follows:

"Jones picked me up in Viareggio, Italy on January 29th 1945 at about dusk. We rode up toward Pietrasanta and then stopped off at a little wine shop and had a drink. Jones asked me if I had to report to my Company and I told him that I had no place in particular to go. He told me that he knew some place where we could get a few drinks and I said O.K. lets go. We went to a little town where Jones took me into the home of an old man who spoke English. We had a few shots of grappa there and after about 45 minutes both of us left. We rode down the road a bit and then stopped. We left the truck on the road and knocked on the door of this second house. They asked who it was and I told them 'Police'. A man came to the door and I put the rifle in his face. Then another man came outside. This man started toward the stable and I started firing at him to scare him. One of the shots hit him, then I called him back and told him to sit down. I looked at his eye and told him 'Poco Male'. In the meantime, Jones was in the house. After Jones came out,

he asked me if I wanted somebody, I said yes I don't mind. Jones then took my rifle and stepped outside. Then I went in and satisfied myself. When I got done, I shook her hand and went back to the truck. Then we left.

"We went up the road again and stopped once more. We knocked on the door of the third house and when they asked who it was, I told them it was the police. A man opened the door and I marched him upstairs to his wife's room. I told him that we weren't going to bother his wife. I then asked him if the radio was Tedeschi or Italian. He said it was Italian and that it was 'finito'. I then fired a shot into the radio. I went in to the next room and left Jones in the room with the radio. I took four flasks of wine and then came back into the other room and told Jones 'let's go'. We went downstairs and I said we ought to take the bicycles. Jones then loaded them on the truck. Jones went upstairs again and got the man to come down and lock the door. Jones and I then got into the truck and left. On the way back to Pietrasanta, we stopped and threw the bicycles over a cliff. We then went on to Pietrasanta and stopped at the entrance to the 599 F.A. area. I pointed out the house that I was staying at and left him and went over to speak to the guard. He went on in the direction of his camp" (Ex. B).

Accused Jones made the following unsworn statement:

"I took my truck to Viareggio and there I picked up Nelson and we stopped, we went back to Pietrasanta and there we went to a bar and had a few drinks of grappa. I said lets go on to Lucca so we decided to go there. We went down to Lucca and went to the house of an Italian and there we asked him for some vino. He said that he did not have any vino but he might be able to get some grappa so I took him to get the grappa. We came back and we had a few drinks and Nelson and I got into the truck and we started back to our camp. We went down the road a bit and we stopped along the side of the road. Nelson went into a house so I went in with him. I was standing in the doorway and a man came up and I told him to stop. He would not stop and I had the carbine so I fired a shot at him. Nelson came out side and told me lets go and we left. We got into the truck and we went on down the road and we stopped again. Nelson got out and went inside the house and up the stairs. He said something to the man but I did not understand what he said. I then went into another room and saw some vino and I got six bottles of vino and I went back down stairs. Later Nelson came down the stairs and we got the bicycles and put them in the back of the truck. We then started back to Pietrasanta. We dropped the bicycles out on the way back" (R. 45).

Accused Nelson made the following unsworn statement:

"We left PietraSanta. First we went to Lucca and we went to the house of an Italian to get some vino. We drank some grappa. We drank pretty much. After this we went down to Guama and we went into a fellows house and we knocked on the door and they asked us who was there and we told them Police and a man came to the door and let us in. Another man came up from outside and we went in the house for about 10 or 15 minutes - - I then came outside of the house and saw some one running away. I called for him to stop - Jones, I fired three shots at him but I did not hit him because he ran. I then went and got Jones and we left. We went on down the road to another little house and Jones and I went inside. Jones went up stairs and he told me to get the bicycles and put them on the truck I told him that I did not see what we could do with them but I put them on the truck that is the only thing that I took from the house" (R. 44).

4. There is thus direct and positive evidence that at the place and time alleged in the Specification, Charge I, accused Nelson and Jones forcibly and without her consent had unlawful carnal knowledge of Ireni Rossi Martini, the woman named in the Specification. Pretending to be American military policemen accused entered the Martini home and at the point of a carbine forced one of the occupants to help them search through the house. When they were unable to enter an attic room one of accused fired his carbine. Returning downstairs they forced Ireni's husband and a young Italian boy outside the house and when Attilio Rovai, a neighbor, approached to give aid he was fired upon thrice with the carbine, the second shot wounding him in the eye. Jones went to Ireni, placed his hand upon her leg and, as she tried to elude him, slapped her face. Ireni screamed, Jones slapped her again, and she fell to the floor. He placed his hand over her mouth to keep her from calling for help and placed a knife or other instrument at her throat. When she asked him not to kill her he replied that he would unless she let him do as he wished. Then, because she was afraid Jones would kill her, Ireni testified that she "let him do as he wished". Jones removed her drawers and penetrated her person sexually. When he finished he took the carbine from Nelson who had been guarding Attilio, and Nelson had intercourse with Ireni. She testified that she was "so frightened" that she let him do as he wished with her. Each act of intercourse took place in the presence of Attilio and Ireni's son and daughter. The testimony of the victim as to the fact of penetration and the force and violence used was corroborated by the medical evidence. Upon the facts and circumstances disclosed, the court was clearly warranted in finding accused Jones and Nelson guilty of rape as charged.

Ireni did not expressly testify that she resisted to the extent of her ability, that her resistance was overcome by force, or that she did not consent to the actual act of intercourse. However, the evidence shows that one of accused (Nelson) was armed with a carbine, that he previously fired the weapon four times, threatened Ireni's husband with it, and that the weapon was always in close proximity during the commission of the act. Jones slapped Ireni

several times, causing her to fall to the floor and there is evidence that he placed an object at her throat, threatening to kill her unless she submitted to him. She did submit and submitted also to Nelson because she was frightened. These facts, together with the other acts of violence visited upon the victim, justify the inference that she did not in fact consent, and that any lack of or cessation of resistance was attributable to her fear of great bodily injury or death. It is rape, though a female may yield through fear. Such being the facts, rape was committed (Bull. JAG, December 1942, sec. 450 (9), pp. 363-364; NATO 3940, Maxey et al; MTO 6436, Mason).

Neither Ireni, the victim, nor her husband, nor Attilio Rovai, identified accused as the assailants except they described the assailants as colored American soldiers. Ireni's daughter Anna, however, unequivocally identified accused Jones and it is abundantly clear from the record that in fact Jones and Nelson were the perpetrators of the crime. Shortly prior thereto they were together at the home of Minconi who had known Jones previously, and who saw them set out in the direction of the Martini home. Each accused in his pre-trial statement and in his unsworn statement to the court admitted he was with the other, and Nelson stated that he went into an Italian home and "satisfied" himself. The other circumstances were similar to those related by each accused and the inference was justified that it was Nelson and Jones who violated Ireni. The court properly found each accused jointly guilty of rape as charged.

It also appears with respect to Specification 1, Charge II, that at the place and time alleged accused jointly took and carried away a watch, two rings and two bicycles, the property of Luigi Decanini, the person named in the Specification, under circumstances compelling the conclusion that it was done with the intent to deprive the owner of his property. Accused Jones was identified by the victim and his wife, and his companion was shown to have been armed with a carbine. The watch and rings were shown to have been taken from the immediate presence of Luigi and under such circumstances as justified him in not objecting to or protesting the act. The court was warranted in concluding that the taking was by force and violence and by putting in fear, as alleged (MCM, 1928, par. 149b). Inasmuch as the bicycles were not taken from the persons or the presence of Luigi, by the use of force and violence it would appear that only larceny thereof was established. However, in view of the fact that accused were properly convicted of robbery of the watch and rings the Board of Review is of the opinion that the substantial rights of accused were not injuriously affected by the erroneous findings of the court with respect to the bicycles (AW 37).

With respect to Specification 2, Charge II, it appears that at the place and time alleged Attilio Rovai, the person named in the Specification, was shot in the eye with a carbine. The wound was so severe that it was necessary the following day to remove what was left of the eye and the eyelid. Attilio had arrived at the Martini house as the accused were ejecting Angelo and Silvio therefrom. One of the accused fired his carbine three times at Attilio, the second shot wounding him. From the violence of the assault, from the use of the firearm, and from the nature of the injury inflicted, the court was justified in inferring an intent by accused to do bodily harm as alleged.

Although only one of accused fired the shot which injured Attilio there is ample basis for the conclusion that the other was aiding and abetting his companion in the unlawful enterprise. The finding that accused were acting jointly and in pursuance of a common intent was justified by the evidence.

Although Luigi Decanini, the victim of the robbery (Specification 1, Charge II) was able to identify only accused Jones, and Attilio Rovai, the victim of the assault (Specification 2, Charge II) was unable to identify either accused, it is apparent from all the circumstances of the case as set forth above with relation to the charge of rape (Charge I), as well as the pre-trial and unsworn statements of each accused, that Jones and Nelson were in fact the perpetrators of the crimes and were properly found guilty as charged.

5. Defense objected to the admission in evidence of the pre-trial statements made by accused on the ground that each accused was not warned of his rights prior to the signing of his statement. The evidence was uncontradicted that each accused was properly advised, in substance, that he need not make a statement and that if he did make a statement it would be used against him, that each statement was signed before an officer who witnessed the signing, that no threats or promises were made or coercion used, and it nowhere appears that the statements were other than voluntarily made. The objections were properly overruled. Neither statement involved a confession of rape.

6. Each accused in his pre-trial statement made reference to the acts of the other accused in the commission of the crimes. These statements were admitted in evidence unconditionally. The court should have been advised not to consider the statements made insofar as they involved the acts of the accused who was not the author of the statement. However, the acts related by each accused in regard to the other were substantially admitted in the statement of the other accused and the Board of Review is of the opinion that the substantial rights of either accused were not injuriously affected thereby (MTO 6411, Steedley et al).

7. The charge sheets show that accused Nelson is about 21 years of age and was inducted 26 February 1943, and that accused Jones is 32 years of age and was inducted 3 November 1942. No prior service is shown as to either accused.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentences. A sentence of death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92.

Edward H. Berglund, Judge Advocate.
William P. Brown, Judge Advocate.
Henry C. Reisch, Judge Advocate.

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(94)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
11 May 1945.

Board of Review

MTO 6640

UNITED STATES)

92D INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Lucca, Italy, 17 March 1945.
As to each: Death.

Private HENRY W. NELSON)
(35 726 029), Company A, 371st)
Infantry Regiment, and Private)
JOHN T. JONES (38 315 973),)
Battery B, 599th Field Artillery)
Battalion.)

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

The record of trial in the case of the soldiers named above has been examined by the Board of Review and held legally sufficient to support the sentences.

 , Judge Advocate.
 , Judge Advocate.
 , Judge Advocate.

MTO 6640

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
11 May 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private Henry W. Nelson (35 726 029), Company A, 371st Infantry Regiment, and Private John T. Jones (38 315 973), Battery B,

CONFIDENTIAL

MTO 6640, 1st Ind.
11 May 1945 (Continued).

599th 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 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. Attention is invited to the fact that the record of trial recites that two-thirds of the members of the court present concurred in the findings of guilty. Radiogram from The Judge Advocate General, WX 77215, 4 May 1945, is applicable.

3. 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:

(MTO 6640).



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

(Sentence as to each accused ordered executed. GCMO 95, MTO, 22 Jun 1945)



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

AGO 512, U. S. Army,
25 May 1945.

Board of Review

MTO 6642

UNITED STATES)

v.)

Private WILLIAM MASSEY)
(32 355 034), 4178th)
Quartermaster Service)
Company.)

ROME AREA, MEDITERRANEAN)
THEATER OF OPERATIONS)

Trial by G.C.M.; convened at)
APO 794, U. S. Army, 28)
February 1945.)
Dishonorable discharge and)
confinement for life.)
U. S. Penitentiary, Lewis-)
burg, Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

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

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

Specification: In that Private William (NMI) Massey, 4178 Quarter-master Service Company, APO 782, US Army, did, at Rome, Italy, on or about 15 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Filacchioni Mario di Giulio, a human being by shooting him with a revolver.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Private William (NMI) Massey, 4178 Quartermaster Service Company, APO 782, US Army, did, at Rome, Italy, on or about 15 December 1944, by force and violence and by putting her in fear, feloniously attempt to take, steal and carry away from the presence of Arlotti Marcella, the property of Arlotti Marcella, to wit, Italian lire, having some value.

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specification, not guilty of Specification 1, Charge II, guilty of Specification 2, Charge II, and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 14 December 1944, accused and Private First Class Milton D. Smith, both members of 4178th Quartermaster Service Company, arrived at Rest Center Foro Italia, Rome, Italy, on five day passes (R. 5,37). On the morning of 15 December they left the rest center together, with Smith carrying for Massey the latter's caliber .38 Smith and Wesson revolver, serial number 947375 (R. 5,7,21,59; Ex. 2). About 1100 hours they arrived at a bar at Via Flaminia, Rome, Italy, where each consumed four or five drinks (R. 4,6,7,11,12,15,16; Exs. 1,3). There, accused obtained his pistol from Smith, which, together with Italian and large denomination German money, were seen in accused's possession by the proprietor of the bar (R. 7,9,12; Ex. 2). They left the bar at about 1400 hours and parted company at 1600 hours, at which time accused was a little intoxicated. However, he talked clearly and coherently and did not stagger or stumble (R. 7,8,10,11).

Between 1700 and 1730 hours accused returned alone to the bar at Via Flaminia 207 (R. 11,12). Also present were the proprietor Marcella Arlotti, the barmaid, Ida De Zorzi, other Italians, and American and British soldiers (R. 12,14,16,17). When he had been there about an hour, accused approached the bar, asked for a glass of gin, went to Marcella and said, "You have plenty of money. I believe you fenesh" (R. 16), and made a motion as if he were to slit his throat (R. 14,16). He pushed the glasses aside and asked for a larger glass of gin (R. 12,16). He showed his fists to Ida and then drew his pistol. Ida told Marcella to try to leave, that accused "had a gun" (R. 16). Accused pointed his pistol at Marcella and said "You much money! Do you know this?" (R. 12). By menacing them with his pistol he kept Ida and Marcella from moving or talking, while the other people ran out of the bar (R. 12,13, 16-18). Marcella pulled out the money drawer but accused did not approach the money drawer or take any money therefrom (R. 12,16,18). At this point an English soldier entered and spoke to accused, whereupon

accused lowered his pistol. Ida and Marcella ran to a bakery next door where they hid behind a counter. (R. 13,15-17). It was then about 1815 hours (R. 14).

Accused followed Ida and Marcella into the bakery, pointed his pistol at the baker, asked for someone named Joseph and after remaining between five and fifteen minutes fired a shot in the doorway as he departed (R. 13,15,17,18). Neither woman could identify accused's pistol at the trial (R. 13,17; Ex. 2).

About 1830 hours, when it was "more or less" dark (R. 26), a colored soldier wearing a "windbreaker" (R. 26), accosted an Italian civilian dressed in a white raincoat in the square known as Piazza Melozzo, about four and a half blocks from the bar at Via Flaminia 207 (R. 25,26,29-31,33; Ex. 3). Three other colored soldiers were behind the civilian (R. 25,29-33). The soldier held the civilian by the arm, and after a short, animated conversation drew a pistol and pointed it at the civilian, who put his hand behind his back (R. 25, 27,29,32). A common billfold, dark or yellowish in color, was then thrown at the feet of an eyewitness, who testified that someone said in perfect Italian "Help me to pick up this pocket book" (R. 25). At the same time the civilian leaned over toward the billfold and the soldier retained his grasp on the civilian's arm (R. 25,27,32). One muffled shot was then fired and the soldier and the other persons present there fled from the square in opposite directions (R. 25-27, 30-33, 85; Ex. 3). Shortly thereafter an Italian civilian in a white raincoat, identified as Mario Filacchioni, was picked up in the square and taken to the San Giacomo Hospital in Rome, Italy (R. 26,32,33,85; Ex. 5). Near his body a yellowish billfold was recovered (R. 32,34).

About 1830 hours an American colored soldier with cartridges in his hands and armed with a pistol of the same type as Exhibit 2, entered an Italian doctor's office at Via Fracassini 22, about four blocks from Piazza Melozzo toward the bar at Via Flaminia 207 (R. 22, 24; Ex. 3). He resembled accused in build and height, was in a state of nervous excitement, and had a bleeding, superficial, contused laceration on the left side of his face. He did not seem to be drunk. (R. 22-24). He opened his clothes at the chest but did not appear to understand the suggestion by the doctor's assistant that he go to a drugstore (R. 22,23). When another person entered the colored soldier hid his pistol under his coat and shortly thereafter left the office (R. 23,24).

About 1900 hours on 15 December, Filacchioni Mario Di Giulio, also referred to as Filacchioni Mario, was admitted to Hospital San Giacomo, where an Italian doctor operated upon him and removed from the right side of his forehead a copper-jacketed bullet, which the doctor delivered shortly thereafter to Agent Wendell Newlin, Criminal Investigations Division, who identified it at the trial (R. 19-21,50,52; Ex. 4).

The doctor testified that Filacchioni improved after the operation, but died about two and a half hours later, and that his death was caused by

"A wound which entered the back part of the head transversely, went through the grey matter, destroying blood vessels and many important veins which are more than enough to cause the death of a person" (R. 21).

Admitted in evidence without objection were an Italian hospital certificate with respect to Filacchioni Mario, dated 15 December 1944, and the following translation thereof:

"Wounded by a firearm in the occipital region.
Lacerated wound in the region over the eye brow.
Extensive hematoma on the forehead S Coma"
(R. 58; Ex. 17).

Also admitted in evidence without objection were an Italian autopsy report dated 18 December 1944 and the following translation thereof:

"The corpse is that of Filacchioni"
(R. 58,59; Ex. 18).

The cause of death was stated to be:

"One bullet wound in the occipital region affecting all the cerebral region, the seriousness of the wound being the sole cause of death" (R. 58,59; Ex. 18).

Accused entered and was apprehended at the main gate of Fifth Army rest camp, in Rome, Italy, at about 2030 hours on 15 December 1944, pursuant to an order received by the sentry (R. 34-36). Accused had a bleeding cut on the side of his face and told the sentry he received it when some Italians "ganged up" (R. 35) on him and beat him (R. 35,46,49). Found in accused's possession, among other items, were a caliber .38 Smith and Wesson revolver, serial number 947375 (R. 35,36,46,58; Ex. 2).
> Accused was a little unsteady on his feet and his breath smelled of
> alcohol, but he was not drunk (R. 36,46-49). Accused and his revolver were turned over to the sergeant of the guard and the officer of the day, who took him to the Military Police orderly room at the rest center (R. 36,46-49). His pistol smelled as if it had been fired. He told the officer of the day that his face was cut by a civilian who struck him with some object while he was walking with two Italian girls (R. 46). Shortly thereafter accused and his pistol were delivered to Central Military Police Headquarters, in Rome, Italy. (R. 47,50; Exs. 2,11).

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The evidence also shows that on 21 December 1944 Agent Newlin fired three test slugs from accused's weapon and made castings of two of them. The pistol, bullets and castings were transmitted to Agent Kritko, Criminal Investigations Division, for laboratory tests. (R. 50-53,55; Exs. 2,4,12-16).

On 17 December 1944 accused, in the company of Agent Bernstein of the Criminal Investigations Division, pointed out the bar operated by Marcella Arlotti and Ida De Zorzi on Via Flaminia. He traced his route to Piazza Melozzo, where he showed the place where the shooting occurred. (R. 39,40,43,44). Three photographs were made of the scene of the shooting and were admitted in evidence without objection (R. 40, 42,43; Exs. 8-10).

Thereafter a statement in his own hand was made by accused on 17 December 1944 after Bernstein read and explained Article of War 24 to him, advised him that he need not make a statement if he did not desire to do so, and that if he did, it could be used against him at a court-martial. The statement was sworn to before "Ralph Hamilton Jr., 2d Lt. F.A.; CID, RAAC, Chief Agent", and was admitted in evidence over objection by the defense that it did not constitute the best evidence as there was no proof of the authority of the person before whom it was sworn to administer the oath to accused. (R. 37-39, 42; Ex. 6). As the statement coincides in part with accused's sworn testimony at the trial, only the following portions thereof are set forth herein (reproduced verbatim):

"I started out for the camp in route to the camp I stop and had a few drinks I wasn't drunk. Some Italian jump me and hit me over the head so I shot him in self defence it was quite a few of them and I was frightened out of my wits for awhile when I saw all of those Italians in behind me. As I said before it was in self defence.

"About the gun I got it from a Englishman for a small sum he claim he was short of money I only had 4 cottages in it when I started in the camp the M.P. stop me for a frist and thats all I remember.

"I only fired one shot in that fellow direction he was about 9 Feet from me, he was chasing me he and the rest of the fellows so I fired 3 more shots to scare them away I was in a bar in Via Flaminio #207 From 6 oclock. Its run by two women a fat one and a small one. Today I was driven to a place at the intersection Via Perin del Vaga. This is the place where I was attacked. I remembered walking to that place from the bar. after the shot I remembered running down Via Perin del Vaga, To Piazza Perin del Vaga.

"I have been shown a Smith Wesson revolver #947375 by Agent Bernsteren this is the gun belonging to me in which I used in firing the shot.

"This statement has been written by me in my own handwriting because I want to tell the truth and to clear my conscience" (Ex. 1).

On 19 December 1944, Bernstein told accused he desired a more detailed statement. He again read Article of War 24 to accused, advised him that he did not have to make a statement and that if he did, it could be used against him at a court-martial. He then obtained from accused an additional statement, similarly sworn to before Lieutenant Hamilton. It was admitted in evidence over objection by the defense based on the same grounds as the objection to Exhibit 6. The defense further contended that the statement was not voluntary, and that a sketch of the route prepared by accused and Bernstein, coincident with the making of the statement, was not offered in evidence. (R. 39-42; Ex. 7). The statement was, in pertinent part, as follows (reproduced verbatim):

"On 15 December 1944 at about 1000 hours Smith and I were in our bunk room near our beds. I handed Smith a 38 Cal. Smith & Wesson gun which I had bought from an English Truck Driver near Leghorn on or about 12 December 1944. At the time I bought the gun it had four (4) bullets in it. When I handed the gun to Smith I told him to hold it going out the gate since it could not be seen on him as easily as on me. I was wearing my blouse and O.Ds. Smith was wearing a field jacket. Smith asked me whether the gun would go off. I told him, 'NO'. He put the gun in between his belt and pants on his right side.

"We left the Bar about 1200 hours, and stopped at a Pro Station. Then we went to an Italian Restaurant where I ate. Smith did not want to eat. We then walked down the street and I stopped at a shoe shine store. I went in. Smith walked away with some kids we were to get him a woman. It was About 1500 or 1600 hours. I did not see Smith again that day. I talked to the old man in the shoe shine place and then went to buy some souveneirs. I bought a pair of gloves from a kid for one dollar. I also bought two wooden boxes for twelve dollars each. I then went to take some pictures and left the boxes and gloves there to be picked up when the pictures would be ready the next day. I then hired a horse and wagon and he drove me to the Bar on via Flaminio at which I had been earlier with Smith.

"I sat in the back with some English soldiers. It was now about six o'clock. I tried to play the accrdion there and listened while a young Italian boy played it. I had about five drinks of gin and left after about fifteen minutes. I went out of the bar which is located on Via Flaminio, walked up to Via Donatello and then on Via Donatello. From Via Donatello I went on Viale Vignola towards Piazza Malozzo, where I turned left. I was lost and was not sure of where I was. I was trying to get bck to camp. I do remember taking this road and have pointed out these streets to Agent Bernstein. As I rounded the corner of Viale Vigola and turned left I reached a place in the middle of the street in front of a wine shop. somebody stepped out from near the wine shop and struck me in the left side of my face. I don't know with what he struck me but he was in front of me and struck me with his right hand swinging. At the same time he ran towards the circle shouting, 'Veniqui, Veniqui' About five or six men came from the circle and two shots were fired at me. I took my revolver out, fired one shot at this man in front of me and then ran down Via Perin del Vaga firing three more shots while running in an attempt to stop the men from chasing me. I kept running until I found out where I was. I then emptied the four empty shells onto the street and walked back to camp. I cannot describe the man who first hit me since it was very dark. I did not say anything to the man at any time.

"I have identified a Smith & Wesson gun #947375 as being the gun which I owned and which I used to fire the four shots. When I reached the Rest Center I was stopped and searched. I do not recall the time. The gun was found in my pocket and taken from me. I was taken into custody by the M.Ps. The M.Ps also noticed the cut on the upper part of my cheek bone. This was bleeding.

"I have made this statement consisting of three typewritten pages to clear up and to add to the statement which I made out in my own handwriting on 18 December 1944. This statement was begun about 1500 hours and finished about 1750 hours. It was made of my own free will. I have read it and it has been read to me. The contents are all true of my own knowledge" (Ex. 7).

John Kritko, a ballistics expert for the Criminal Investigations Division, Provost Marshal General's office, testified that on 27 and 28 December 1944, he made a microscopic comparison of the evidence bullet removed from deceased's body and the three test bullets fired from accused's pistol. He further testified that the three test bullets compared with the evidence bullet, that in his opinion the evidence bullet was fired from the "suspect firearm" and that there was no possibility of error in the results of the test. (R. 53-58; Exs. 2,12-16)

Alfredo Giovannetti testified for the defense that he operated a shop at Via Flaminia 209, between a butcher shop and a bar and that about 1815 hours 15 December 1944 his daughter, the owner of the bar, her son, and the barmaid were hiding in Giovannetti's back room when a colored soldier, who resembled accused in height, build and shape of nose, stuck a revolver in Giovannetti's stomach and asked for someone named Joseph. The soldier stayed only two or three minutes and fired a shot as he departed. (R. 66-68) About the same time another witness for the defense heard three shots fired in the vicinity of his shop at Via Flaminia 237, and an employee of this witness also heard the shots and immediately thereafter saw a colored man run down the street (R. 68-70).

Bardi Deyanira testified for the defense that he was in Piazza Melozzo at about 1830 hours on 15 December 1944, heard a shot and saw the body of Filacchioni on the ground. He observed two Italians run away, but he saw no soldiers. (R. 61-64; Ex. 5)

About 1830 hours 15 December 1944, Maria Bonanno, also a witness for the defense, was in a dentist's office a few steps from Via Cesare Fracassini 4, and about a five minute walk from Piazza Melozzo, when she heard two or three muffled shots emanating from a direction away from Piazza Melozzo. About ten minutes later a colored man resembling accused in height and build, with a wound on his left cheek, entered the office, opened his shirt and examined himself, walked out, and then re-entered. While standing in a door he took out a pistol which, she testified, was similar to Exhibit 2, and loaded it. The dentist entered, touched the wound and the man ran out. (R. 64-66; Ex. 2).

Accused testified that he obtained his caliber .38 revolver from an Englishman about three weeks prior to 15 December 1944 and that he arrived at the rest center in Rome on 14 December 1944 (R. 71,75,76; Ex. 2). He and Private Smith left the rest center together at about 1000 hours 15 December at which time he had his pistol loaded with four cartridges, and he asked Smith to carry the pistol while they were in front of the rest center (R. 71,75,78). After visiting several places they arrived at a bar where they stayed for about two hours, during which time accused obtained his pistol from Smith, left with a girl with whom he had intercourse, and returned (R. 71,72,75). At about 1400 hours they went

from the bar to a "pro station", and from there to a restaurant. After eating, accused went next door to obtain a shoeshine, and Smith departed. Accused then shopped in various stores and about 1715 hours had his photograph taken. (R. 72,73) After more shopping he returned to the same bar where he had been that morning and had five drinks, three small and two large. He spent his time talking and drinking with an Englishman and endeavoring to play an accordion, but did not remember threatening anyone, firing a shot, or engaging in a scuffle. (R. 73)

Accused did not know whether his statement of 17 December was true (R. 81; Ex. 6). He did remember that the statement of 19 December was signed and sworn to by him, and that he was sober when he made it (R. 79,80,82). He did not remember when or where he was questioned but testified that Agent Bernstein took him to Piazza Melozzo, and that Bernstein, not accused, pointed out where the Italian was killed, as accused had never seen that general area before (R. 74,79,84). He made up both statements as he was confused and did not know what he was doing (R. 75,76,78,80,84). He admitted that the pistol was his property, but testified that the only cartridges he had were those loaded therein (R. 82; Ex. 2). He had no recollection of pointing a pistol at Marcella Arlotti or asking her for money (R. 76,77). He did not know where he went after leaving the bar, did not recognize the baker, could not remember at what time he went to the bakery, did not know if he fired any shots, or on what street he travelled after leaving the bakery (R. 73,77,78). He did not remember what he did on the night of 15 December 1944, or how many people were on the corner of Piazza Melozzo when the Italian was shot. He did not know whether or not other colored soldiers were there with him, whether he killed the Italian, or whether the bullet that killed the Italian came from his pistol. (R. 76,79,82-84) He remembered that somebody hit him on the left cheekbone, but did not know where he was at the time (R. 73,77,84). Accused did not remember scuffling or exchanging shots with the carabinieri. He was in a daze after he was struck and slightly recalled the doctor and the doctor's office, where he asked for medical attention, and unloaded from his pistol four empty shells. He threw away the shells, dropping two of them in the dentist's office. (R. 73,74,83) He did not know if he fired any shots, or how many shots were fired, whether he fired any of them after he left the doctor's office, or whether the weapon was in his possession all the time. He remembered only that he had it "in the shop". (R. 78,82,83)

Accused further testified that he did not remember much of his conversation with the officer of the day on the night of 15 December, that it was rather hot in the orderly room, and that he had had a few drinks (R. 81). He was neither drunk nor sober, did not know what he was doing when talking with the officer, and did not remember saying that he had been walking with two Italian girls when injured (R. 81,82). He admitted having told a Major Cheshire that he shot the Italian in self-defense, but did not know if he did fire in self-defense. He testified that he had made up the story because he was frightened and confused. (R. 79,84)

4. As to Specification 2, Charge II, it thus appears from the evidence that at the place and time alleged accused attempted to rob Arlotti Marcella, the person named in the Specification, as alleged. Accused spent about an hour in a bar operated by Marcella, during which time he had about five drinks. He was armed with a loaded caliber .38 Smith & Wesson revolver. About 1800 hours he ordered a drink, demanded a larger one, and then overturned the glasses on the bar, drew his revolver and pointed it alternately at Marcella and the barmaid. He threatened them by words and gestures, and referred to Marcella having "much money", in consequence of which Marcella opened the money drawer. All of the other occupants of the bar ran out, but accused prevented the proprietor and the barmaid from talking or moving until the entry of an English soldier who, by speaking to accused, caused him to lower his revolver, and thus gave the two women an opportunity to make their escape. Accused had made no motion toward the money drawer nor did he obtain any money from Arlotti Marcella.

In defining an attempt, the Manual for Courts-Martial, 1928, paragraph 152c, provides

"An attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission. (Clark)"

In drawing a loaded pistol, pointing it at Marcella and using threatening gestures and references to money, the accused committed an overt act in the form of an assault upon her, which under the circumstances fully justified an inference that he was impelled by no intention other than to rob her. That he made no motion toward the cash drawer does not modify the effect of these circumstances, as the putting of Marcella in fear by his violent and unlawful assault, coupled with his reference to her money, thus forcing her to open the cash drawer at the point of a pistol, leave no room for doubt as to his motive. No condition or circumstances appear which would have prevented consummation of that intention had not the intervention of the unidentified English soldier distracted accused's attention, thereby making possible the escape of his intended victim from her enforced restraint by accused. The intervention and escape were not of accused's devise but were independent of his will, and had they not occurred, it is apparent that continuation of accused's conduct would have resulted in fulfillment of his intent to rob. Had accused succeeded in obtaining the money, he would have perpetrated the offense of robbery rather than an attempt to rob (MCM, 1928, par. 149f). The court was justified, therefore, in finding accused guilty of attempt to rob, as alleged, in violation of Article of War 96 (MCM, 1928, par. 152c).

As to the Specification, Charge I, it thus appears from the evidence, including accused's pre-trial statements and testimony, that at the place and time alleged accused killed Filacchioni Mario di Giulio, the person named in the Specification, by shooting him with a

pistol. Several minutes before the shooting accused, armed with the pistol with which deceased was killed, was in a bar a few minutes walk from the public square in which deceased was killed. Between 1815 and 1830 hours Filacchioni was accosted in the square by a negro soldier armed with a pistol. Three other negro soldiers were in the vicinity. The armed soldier, after a short, animated conversation with Filacchioni, caught him by the arm and simultaneously a billfold was thrown to the ground. Someone called out in perfect Italian for aid in picking up the billfold. Filacchioni, with the soldier still holding him by the arm, was seen to lean forward toward the billfold. Almost immediately Filacchioni was shot in the back of the head, and fell to the ground near where a billfold was later found. The soldier and the others present escaped in opposite directions. Filacchioni died as a result of the pistol wound in the back of his head, which wound was his only injury. The bullet causing the wound and death was established by a ballistics expert, without contradiction, as having been fired from accused's pistol, which was still in accused's possession when he was apprehended approximately two hours after the shooting.

There is variance in the testimony as to the precise time of the shooting, and the purpose of the testimony for the defense appears to be to establish that at the time thereof accused was elsewhere in the immediate neighborhood of the locus of the crime. The effect of the testimony, including that of the defense and accused's own testimony, is to place accused in the close neighborhood about the time Filacchioni was shot. Moreover, in accused's pre-trial statements he admitted that he shot one Italian with his pistol, and fired three shots at other Italians to frighten them, at the approximate place and time the assault occurred. Testimony by a defense witness that no colored soldiers were seen at the locus of the assault, at variance with the evidence for the prosecution, as well as the variances in testimony as to where accused was at the particular time presented issues of fact solely for consideration and determination by the court. The uncontradicted ballistics evidence that the shot which killed deceased was fired from accused's pistol, coupled with the other circumstances, amply support the inference that accused was the assailant, and suggest no basis for any tenable hypothesis that Filacchioni came to his death by other means. The proof of accused's actions in seeking medical attention at several different places for an injury to his face, he then being armed with a pistol which had been discharged, his abandonment of empty shells, and his condition of excitement, all closely related in time and location with respect to the homicide, were among those circumstances forming part of the res gestae, and were properly considered by the court in support of the inference that accused was the assailant who had just shot Filacchioni Mario di Guilio (MGM, 1928, par. 115b; Vol. 1, Wharton's Criminal Evidence, sec. 503, p. 769 et seq; 22 C.J.S., sec. 666-667, p. 1053-1057). Inability of the Italian witnesses positively to

identify accused as the assailant does not modify this conclusion, as the physical evidence and other circumstances in proof are compelling as to accused's identity (MTO 6411, Steedley et al).

Accused's pre-trial statements vary in accounting for the circumstances in which he shot one Italian and fired his pistol at other Italians, but the essence thereof is that he did so in self-defense when attacked by a group of Italians. The right of self-defense was not relied upon at the trial by accused, and was completely abandoned as an issue in the case by accused's own testimony, whereby he sought to repudiate those statements in their entirety by testifying that he had made up the statements because of confusion at the time, that he did not know what he was doing, and that the statements were untrue in part. Moreover, admission in evidence of the written pre-trial statements of accused was objected to by the defense, which further indicates that accused did not desire to rely upon the right of self-defense in exculpation of the offense charged. Further, accused's statement that he was attacked by a group of Italians was entirely uncorroborated by any of the other evidence.

In his testimony at the trial accused gave no version of the occurrence. He at first testified that he did not know if he had fired his pistol on the night in question. He then testified that he did not remember, or know anything of the salient facts of the case already placed in proof, including his failure to remember where he went when he left Arlotti's bar, and to recall whether or not a shot from his pistol killed deceased. In weighing the evidence the court had before it other testimony by the accused embodying admissions that place him at or near the time and place deceased was killed and armed with the weapon with which the homicidal assault was committed, and his pre-trial admissions against interest, wherein he admitted shooting an Italian at the approximate time and place alleged. The court, therefore, was fully justified in resolving against him issues of fact raised by accused's testimony of his lack of memory and knowledge of his movements and actions.

It is suggestible, however, that accused's testimony in substance that he did not remember any of the events related to the attempt to rob as alleged in Specification 2, Charge II, and did not know or remember many of the facts involved in the murder of Filacchioni Mario di Giulio, as alleged in the Specification, Charge I, is tantamount to a defense of drunkenness, when considered in conjunction with the evidence that accused had been drinking intermittently throughout the day and immediately preceding the commission of both offenses. Although these are separate offenses they are closely related in time and location, and it is obvious that if it was intended to establish such a defense, it was to show one continuous state of drunkenness during the period in which both events occurred. It is significant that

accused did not testify affirmatively that he was drunk at any time on the day in question. Moreover, there was no affirmative testimony by any other witness that accused was drunk at the time of the commission of either offense, but there was testimony that he did not appear to be drunk shortly after the homicide. The issue was one of fact for determination by the court, and in the absence of any substantial, competent evidence indicating that accused was sufficiently intoxicated to prevent his entertaining the intent requisite to an attempt to rob or the intent requisite to constitute murder, the court's findings were justified.

In seeking to determine a motive for accused's conduct, it cannot be ignored that though the court acquitted accused of attempting to rob Filacchioni Mario di Giulio, as charged in Specification 1, Charge II, the facts upon which that specification was based were closely related to the commission of the homicide. It is convincingly established that accused forcibly restrained and assaulted deceased in an unlawful and violent manner, and the circumstances justify the inference that accused endeavored thereby to force deceased to relinquish his billfold to accused. The shooting occurred immediately after the billfold was thrown to the ground. Accused's acts were willful and deliberate, and he demonstrated a wanton, callous and malicious indifference to the life of his victim by shooting deceased in the back of the head. Malice was properly inferable, not only from the shooting in pursuance and in continuation of an unprovoked, deliberate, vicious and felonious assault upon deceased, but also from the employment of the dangerous weapon with which accused was armed and from the manner in which the homicide was deliberately perpetrated, together with the other circumstances in evidence. The findings of guilty of murder were proper notwithstanding the fact that the court found accused not guilty of the attempt to rob (MCM, 1928, par. 148a; CM 191695, Dig. Op. JAG, 1912-40, sec. 428(5); CM 157982, Dig. Op. JAG, 1912-40, sec. 451(32)).

5. The objection to the admission of the pre-trial statement of 17 December 1944 was based upon the ground that there was no proof that the individual before whom accused verified the statements had authority at the time to administer oaths. That statement is written and signed by accused entirely in his own hand, and is sworn to before "Ralph Hamilton Jr., 2d Lt. F.A., CID, RAAC, Chief Agent". Accused admitted making the statement, which is not an admission of all the elements of the offense charged, and is therefore construable as an admission against interest. There is no requirement that such statement made by accused need be under oath (MCM, 1928, pars. 114a, b).

The statement of 19 December 1944 was typewritten, admittedly signed by accused, also sworn to before Lieutenant Hamilton, and is of the same general import, but in greater detail, as the first statement. The defense also objected to its admission because proof was not made of the authority of Lieutenant Hamilton to administer the oath to accused, because the statement was not voluntary, and also because a sketch jointly made by accused and two agents of the Criminal Investigations Division to aid in its preparation was not offered in evidence.

This statement likewise is not an admission of all the elements of the offense alleged, and at most is construable only as an admission against interest. As has been stated there was no requirement that the statement be under oath. Although not required for its admission in evidence, it was affirmatively proved that before he made the statement a second explanation of his rights was made to accused and that he made the statement voluntarily. It was for the court to determine if it was "procured by means which the court believes to have been of such character that they may have caused the accused to make a false statement" (MCM, 1928, par. 114c). The sketch referred to was not part of the statement, and the admissions of the accused do not appear to be modified by or dependent thereon. The statement is complete in its entirety without the sketch and its materiality is not apparent. There is no perceivable authority pursuant to which the prosecution was required to introduce it. It does not appear, therefore, that the accused was prejudiced by the overruling of the objections to the admission of the statement in evidence.

6. It is alleged in the Specification, Charge I, that the person killed was "one Filacchioni Mario di Giulio". In the evidence the deceased was variously referred to as "Filacchioni Mario di Giulio", "Filacchioni Mario", "Mario Filacchioni" and "Filacchioni". It is a matter of common knowledge that it is an Italian custom to give or write the surname first. It is also customary in writing the full name to include after the given name the given names of one or both of the parents, which evidently was done here by the pleader. In the light of the whole record it is clear that the various names recited above referred to one and the same person, and that the man killed was the person named in the Specification (MTO 6040, Grant).

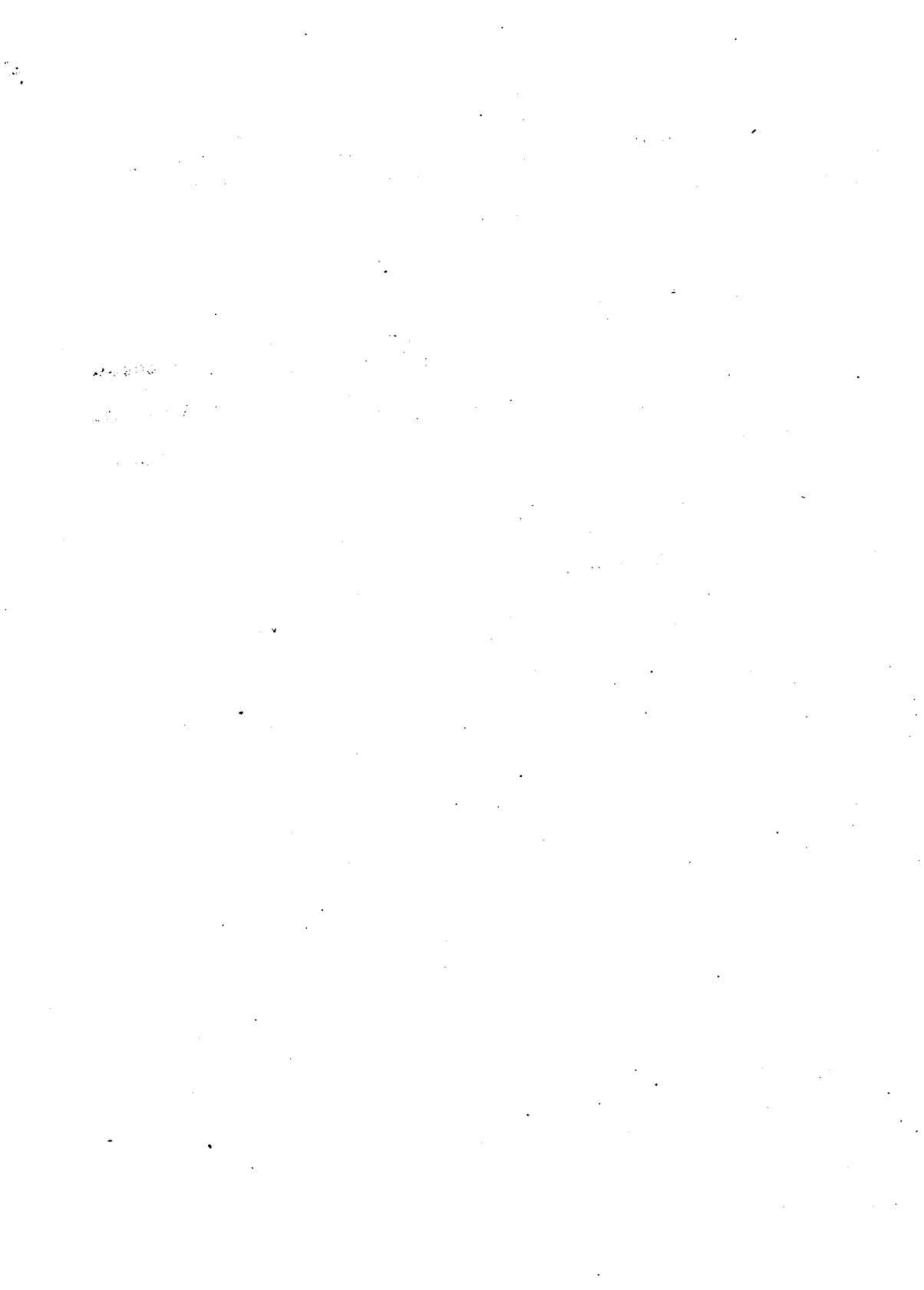
Similarly, it is alleged in Specification 2, Charge II, that accused attempted to rob "Arlotti Marcella", who testified at the trial that her name was "Marcella Arlotti", but who was also referred to by the name alleged. There is no doubt that "Arlotti Marcella" and "Marcella Arlotti" were one and the same person, and that the person accused attempted to rob was the one named in the Specification.

7. The charge sheet shows that accused is 32 years of age and was inducted 16 June 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon a conviction of murder under Article of War 92. Confine-

ment 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.

William P. Brown; Judge Advocate.
Cyprus C. Sessions, Judge Advocate.
Henry C. Keenish, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
17 May 1945.

Board of Review

MTO 6685

UNITED STATES

v.

Private CHARLES A. JOHNSON
(13 057 308), casual, attached
400th Replacement Company,
13th Replacement Battalion,
24th Replacement Depot.

) THE REPLACEMENT AND TRAINING COMMAND
) MEDITERRANEAN THEATER OF OPERATIONS

) Trial by G.C.M., convened at
) Bagnoli, Italy, 22 March 1945.
) Dishonorable discharge and
) confinement for life.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Charles A. Johnson, attached unassigned, 400th Replacement Company, 13th Replacement Battalion, did, at Soccavo, Italy, on or about 15 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Frank O. Usher, a human being, by shooting him with a pistol.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. All members of the court present concurred in the findings and the sentence. 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, Mediterranean Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 15 December 1944 accused, then a Staff Sergeant, was performing his duties as sergeant of the guard in camp (7th Replacement Depot). He was armed with a .45 caliber Colt pistol. After his relief came off guard at 1600 hours he went with other soldiers to the home of Rosa Colucci, Via Paolo Grimali, in the town of Soccavo, Italy. (R. 5,27,28,35; Ex. A) While they were eating some eggs which Rosa fried for them, Frank O. Usher (the deceased) entered (R. 7,25). One of accused's companions, Private Delmus Hawkins, 432d Replacement Company, 7th Replacement Depot, had some arguments with Usher about the price of food and drinks and Usher "threatened to shoot up the place". An Italian came in, "hollering something about his wife and two bucks", and Hawkins heard "the fellows say" that Usher was involved. Hawkins saw no weapon in Usher's possession but had previously seen him with a six-inch Italian knife. He had also heard of Usher "being in trouble". (R. 29-32) When Rosa saw that the soldiers wanted to argue she told them to leave her house or she would call the military police. The soldiers left. (R. 8)

After about 15 minutes Usher returned, entered the house and asked for a drink (R. 8). He was followed a few minutes later by 13-year old Giacquindo Giro, who came to get some phonograph records, by accused and by other colored soldiers (R. 8-11,15). While approaching Rosa's house Private Lawrence Powell had heard someone say, "Why you calls me a no good mother-fucker" and heard Usher say, "I don't calls you no mother-fucker, I say, hella paesan to you". Then accused placed his hands on Usher and said, "We is just joking, ain't nobody mad". (R. 15) When they got inside Rosa's house Usher argued again about the food and drinks. It seemed to Powell that Usher and accused were "arguing more and more and getting angrier by the minute at each other". Then he heard something "like a snapping open of a knife", and saw Usher bring his right hand up from his side to a position at thrust. Powell said to Usher "Come on, paesan", and left the room. (R. 16,19) Rosa and Giro observed Usher and accused arguing and becoming angered with each other (R. 8,12). Then Usher put his hand in his right hand pants pocket and accused, seeing this action, pulled out a pistol and shot Usher, who fell to the floor. Accused stumbled and ran out of the house. Both Rosa and Giro, the two eye-witnesses of the shooting, identified the weapon which accused used as a United States Army .45 caliber Colt pistol. (R. 8-10,12, 35,39; Ex. F) Neither Rosa nor Giro saw Usher in possession of a weapon (R. 8,12). Rosa had seen Usher once before, at which time he did not appear to be a quarrelsome person (R. 10). Powell had observed the "gun" (.45 caliber Colt) in accused's hand before he left the room (R. 16) but did not see or hear the shooting. He was unable to state whether Usher had a weapon but did not see him draw a knife or a pistol on anyone. (R. 19) Powell had

met Usher in the Depot and, although Usher never appeared to be quarrelsome, he had a bad temper and disposition, and Powell had heard that he was "in fights". He testified that Usher, for whom the military police were looking as a deserter, usually carried a pistol or knife. (R. 18,19)

When Powell returned to Rosa's house Usher was lying motionless on the ground and Powell was unable to state whether he was breathing (R. 17). Private First Class Harry Rascoe, 59th Military Police Company, went to the Colucci home on the evening of 15 December 1944 and found Usher lying against the wall opposite the doorway of Rosa's house. He covered the body with a blanket and went inside the house, where he found an empty .45 caliber cartridge shell case. (R. 32-34; Ex. D) On 16 December 1944 an autopsy was performed on the body of Usher by Captain Leslie S. Jolliffe, pathologist of the 15th Medical General Laboratory, 6744th Medical Center. Captain Jolliffe found gun-shot wounds of the left forearm, left thorax, and the descending aorta in the left upper lobe of the lung, the right upper lobe of the lung and the right thorax and right scapula. There were three distinct bullet wounds, caused by the continuous track of one bullet, and resulting in a hemothorax, bilateral and massive, in both chest cavities. The cause of death, which was instantaneous, was the severing of the aorta causing a hemorrhage into the plural cavities of the lungs. There was also anemia to a severe degree but secondary to the hemorrhage. Captain Jolliffe removed a .45 caliber copper-colored bullet which he found in the right scapula. (R. 20-22; Ex. U)

The deceased, whom the witnesses knew only as "Frank", (R. 7,8,11-13,15, 17,20,23,28,32; Ex. B) was identified through his finger-prints as Frank O. Usher, Army Serial Number 34 410 743, by Agent Charles N. Stewart, Criminal Investigations Division (R. 23-26; Ex. C). No weapon of any nature was found among accused's clothing or personal effects on the morning of 16 December (R. 26).

Acting on advice furnished by accused, an agent of the Criminal Investigations Division on 29 December 1944 obtained accused's .45 caliber pistol and turned it over to Agent John Kritko, a qualified ballistics expert and firearm technician of the Criminal Investigations Division (R. 35,38,39; Ex. F), who had previously received the cartridge case and bullet (R. 38,21,34; Exs. D,U). Kritko fired a test shot from the suspected firearm, and an examination of the recovered bullet revealed under the microscope that the grooves on the fatal bullet (Exhibit U) compared with the test bullet (R. 39).

On 18 December 1944, after he had been warned that he was not required to make a statement and that anything he might say could be used against him if the investigation resulted in a trial by court-martial, accused signed and swore to a statement which was admitted in evidence without objection (R. 35,36). Pertinent parts thereof are as follows:

" *** on Friday, 15 December 1944. *** About 1800, I left camp with Delmus Hawkins, Joseph Lawrence, and Wyman Allen
 *** I carried a pistol belt without a holster because I

forgot to take it off. I had a Army .45 automatic pistol with a full clip of ammunition in my right hip pocket. I carried a gun because I had been robbed in town twice, once by an Italian, and once by some AWOLs *** When I was standing out in the street *** I sees a colored AWOL named 'Frank' arguing with Jugee. I knowed Frank to be an AWOL for quite a few months, and he deals in black market. Jugee had a knife in his hand, and I didn't see what Frank had. I asks the trouble, and Jugee said Frank offered his wife two dollars to screw her, and Jugee was angry about it and wanted to kill him. Frank was about drunk then, and I told him, come on fellow, you don't want to get in trouble about nothing. Frank told me, well motherfuck you and these dagoes, do you want to take it up. And I said, 'No, fellow, I don't want to take it up, I'm just trying to get you out of trouble.' *** A half hour later *** I met Frank and Powell on the street. It was dark then. One of them said, 'Hello, motherfucker.' I said, 'Feller, I told you about calling me a motherfucker, I don't play that shit.' Frank said, 'You don't like it.' I said, 'No, hell, no, I don't like it.' That's when Powell said, 'He didn't call you a motherfucker, he called you a pison.' Frank said, 'Yeah, I called him a motherfucker.' And Jimmie patted me on the back, and said, 'C'mon, Sergeant, he's just drunk,' and we walked off together *** I goes into Rosa's house *** I sees Frank standing up with Gator, another white soldier who is AWOL *** arguing about the price of eggs, and one of the boys said, 'Don't worry, we'll pay for it.' I stayed in the place a few minutes, and then stepped out in the street with Jimmie. About 15 minutes later, I saw all the boys running out the door, and Rosa come out crying, and grabbed me. She said, 'Sgt., Sergeant, speak to one of the soldiers.' I said, 'What's the matter.' She tell me this soldier wanted to sleep with her all night. I goes back in Rosa's place, and only Frank was there. Rosa came behind me, and Gator came behind Rosa. I heard a snap, and looked behind and saw Gator an open knife. I stepped around so I could see Gator. I told Frank 'Hey man, let's get out of the people's house.' Frank said, 'Look her(e), motherfucker, I will do something.....' and then he put his hand in his bosom like he was going to draw something. When Frank did this, Gator run out the door, and I reached for my gun and pulled the slide back and shot once. Frank stood by the door and leaned down, and I got scared and run. I went back to camp right away, and met no one going back. I took the gun and put it in a haversack at the head of my bed *** I was playing cards when the MP's come and put me under arrest" (Ex. E).

Anna D'Angio, of Via Paolo Grimaldi, Soccavo, testified for the defense that she knew the deceased, whose name was "Frank", and that she had twice before 15 December 1944 seen him involved in quarrels. On one occasion he

had knifed a white American soldier, and on another occasion he argued and fought with a colored soldier. In the latter instance he had "wanted to draw and throw a rock". (R. 40,41)

Accused testified that on the night of 20 November 1944, when he was in town with other soldiers, he met Frank Usher. About 2030 hours the military police checked for passes and Usher wanted to "buck" them. When they were taken to camp for being absent without leave, Usher gave his name to the sergeant as "Joe Brown". Later, when accused told Usher that the sergeant wanted to see him he replied "'Fuck the sergeant'". Usher could not be found in the morning. (R. 42,43) About five days later accused heard Usher and another soldier plotting to steal some Air Corps clothes and intimating they would be armed. When it later developed that one of accused's fellow-soldiers had missed his carbine, accused spoke to Usher about it and told him he would have him put in jail if the carbine were not returned. Usher told accused "that I was nothing but a smart mother-fucker and that I had the ups now but he would be up someday, sometime". (R. 43) On another occasion, when Usher had been found asleep in an empty tent, accused took him to the Officer of the Day, who directed that he be taken to the Provost Marshal. On the way Usher said that accused thought himself "a smart motherfucker and someday if he caught up with me he would fuck me up". (R. 44)

Accused further testified that on 15 December, when he came off guard, he cleaned his .45 caliber pistol. When Hawkins and other soldiers urged him to hurry to the village, he put the weapon in his hip pocket. He had no reason for taking it to town. (R. 44-46; Ex. F) When accused arrived at Rosa's place, in the evening an Italian came up to him, bringing his screaming wife. Accused asked the Italian what was the matter and the latter replied that Usher wanted "to be with his wife for two dollars". Accused asked Usher what he was trying to do, "because that is not right", and Usher replied "'You motherfucker, you want to take it up.'" (R. 44) Accused testified "Long time ago I was told to try to prevent all arguments between colored soldiers, or military personnel". Because he deemed it his "duty to go and see what was going on" and "to prevent any wrong in the street", accused went into the house where Usher was present.

"I was talking just the same and he wasn't angry at the time but he did say, 'mother-fucker, I told you about fucking with me.' He made a move for his pocket and when he did that my hand went to my hip pocket and I got my .45" (R. 45,47).

Accused testified further that he was in fear of his life because he knew that Usher was a quarrelsome person and that he carried a six-inch pocket knife. On a previous occasion accused observed him with a "gun" and Usher had stated that "he couldn't stand to be arrested with the gun not on him" (R. 45,47). He did not see a weapon of any nature in Usher's hand (R. 48). He did not strike Usher, because there was a table between them and he "couldn't get at him" (R. 45,47). When Usher "tried to make a pass" at him accused did not attempt to retreat but "backed off from the table". The

door, which was in back of accused, could not be unfastened from the inside, as it had four to six bolt locks on it. After accused drew his pistol and shot Usher, accused "got afraid", opened the door which was in back of him, and departed. He did not know how badly Usher was wounded and testified, "I didn't intend to kill him, I just wanted to shoot him in the arm and when I fired the shot, he said, 'Oh, I have got shot.' That got me all nervous like". He did not report the shooting to anyone as the Provost Marshal came for him in 25 minutes, but accused had been "thinking a way of telling the CO about it; that night or in the morning." (R. 47,48) Although he did read and sign his pre-trial statement, "they was rushing" him when he made it, and the fact that he had been robbed twice before in town was not the reason he took his "gun" with him (R. 46).

4. It thus appears from the uncontradicted evidence, including accused's pre-trial statement and testimony, that at the place and time alleged accused killed Frank O. Usher, the person named in the Specification, by shooting him with a pistol. Accused and deceased had been involved, in several arguments prior to the shooting, and deceased had referred to accused in an obscene manner. When accused went back into the Italian house where he had previously encountered the deceased they again began to argue. Usher put his hand in his pants pocket and accused drew out his pistol, pulled back the slide and fired at him. Usher fell to the floor, mortally wounded, and accused fled.

The gist of accused's defense was that Usher had been calling him vile names, that they had had arguments and quarrels on several prior occasions, that he feared his antagonist who had said that some day he would be "up" and had threatened to "fuck up" accused, and that he shot Usher in self-defense believing him to be armed. The law of self-defense is set forth in 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" (MCM, 1928, par. 148a).

It is undisputed that accused was carrying a .45 caliber automatic pistol with a full clip of ammunition when he went to town. He met deceased several times and they exchanged animosities. He voluntarily entered a house where he had every reason to believe he would encounter the deceased, who by accused's own assertions, harbored ill will toward him. When deceased made what accused considered a threatening gesture, accused shot and killed him, without retreating or seeking to leave the room as another soldier had done, and deceased produced no weapon and at no time that day before the shooting, was any weapon seen in his possession. When deceased's clothing and personal effects were examined the following morning, no weapon was found. Accused

admitted that he saw no weapon in Usher's hand, and that he fired when there was a table between him and deceased. From all the evidence the court was fully justified in concluding that no force was threatened or attempted by deceased which would warrant a reasonable belief by accused that the killing was necessary to save his own life or to prevent great bodily injury to himself. The Board of Review is of the opinion that the findings of guilty of murder are supported by evidence that accused deliberately and without legal justification shot and killed deceased. The prior conduct of deceased, even as accused described it, did not amount to legal provocation. Malice is inferable from the use of a deadly weapon in a willful, deliberate and vicious manner. The circumstances exclude any theory of legal justification or excuse and the evidence is devoid of any matters of extenuation or mitigation.

5. The charge sheet shows that accused is about 23 years of age and enlisted 8 September 1939. He had no prior service.

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

William P. Brown, Judge Advocate.
Clifford C. Sessions, Judge Advocate.
Henry C. Reinal, Judge Advocate.

CONFIDENTIAL

(120)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
17 May 1945.

Board of Review

MTO 6685

UNITED STATES)

v.)

Private CHARLES A. JOHNSON)
(13 057 308), casual, attached)
400th Replacement Company,)
13th Replacement Battalion,)
24th Replacement Depot.)

THE REPLACEMENT AND TRAINING COMMAND
MEDITERRANEAN THEATER OF OPERATIONS

Trial by G.C.M., convened at
Bagnoli, Italy, 22 March 1945.
Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

William R. Irion; Judge Advocate.
Geo. C. Sessions, Judge Advocate.
Henry C. Remick, Judge Advocate.

MTO 6685 1st Ind.
Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
17 May 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private Charles A. Johnson (13 057 308), casual, attached 400th Replacement Company, 13th Replacement Battalion, 24th Replacement Depot, attention is invited to the foregoing holding by the Board of

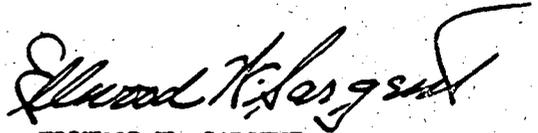
CONFIDENTIAL

MTO 6685, 1st Ind.
17 May 1945 (Continued).

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:

(MTO 6685).



ELLWOOD W. SARGENT
Colonel, J.A.G.D.
Acting Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMD 77, MTO, 17 May 1945)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

AGO 512, U. S. Army,
1 June 1945.

Board of Review

MTO 6718

UNITED STATES)

PENINSULAR BASE SECTION)

v.)

Trial by G.C.M., convened at
Leghorn, Italy, 27 March 1945.
Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

Private LOUIS EDD SOUTHWARD)
(34 273 692); 404th Port)
Company, 522d Port Battalion.)

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 Pvt. Louis Edd Southward, 404th Port Company, 522nd Port Battalion, did, at Leghorn, Italy, on or about 7 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Sergeant James C. Heard, a human being, by shooting him with a revolver.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

(124)

3. The evidence shows that on 7 February 1945, 404th Port Company, 522d Port Battalion, of which accused was a member, was stationed at Leghorn, Italy (R. 8,24,25,34). Between 2030 and 2100 hours on that date after one drink in the noncommissioned officers' club maintained by 522d Port Battalion in Leghorn, accused (then a sergeant), a Sergeant Hatchett and two privates, decided to visit the battalion privates' club, located one floor below, to listen to some music (R. 9,12,15,17,19,25-27,31,32,34). Under the rules of the respective clubs, privates were not admitted to the noncommissioned officers' club and no noncommissioned officers except the first sergeant were admitted to the privates' club, although on occasions noncommissioned officers visited the latter (R. 12,15,16,19). Accused and his companions entered the check room entrance to the privates' club, wherein at the time were the president and two civilian women employees of the club, a sergeant of 522d Port Battalion, and Sergeant James C. Heard (the deceased), 406th Port Company, 522d Port Battalion, who was assigned to full-time duty as battalion provost sergeant (R. 9,10,19,23,25-27,34). One of the civilian employees asked accused for his pass, whereupon Heard intervened and demanded passes from accused and his companions (R. 19,20,24,32,34). Heard started cursing, stated that only privates could enter and that accused and his companions would have to leave the check room and go to the noncommissioned officers' club. He said, however, that Sergeant Hatchett could enter because Hatchett was his "brother", or friend or something like that" (R. 10,26,32,35). Accused replied that he and Heard had been brothers and friends for a long time and that he did not see why Heard treated him "like that" (R. 10,26,32). Deceased responded

"Yes, we are brothers, but I am carrying out my orders!"
(R. 10)

and

"You mother fucker think you are bad but I am the baddest man around here!" (R. 26,32)

and also

"Yes, but I am Sergeant of the Guard!" (R. 35).

The conversation between accused and Heard lasted for about twenty minutes, during which they became angry (R. 20). Accused had been drinking and was in a rage but was not drunk (R. 17,33). One witness testified that she saw Heard take one drink about an hour before (R. 24). Two of accused's companions finally took accused by the arm and all three left the check room (R. 10,13,20,24,26,27,33,35,38). After accused's exit, Heard walked up and down the check room talking and cursing loudly to himself, and was heard outside the check room (R. 11,14,20,21,27,33,35). He was heard to say

"You old mother fuckers think you are bad but I am the baddest son-of-a-bitch around here!" (R. 27)

and

"You black son-of-a-bitch think you can come in and run

over people, you think you are bad but I am the baddest son-of-a-bitch in here",

which remark he kept repeating (R. 33). Accused was about ten feet away from the door going up the steps when Heard's remarks were heard (R. 35,38). Accused broke from the grasp of a companion, drew a pistol and ran back to the entrance of the privates' club (R. 35).

About 2040 hours, approximately three minutes after his exit, accused re-entered the club check room with a small pistol five to seven inches long in his right hand, which he pointed at Heard just after the latter said, "If you says I am bad, yes I am bad'" (R. 10,11,14,17,21,28,33). One of the witnesses testified that the weapon was an automatic pistol (R. 11). Accused said nothing (R. 18). Heard who was about 15 feet away, rushed at accused, attempted to seize the latter's right arm but missed, and seized accused around the waist (R. 11,14,15,22,29,30). They scuffled for a few seconds (R. 15,22,30). Accused pointed his pistol "down" (R. 11), close to and toward Heard's left side, and shot him with the pistol during the tussle (R. 11,12,15,17,22,23,30). Both accused and Heard fell to the floor and accused then ran out of the room (R. 23,30).

Heard was taken to the 7th Station Hospital in Leghorn, Italy, where he was treated by a medical officer about 2130 hours on 7 February 1945. He died about ten minutes later (R. 35-37,39,40). An autopsy conducted on 8 February established that the cause of his death was a gunshot wound which perforated the middle and lower lobes of the left lung, and caused a hemorrhage. The wound was the only injury sustained and the presence of powder burns indicated that the shot causing death had been fired at very close range. (R. 37,40,41)

Agent Daniel A. Szewczyk, Criminal Investigations Division, interviewed accused on 9 February 1945, warned him of his rights under Article of War 24, and told him that he did not have to make a statement, but that anything he said would be held against him. He then obtained from accused a signed, sworn statement. (R. 44-46) The statement, dated 9 February 1945, and admitted in evidence without objection (R. 46; Ex. 1), was, in pertinent part, as follows:

"On 7 February 1945, at about 2030 hours, I went alone to the NCO Club of my organization and there I had some drinks of cognac and rhum with some of the boys of my organization whose names I do not know. After spending about one (1) hour in the NCO Club, I went downstairs to look-up Sgt. HATCHETT. I went through the check room of the Privates Club, where I found HATCHETT. When I saw HATCHETT, I said, 'Let's get the keys, I want to go to the mess hall', and HATCHETT replied that he was going to the barracks too. On my way out of the Privates Club, I bumped into Sgt. James HEARD, of my organization, in the check room, and that is when Sgt. HEARD called me a 'son-of-a-bitch'.

I started to call him one back, but before I had a chance to say it, he told me to shut my mouth. I then walked near the door, and then I called him a son-of-a-bitch. Sgt. HEARD then ran towards me, running his hand in his pocket as though he were reaching for a pistol. When I saw Sgt. HEARD reaching in his jacket, I pulled-out my 38 Cal. revolver and fired one (1) shot at Sgt. HEARD. I then ran down-stairs and out of the building, and I threw my pistol into the canal, which is right across the street from our barracks. Then I went to my barracks where the M.P's came and got me" (Ex. 1).

Accused elected to make an unsworn statement at the trial, wherein he said that he had been a corporal for five or six months and a sergeant for about a year and a half prior to 7 February (1945), and that he had been both corporal and sergeant before leaving the United States (R. 42). He was first cook in his company, and stated

"Where I got the pistol, I got it from an Italian and I gave him three dollars and a quarter for it, I borrowed ten dollars from a boy in my organization, I think Hull lent it to me to pay" (R. 43).

He also stated that about 1100 hours on 7 February, he took the pistol to sell to a merchant marine, as he had told "the Sergeant" he would pay him that day. He went to the club that night with the pistol. (R. 43)

Corporal Benjamin Hull, 522d Port Battalion, testified for the defense that he had lent accused money sometime during the month of February (1945), which accused promised to repay on that day or the end of the month. He did not remember what day the loan was made, and was not present at the (privates' club when deceased was shot. (R. 43,44)

4. It thus appears from the evidence, including the pre-trial statement of accused, that at the place and time alleged accused killed Sergeant James C. Heard, the person named in the Specification, by shooting him with a pistol. Before the homicide Sergeant Heard denied accused, who was a sergeant, admission to the battalion privates' club, which accused was not entitled to enter. Heard said that one of accused's companions, a sergeant, could enter. Accused remonstrated with Heard and a heated, verbal altercation ensued between the two men, both of whom became angry. Heard employed and applied to accused curses and vile epithets. After accused was escorted from the check room of the club, Heard continued to curse and talk loudly. About three minutes later accused, who went only a short distance away to a place where deceased's remarks could be heard, broke from the grasp of a companion, drew a pistol, returned to the check room and pointed the pistol at Heard. The latter rushed to accused and attempted to take him by the arm, but missed and seized accused around the waist. After the two men struggled for a few seconds, accused shot Heard in the left side and fled. Shortly thereafter Heard died as a result of the wound.

Although the issue was not raised or supported by affirmative defense evidence, the pre-trial statement of accused suggests that he shot Heard in self-defense. This statement is in direct conflict with the testimony of all the witnesses for the prosecution. To justify or excuse a homicide on the ground of self-defense, it must be established by the evidence that the slayer was without fault in bringing on the difficulty, or in other words, that he was not the aggressor, and that the slayer must have believed on reasonable grounds that the killing was necessary to save his life or to prevent great bodily harm to himself (MCM, 1928, par. 148a; 26 Am. Jur., Homicide, sec. 126, p. 242). Whether or not deceased was acting with authority in denying accused admittance to the club was not material. The initial altercation was terminated when accused left the scene, and his re-entrance three minutes later, armed with a pistol which he pointed at deceased, constituted a resumption of the altercation in which accused unquestionably was the aggressor. The two men engaged in a struggle during which accused had his pistol, but there is no evidence that his opponent was armed. Instead of retreating, or breaking off the engagement, accused deliberately lowered his pistol and shot deceased at very close range while they were struggling. Accused was not in imminent danger of great bodily harm, or of losing his life, at the time he fired, and the court was amply justified in concluding that he did not shoot deceased in self-defense (MCM, 1928, par. 148a). Heard's application to accused of vile and contumelious epithets in the initial altercation, in calling accused a "mother-fucker" and a "black son-of-a-bitch", well may have enraged accused. But there is not embodied therein threats or overt acts committed which would in any sense justify accused's use of a firearm. Where intent to kill is shown by the evidence, no words of reproach, however grievous, are provocation sufficient to justify the killing (Wharton's, Crim. Law, Vol. 1, 12th Ed., sec. 584, p. 802). Even though deceased may have angered accused by offering to admit another sergeant to the club, there is not shown thereby any provocation which in any sense would have justified accused in resorting to use of a firearm. Other than as asserted in accused's pre-trial statement, the record of trial does not disclose any legal excuse or justification for the homicide. The court was justified in concluding from all the evidence that accused deliberately and willfully shot deceased, with callous indifference to the life of his unarmed victim. Therefrom flows the inference of the malice with which accused was impelled. No matter of extenuation or mitigation is suggested in the evidence (MCM, 1928, par. 148a). The Board of Review is of the opinion that the findings of guilty of murder are supported by the evidence.

5. It is alleged in the Specification that accused employed a "revolver" in committing the offense. All of the witnesses testified that accused was armed with a "pistol", one witness testifying that it was an "automatic pistol". In his pre-trial statement accused admitted that he shot at Heard with his ".38 Cal. revolver", and later threw his "pistol" into a canal. In his unsworn statement at the trial, accused referred to the weapon as a "pistol". The firearm with which the homicide was committed was not introduced in evidence. No issue was raised by the defense as to the nature of the weapon used, and the evidence establishes clearly that deceased shot accused with a pistol, either an automatic or a revolver.

This variance or omission between the allegations and proof is not material, and accused was not injured or misled thereby (AW 37; MTO 6638, Jefferies; MTO 5917, Jones).

6. The charge sheet shows accused is 25 years of age and was inducted 31 March 1942. He had no prior service.

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

William P. Inoué, Judge Advocate.
Wiggo C. Sessions, Judge Advocate.
Henry C. Reisch, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
8 June 1945.

Board of Review

MTO 6780

UNITED STATES)

FIFTH ARMY)

v.)

Trial by G.C.M., convened at
APO 464, U. S. Army, 20 April
1945.)

Private First Class BLAKE)
BILLS (38 219 070), Head-)
quarters Company, 2d Battalion,)
366th Infantry.)

Dishonorable discharge and
confinement for life.)
U. S. Penitentiary, Lewisburg,)
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

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

Specification: In that Private First Class Blake Bills, Headquarters Company, 2nd Battalion, 366th Infantry, did, at Fornaci, Italy, on or about 12 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Lorenzo Simone, by shooting him with a carbine.

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

Specification: In that Private First Class Blake Bills, Headquarters Company, 2nd Battalion, 366th Infantry, did, at Fornaci, Italy, on or about 12 February 1945, with intent to do her bodily harm, commit an assault upon Theresa Egui Nei Simone, by shooting her with a dangerous weapon, to wit, a carbine.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, 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 for the prosecution shows that on 12 February 1945 accused, Private First Class Blake Bills, was a member of the Antitank Platoon of Headquarters Company, 2d Battalion, 336th Infantry Regiment (R. 5, 14, 25-27, 34). First Sergeant William K. Robinson, Technical Sergeant Jay B. Fair, platoon sergeant of the Antitank Platoon, Staff Sergeant Wayne F. Walker, and other members of the organization occupied and were billeted in a two-story dwelling house at Fornaci, Italy, on the road to Barca, about a mile and one-half to three miles from the front lines (R. 5, 6, 11, 26, 29, 34). Pietro Rossi, an Italian civilian, had been working with the Antitank Platoon of Headquarters Company for about a month and was billeted with them (R. 19, 21, 24, 29). Before coming to Fornaci, about 7 February, the organization had been stationed at Fabrique, Italy, where the curfew for civilians had been six o'clock (1800 hours) and the Antitank Platoon had been in charge of imposing the curfew, enforcing security regulations, and performing guard duty (R. 6, 26, 27). At Fornaci, however, although the six o'clock curfew remained in effect for civilians, the duty of imposing the curfew was on Company Headquarters Platoon, and not on the Antitank Platoon which was performing no security guard but which was maintaining gun positions while waiting to be "moved up" (R. 6, 11, 26). There were no orders in effect to carry weapons but it was customary to carry them at all times, whenever "they went out night or day" (R. 15). The men had received instructions with regard to civilians and were authorized, whether on duty or off duty, to bring in suspicious characters (R. 12).

About 1900 hours, 12 February, Rossi met accused on the street in Fornaci and began walking with him toward their billet (R. 6, 7, 12, 19, 20, 23, 24, 27, 29, 31). Both Rossi and accused were armed (R. 21, 23). After they had gone a short distance they met Tereza Egui Nei Simone and her 16-year old son, Lorenzo Simone, Italian civilians, who were on their way to Tereza's sister's house to sleep (R. 20, 21, 24, 25, 30-32). It was past the curfew hour (R. 23, 33). Accused called out in English and was answered in Italian, "We are Italian paesan" (R. 20). Accused flashed his light at them, threatened them with his weapon, said "Via, via" and motioned to them to proceed ahead. Tereza testified that "the colored soldier" (accused) "pushed us ahead pointing the gun at us and we were very much afraid". (R. 20, 21, 31, 33) Rossi did not tell accused that the civilians might be "Tedeschi" (Germans) but tried to quiet accused (R. 25, 31). Accused, however, insisted that they were Fascists (R. 21) and was "very nasty" (R. 33). When they arrived at the house where the organization was billeted, the door was closed and accused told Rossi to call the sergeant. Rossi opened the door and called three sergeants, including Fair and Walker. (R. 21)

First Sergeant Robinson, who had been sitting in the orderly room on the ground floor, heard a noise at the door, was called out by one of the men, and went to the front door, where he saw accused with the two Italian civilians. Robinson asked accused "why he had brought the people there and what it was all about", and accused replied "'Sergeant, you don't know what these people may do. You don't know how much trouble they will cause. You are too easy on these people'". (R. 7) Robinson told accused "to leave the people alone" and that if they had done any harm he would take care of them. He told accused to come inside the house, and the latter did so, bringing the civilians with him (R. 7,8). The light was not lit in the hallway but some of the men who had assembled there had lighted their flashlights (R. 8, 12,21-23,27,29). The two civilians stood near a kitchen on the left-hand side of the hallway and accused stood in the hallway, his carbine held in his right hand by the small of the stock, pointing down at a slight angle, with his finger on the trigger (R. 8,9,12,14,21-24,27-29). Rossi testified that accused was holding his weapon pointed at the civilians (R. 23).

Robinson tried to quiet accused and Fair, who had been summoned to the hallway, started to talk to the civilians and, with the help of Rossi, was securing their names and place of residence when accused raised his carbine waist-high and fired four to six shots at Tereza and her son (R. 9,12,22,28, 30,31,34), both of whom fell to the ground wounded (R. 9,22,34,35). Tereza was hit in the left thigh and in the right hand and her son Lorenzo was hit in the leg (R. 32). Fair had not noticed either Italian make any sort of movement or gesture (R. 28,29). Fair grabbed accused's weapon, struggled with him for it and finally, after getting accused down on the floor, with the help of Robinson and another soldier took it from accused (R. 9,28,30). Fair's hand was slightly scratched during the struggle (R. 22,29). Robinson took accused outside the building for the purpose of seeing a Lieutenant Abron at the battalion command post. About 50 yards from the building accused said to Robinson "'I must have a rifle'", went back and secured another weapon. (R. 9,10,13,14) At the command post Robinson reported to Lieutenant Abron that accused had shot two civilians, and, Robinson testified, accused

"started to tell Lieutenant Abron about it. He told him that he had met the people in town and had spoken to them - buono sera - and then he said what they might do, all the harm they might cause and that he was afraid of them" (R. 10).

When Lieutenant Abron asked accused why he had done it accused answered "'I am afraid of those people'", and "'In Barca these people almost caused me to be killed. The house that I was in was hit by the Jerries'" (R. 35). Accused was ordered placed in confinement (R. 35) and transportation was furnished to take the wounded civilians to a medical aid station (R. 10,22, 32,34). Five .30 caliber carbine ammunition shells were found in the hallway of the dwelling, which Robinson picked up and turned over to an investigating officer (R. 10,11,28,30).

The evidence as to accused's intoxication was conflicting. Robinson

"observed" that accused "was intoxicated", a conclusion he reached solely from accused's manner of speech. "He wouldn't listen to anyone — he just kept talking continuously — all of the time". On the way to the battalion command post accused walked in a normal manner. (R. 11,13) Rossi was unable to state whether accused was drunk. He did not see accused drink anything but thought he staggered a little. (R. 20,25) Fair thought that accused was "normal" and "sober" and accused, who was not staggering, did nothing to lead witness to believe he had been drinking. "He was talking, but I know that he has a tendency to talk loud anyway". (R. 30) Walker had no opinion as to whether accused were drunk or sober, but thought he was "excited" (R. 35,36).

Tereza and her son were given first aid (at medical aid stations) and were subsequently taken to the civilian hospital in Lucca, Italy (R. 32,36). Tereza remained there about six weeks (R. 32). Lorenzo's wounds, which were serious, were on both thighs and appeared to have been caused "by shots". The wounds were examined at the hospital and he was given external treatment "and then placed on an iron apparatus — in a contraption with Brown's apparatus". He died on 17 March 1945. (R. 32,36,37) Torgiato Cecchini, assistant surgeon at the civilian hospital, testified that Lorenzo's death was due to a hemorrhage caused by the wounds Lorenzo had received, or that "it might have been a fragment of the shot itself". Asked if "the wounds from the shots had any bearing" on Lorenzo's death he testified "Yes. I must say yes, because the hemorr(h)age was caused by the wounds. It is a complication. The bone was also fractured. The bone might have touched the arteries and thus caused the hemorr(h)age". (R. 37,38)

On 3 March 1945, after he had been warned under Article of War 24 that he was not required to make a statement but that if he made one it could be used against him, accused signed and swore to a statement which was admitted in evidence without objection. No promises were made, nor any force or coercion used to obtain the statement. (R. 15-19; Ex. A) It reads as follows:

"About 1630, 12 Feb 45, I left the camp and went to Fornaci Di Barga. I was walking around looking for a woman. About two hours later I met the paesan who works in the same outflr with us. We stopped and talked for about fifteen minutes. Then we started to go back to camp. About 200 yds. from the house where we live we met a woman and a man. 'Paesan said, 'Similar to Tediski.' I shined my flashlight on the man and woman. I asked the man his name and he replied, 'No capito.' I had my carbine under my arm and I motioned to them with my other hand to go. I said, 'Let's go, Via'. We proceeded to the house. Some soldiers were standing in front of the house and I told them to call out the first sergeant. The first sgt. came out and began talking to the man and woman. I could not understand what he was saying. Sgt. Robinson led them in the house and stood them with their backs to the wall. The sgt. was

talking to them. I had my carbine on the man and woman. The sgt. stopped talking to them. The gun went off, I, thinking the safety was on. The gun fired about three times. A soldier standing beside me hit my arm and took the gun away from me. A S/sgt. Walker shortly afterwards took me to the 365th stockade" (Ex. A).

First Sergeant Robinson testified for the defense that accused had served on the front lines as an ammunition-bearer in the Antitank Squad, was of value to the government as a soldier, and before 12 February 1945 had caused no trouble in the organization. Robinson would give accused "an excellent character rating". (R. 38,39) Sergeant Fair testified for the defense that accused had served on the front lines as an ammunition-bearer in witness' platoon. He would rate accused's performance of duty "very good" or "excellent" and his character "good" or "very good". (R. 39)

Accused elected to remain silent (R. 39).

4. It thus appears from uncontradicted evidence that at the place and time alleged accused wounded Theresa (or Tereza) Egui Nel Simone, the person named in the Specification, Charge II, by shooting her with a carbine, and that he shot Lorenzo Simone, the person named in the Specification, Charge I, with a carbine, inflicting injuries which, with complications resulting directly therefrom, caused his death 33 days later.

The evidence shows that at the time of the homicide, accused's organization was in close proximity to the front lines and had previously been engaged in carrying out security regulations and enforcing the curfew upon Italian civilians. About five days prior to the commission of the offense, however, accused's organization had been relieved of that duty and was engaged in maintaining gun positions prior to being moved forward. There were no regulations in effect requiring or forbidding the carrying of firearms but it was customary to carry them at all times of day and night, and the men were authorized to bring in suspicious civilians. About 1900 hours, one hour after curfew, on the date alleged accused, armed with a carbine, met Tereza and her son Lorenzo Simone on the streets of Fornaci, threatened them with his weapon and, asserting that they were Fascists, compelled them to go with him to the dwelling-house where his organization was billeted. Accused was "very nasty". Upon arrival accused told his first sergeant, who attempted to quiet him, that it was impossible to tell what "these people" might do, that they might cause trouble, and that the sergeant was "too easy on" them. As other noncommissioned officers were endeavoring to straighten out the difficulty, accused fired five shots from his carbine at the two Italian civilians, wounding Tereza, the person named in the Specification, Charge II, in the thigh and in the hand. From the suddenness and violence of the assault, and from the use of the firearm the court was justified in inferring an intent by accused to do bodily harm as alleged.

Lorenzo Simone, Tereza's 16-year old son, was struck in the thighs by one or more of the bullets from accused's carbine and later died from hemorrhages and complications caused by his wounds. On searching for a motive for

accused's conduct, the evidence presents a reasonable basis for an inference that accused was angered because the civilians, whom he accused of being Fascists, were on the street after curfew and that he determined to settle the matter himself. When asked why he had shot them, he stated to an officer that he was afraid of "those people" and that on another occasion "these people" had almost caused him to be killed. In his pre-trial statement, however, he claimed that his carbine went off accidentally. The truth of this contention, as well as the extent and effect of accused's intoxication, if any, were matters for determination by the court. There is evidence that accused had his finger on the trigger of his carbine and that he kept his weapon pointed at Lorenzo and Tereza, who were unarmed. Neither their presence on the streets after curfew nor accused's alleged fear amounted to legal provocation or justified his resort to the firearm. It is clear that when accused fired he was not in danger of losing his life or of incurring serious bodily harm at the hand of Tereza, Lorenzo or any other person.

Malice aforethought is abundantly evident from his apparent anger and resentment, and the deliberate, wanton, cold-blooded use of a deadly weapon in a deadly manner. Callous indifference to the life of his victim or vicious malice characterized the behavior of accused. The homicide was without legal provocation, justification or excuse. Accused was properly found guilty of murder as charged (MCM, 1928, par. 148a).

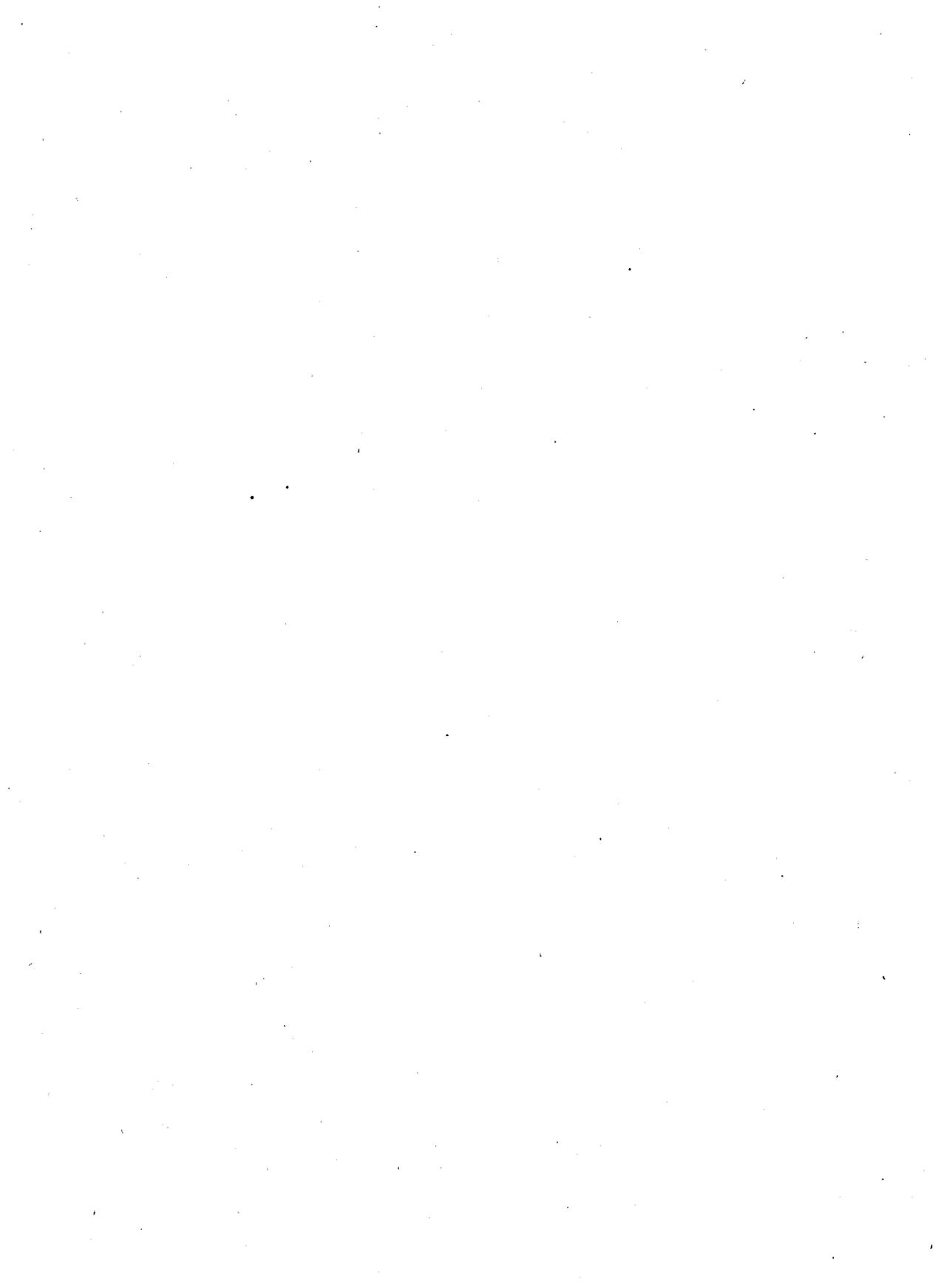
5. The record suggests a question as to whether the evidence shows a sufficient causal connection between the gunshot wound and Lorenzo's death. The surgeon in charge testified that his death, 33 days after the wounds were received, was caused primarily by a hemorrhage, which in turn was a complication arising from the wounds themselves, a fracture of the bone, or a fragment of shell. There is no suggestion in the evidence that Lorenzo received other than prompt, normal and approved medical attention. In such cases the general rule is that there is criminal responsibility if the act of the accused is the proximate cause of death. Intervention of other factors contributive to death, but which are not the proximate cause thereof, does not lessen the responsibility (26 Am. Jur., sec. 48, p. 191; 40 C.J.S., Homicide, sec. 116, p. 854). There was substantial evidence to warrant the conclusion that, under the above rule, Lorenzo's death resulted from and was proximately caused by the gunshot wounds inflicted by accused (NATO 2295, Lavender, Bull. JAG, July 1944, sec. 450; NATO 3015, Baugh).

6. The charge sheet shows that accused is 32 years of age and was inducted 6 August 1942. He had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary

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

Walter P. Brown, Judge Advocate.
Cress C. Sessions, Judge Advocate.
Henry C. Keen, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
4 July 1945.

Board of Review

MTO 6781

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

PENINSULAR BASE SECTION)

v.)

) Trial by G.C.M., convened at
) Naples, Italy, 23 March 1945.
) As to each: Dishonorable dis-
) charge and confinement for life.
) Eastern Branch, United States
) Disciplinary Barracks,
) Greenhaven, New York.

) Private MILTON M. ALEXANDER
) (34 045 493), casual attached
) 400th Replacement Company, and
) Private CHESTER DAVIS
) (38 086 062), casual attached
) 401st Replacement Company, both
) of 13th Replacement Battalion,
) 1st Replacement Depot.)

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 separate Charges and Specifications:

ALEXANDER

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

Specification: In that Private Milton M. Alexander, casual attached, 400th Replacement Company, 13th Replacement Battalion, 1st Replacement Depot (then of the 547th Replacement Company, 110th Replacement Battalion, 24th Replacement Depot), did, without proper leave, absent himself from his organization at La Fagianeria, Italy from about 29 August 1944, to about 21 September 1944.

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

Specification: In that Private Milton M. Alexander, casual attached, 400th Replacement Company, 13th Replacement Battalion, 1st Replacement Depot, did at Naples, Italy, on or about 13 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Gregorio di Francesco Palumbo, a human being by striking him on the head with a pistol.

DAVIS

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

Specification: In that Private Chester Davis, casual attached, 401st Replacement Company, 13th Replacement Battalion, 1st Replacement Depot, then of 547th Replacement Company, 110th Replacement Battalion, 24th Replacement Depot, did, without proper leave, absent himself from his organization at La Fagianeria, Italy from about 9 August 1944 to about 7 October 1944.

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

Specification: In that Private Chester Davis, casual attached, 401st Replacement Company, 13th Replacement Battalion, 1st Replacement Depot, did, at Naples, Italy, on or about 7 October 1944, impersonate a non-commissioned officer by wearing chevrons of a Staff Sergeant.

CHARGE III: Violation of the 92d Article of War. (additional charge, 11 Dec 44).

Specification: In that Private Chester Davis, casual attached, 401st Replacement Company, 13th Replacement Battalion, 1st Replacement Depot, did, at Naples, Italy, on or about 13 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Gregorio di Francesco Palumbo, a human being by striking him on the head with a pistol.

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 Alexander. 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, all members of the court present concurring in the findings and the sentences. The reviewing authority approved the sentence as to each accused, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Accused Davis having died subsequent to the trial of this case (see report of death in allied papers), the proceedings as to him are abated. Evidence pertaining solely to Davis is omitted from the review and the Board of Review expresses no opinion as to the legal sufficiency of the record of trial to support the sentence as to Davis.

4. The evidence shows that on 29 August 1944 accused, Private Milton M. Alexander, then a member of the 547th Replacement Company, stationed at La Fagianeria, Italy, absented himself from his organization without proper leave and remained unauthorizedly absent until 21 September 1944 when he reported to the 400th Replacement Company, stating he had been in the hospital since 10 September 1944. His name was not found in the organization's sick book. (R. 45; Ex. 6)

The evidence shows further that about 2145 hours on 13 September 1944 Gregorio Palumbo, an Italian civilian residing at Number 12 Via Conservazione dei Grani, Naples, Italy, which is about 30 meters from Piazza Dogana, stumbled into his quarters and exclaimed to his wife "I don't see. I don't see". He was bleeding and dirty and stated he had been assaulted by three negroes. (R. 30,31) He was taken to the Pellegrini Hospital in Naples where he was found to be in a critical condition as a result of a "breaking of the skull bones with oozing of the cerebral matter and irradiation to the cranic base" (R. 32,34,39). An examination disclosed that Palumbo had no objective evidence of any injury other than an irregular four-inch laceration in the center and toward the rear of his head (R. 35,39-42). A doctor who examined the wound expressed the opinion that it was more likely that it had been caused by a Beretta pistol butt than a rifle barrel (R. 41). Last rites were administered to Palumbo by the hospital chaplain on 16 September 1944 at which time Palumbo stated "While I was going back I was struck by three negroes" (R. 37,38). The chaplain testified that at the time he made this statement Palumbo knew he was about to die (R. 38). Palumbo died 16 September 1944 as a result of the breaking of the cranium and lesion of the brain (R. 30,40).

The evidence shows further that on the night of 13 September 1944, before 2200 hours, in the vicinity of the Piazza Dogana, Naples, three "shadows" were seen attacking a man and a masculine voice was heard to scream "Mamma del Carmine" in Italian (R. 8,9,12). About five minutes later the same three "shadows" were observed to be three colored soldiers. One was wearing khaki clothing and staff sergeant's stripes. One had a knife and was heard to say "Come on, John". (R. 10) After another five minutes a number of people were observed near Via Conservazione dei Grani carrying an injured Italian civilian (R. 10,11). The Italian had a four-inch wound on his head and was taken to the Pellegrini Hospital (R. 11).

Private Ernest Jackson, formerly a member of 400th Replacement Company, 1st Replacement Depot, who had been previously convicted of the murder charged in the instant case, testified that on the night of 13 September 1944 he and accused Davis had supper together at the 524th Port Battalion at Piazza Dogana near Gate Number 1, Port of Naples. After dinner they went

(140)

to "Lia's house" (home of Cecilia Farina, Number 12 Via Conservazione dei Grani) just behind the 524th Port Battalion where they met accused Alexander. (R. 14-16, 21, 35) Witness was wearing "O.D.'s" and Alexander had on "khakis" with staff sergeant's stripes and was wearing dark glasses. Davis also was wearing a khaki uniform and staff sergeant's stripes. (R. 18) They remained at "Lia's" for a time and then witness and Alexander went out to steal a "jeep". Witness was armed with an Italian Beretta pistol and Alexander had "a piece of iron which used to be a muzzle of an old gun, with all the wood burned off of it". Davis remained at "Lia's". (R. 16) They were unsuccessful in locating a "jeep" and were walking up an alley returning to "Lia's" about 2130 hours when witness observed an Italian walking behind them. Alexander said "I'll cave that mammy dodger's head in" and asked witness if he believed him. Witness replied "You said you would". (R. 17) The Italian walked past the two soldiers and was about two or three paces ahead of them when Alexander took two or three quick steps and, with the gun barrel he was carrying, struck the Italian on the head from behind. The Italian fell to the ground. Witness and Alexander then walked around a building, returned and found that the Italian had disappeared. (R. 17) The assault occurred at a point about 50 yards or paces from Number 12 Via Conservazione dei Grani (R. 35). Alexander and Jackson then returned to "Lia's" where they rejoined Davis and others (R. 17). Alexander called Davis into another room and told him "I just caved an Italian's head in. I should kill all the sons-of-bitches", and "The best thing is that we don't stay in this house, none of us, because the police is going to come down for investigation, I imagine". (R. 18) Witness, Davis and Alexander then departed (R. 18).

Alexander, on 18 October 1944, after having been informed of his rights under Article of War 24 and told he did not have to make a statement and that if he did make a statement whatever he said could be used for or against him in the event of a trial, made the following sworn statement which was admitted in evidence against the author only, and reads in pertinent part (R. 22, 23)

"I remember the time the civilian man was killed. It was the 13th of September that Jack hit the guy and we found out later that he died. About the 1st of the month, Jack and myself were on the streets in Naples and he was talking to me about getting a gun. And I asked him what he wanted a gun for. And he said, 'I want to me (make, /i/ M.A.) me some money. I'm going to sticking up somebody.' After that he said he didn't want to stick up anybody naked handed, that he wanted some protection.

Question: 'Who else was with you?'

Answer: 'Only me and him alone.'

Question: 'Did Jack get the gun?'

Answer: 'About three days later Jack met a soldier friend of his from the 7th Repl. Depot and got the gun. He asked the friend to sell the gun to him. The soldier didn't want to sell the gun to him at first. He asked

Jack what he wanted to do with it. Jack said he needed it bad, but he didn't tell him what he wanted with it. Jack worried him around for it for about half an hour and finally the soldier said he would sell it for \$25.00. Jack said he was short \$3.00, and he went over to King and borrowed \$3.00. Davis, King, and myself was standing around when the soldier gave Jack the gun, which was an Italian Beretta automatic pistol. The soldier gave him two bullets which Jack put in the pistol. King said if he had known what he wanted to do with the \$3.00 that he would have bought something to eat for himself.'

Question: 'What did you do, from the time you left camp, on the day that Jack hit the civilian?'

Answer: 'On the 13th I left camp with Cpl. Jameson. We both had passes. We come to Naples. It were about 10:00. We went on Via Roma. We was just walking and looking. We stayed together until 12:00. Then I went to a cafe alone and had dinner. When I left out of the cafe, I came back on the corner right near the 524th Port Battalion. I stood around there about an hour and a half and Jack came up later. Tony Davis came up after him. We walked down the side street and stopped in a cafe. Jack had a meal and me and Tony had a glass of vermouth. We left the cafe and went to another joint down by the big square behind the colored barracks.'

Question: 'What did you drink?'

Answer: 'I drank two small glasses of vermouth and Tony had two glasses of cognac. Jack didn't drink anything. We left and then went to Lia's house. Tony and me stayed about 15 or 20 minutes. We came down and left Jack up there. Right after we come out of the house on the corner there, the two girls we was talking with: I was talking to one girl and Tony was talking to another. Tony left me and went into the square. There was an Italian soldier coming up the street with a blackjack. He had the blackjack in his hand. There was an Italian civilian man close. Tony started arguing a few minutes with the Italian who was carrying the blackjack. The Italian just stood there facing him. He just stood there looking at Tony. After I came up Tony wrung the blackjack out of his hand and Tony jumped back from me and took a big swing and hit me on the head once. Then Tony threw the blackjack in the back of the square. Three or four girls came running up and ran up to Tony and asked him why he wanted to do that. They told Tony he wasn't no good. And Tony turned around and I told him, 'Man, you shouldn't have did nothing like that.' About that time Tony walks up the street to the corner of the main street up by the 524 Battalion. I came on up later behind him.'

Question: 'What time was it that Tony hit the soldier?'

Answer: 'It was in the afternoon when it was still day.'

I think it was around 3:00 o'clock. Tony stopped on the corner and I came on up later. And Tony looked back at me and walked on into camp. He didn't say anything. I stayed there about ten minutes and then I caught a ride in a truck and went up around the Liberty Club. I stayed around there until night and ate supper at the 385th Engineers. And I came back to Lia's house after supper and Jack and Tony and myself, we got together there. We stayed there for a while and we three walked over toward the Red Cross show on Via Roma. We didn't go into the show; we stayed on the street for a while, and Jack said, 'Let's stick up somebody.' I told him, 'No, I won't do anything like that.' He asked Tony would he stick up somebody with him, and Tony told him, 'No.' Jack asked us was we scared. We walked on the street about an hour and Jack was trying to get us to stick up somebody. We knowed he had the gun because he showed us the gun when we left Lia's house. We walked on down to the square down by the 524th Battalion. When we turned up into the square Jack asked us again to stick up some Italians and get some money. We told him, 'No.' About that time an Italian man was coming behind us. Jack took his pistol out of his back pocket and put it in his front pocket. When the Italian got even with us, Jack told us, 'Let's get him,' and I said 'No.' Jack said 'I'll get him,' and he took his pistol out of his pocket and hit the Italian in the head. Question: 'Was the Italian civilian facing Jack?' Answer: 'No, Sir. The Italian had passed him. Jack walked behind him and hit him in the head with the pistol while he was walking along. When the Italian fell, Jack walked around on the right side of the civilian, and then two lights come shining out of the window before Jack could rob him. Somebody was yelling down, "What is going on down there?"'

Question: 'Where did the lights come from?'

Answer: 'From the open window above the door. Jack didn't search the civilian because when the lights came on, he didn't have time and walked on. Tony and myself followed Jack to the fountain in the square. The civilian got up pretty soon and walked by himself to the same house where Lia lives. Jack said, "He made it to the house." Then we went over to the corner and in a few minutes some civilians brought the man back down in the street. Another civilian who was standing nearby then came and went with the other civilians and took the man to the dispensary.'

Question: 'While you were standing at the corner, did any of the soldiers shine their lights or talk to you?'

Answer: 'There were three or four lights shining down from the side window where the screen is, and we heard the boys talking upstairs together.'

Question: 'When Jack hit the civilian, how far away were you and Tony?'

Answer: 'We was behind Jack because Jack walked off fast and hit the civilian. We must have been about twelve feet away from Jack.'

Question: 'After they carried the civilian away, what did you do?'

Answer: 'Jack, Tony, and myself went upstairs to Lia's house. King was already upstairs. Jack went to the window and opened it and called Tony Davis. He said, "Come here." All of us went to the window and Lia and Tony's girl friend come to the window also. We looked and didn't see anything, and Jack said, "They must have taken that man to the dispensary." Jack told Lia he hit the man in the head with a pistol. Jack still had the pistol. Me and Jack left the house about fifteen minutes later and we went to the Port and rode with the 127th QM boys. We slept and drove in the trucks.'

Question: 'What did you do the next day?'

Answer: 'Me and Jack came back the next morning about 7:00 o'clock to Lia's house. Tony and King had stayed at the house all night. Tony, King, Jack, and myself, another tall boy, and Tony's girl Syndia, the one he slept with all night, we got together. There was five of us and the one girl. Jack told Tony's girl to go up and tell the lady that what happened to this Italian he was sorry about it, and don't say anything about it, and he would give her something for it. Tony's girl went out with this tall boy from the 480th Port Battalion. The girl came back in a pretty short while with this tall boy and told Jack that the widow wouldn't say anything about it. Later on, about two or three days, all the civilians were talking about it. They were talking about Jack doing it and Jack said he was going to leave. And he left and went up to his girl friend's house on Via Roma. About two weeks later Jack, Tony, and myself were talking on the street and two M.P.'s come up and talked to us. They took Jack to the station because he had no pass. Tony and myself went along up there also, and they put Jack in jail" (Ex. 1).

Each accused elected to remain silent and no evidence was offered by the defense (R. 46).

5. It thus appears from uncontroverted evidence that at the place and time alleged in the Specification, Charge I, accused Alexander absented himself from his organization without proper leave and remained unauthorizedly absent until 21 September 1944, when he reported to the 400th Replacement Company stating he had been in the hospital since 10 September 1944. His name was not found in the sick book. The court was warranted in finding accused guilty of a violation of Article of War 61 as charged.

There is evidence that about 2130 hours on the date alleged in the Specification, Charge II, another soldier and accused Alexander, who was armed with an iron gun barrel, were walking along an alley near Number 12 Via Conservazione dei Grani in Naples, Italy, when an Italian man walked past them. Accused remarked "I'll cave that mammy dodger's head in", took two quick steps behind the Italian and struck him over the head with the gun barrel knocking him to the ground. There is further evidence that about 2145 hours the same night Gregorio Palumbo, an Italian, the person named in the Specification, stumbled into his quarters at Number 12 Via Conservazione dei Grani, dirty and bleeding from an irregular four-inch laceration in the back of his head, exclaimed to his wife "I don't see, I don't see", and asserted that he had been assaulted by three negroes. He was taken to an Italian hospital where he was found to be in a critical condition as a result of a "breaking of the skull bones and with irradiation of the cranial base". He had no other injury. As last rites were administered Palumbo stated that he had been struck by three negroes. Three days after his admission to the hospital Palumbo died as a result of the breaking of the cranium and lesion of the brain.

The evidence shows further that immediately after committing the assault Alexander and his companion went directly to the apartment of a friend at Number 12 Via Conservazione dei Grani. Shortly after their arrival Alexander called Davis into another room and told him "I just caved an Italian's head in. I should kill all the sons-of-bitches", suggested they all leave as the police would probably come there, and departed immediately. In his voluntary statement accused Alexander admitted his presence at the scene of the attack but maintained that a companion perpetrated the assault and that he declined to participate therein.

There is substantial evidence warranting the conclusion that Gregorio Palumbo, the person named in the Specification, was the Italian assaulted by Alexander and that he died as a result of the injuries inflicted (NATO 2295, Lavender, Bull. JAG, July 1944, sec. 450). There is direct evidence that accused Alexander struck the fatal blow. The court was warranted in giving credence to this testimony and rejecting accused's version of the assault as reflected in his voluntary statement.

Malice may be inferred from the use of a dangerous weapon in a deadly manner and from the deliberate and vicious manner in which the assault upon an unarmed victim was perpetrated. The evidence discloses not the slightest suggestion of any provocation or legal excuse for the homicide. The court was warranted in finding accused Alexander guilty of murder as charged (MCM, 1928, par. 148a).

6. Over objection of defense Palumbo's widow was permitted to testify that when he stumbled into their quarters at Number 12 Via Conservazione dei Grani about 2145 hours on the night he was assaulted he was dirty and bleeding, exclaimed "I don't see, I don't see" and stated that he had been assaulted by three negroes. The ruling of the court was proper. These remarks appear to have been made immediately upon Palumbo's arrival at his home and substantially contemporaneously with the assault and were

therefore properly admitted as part of the res gestae (MCM, 1928, par. 115b; MFO 6867, Jackson).

7. Accused Alexander was charged with having killed Palumbo by striking him on the head with a pistol. The evidence shows that the weapon employed was an iron gun barrel. There is no suggestion in the record that the named accused was misled by this slight variance. The variance did not prejudice the substantial rights of the accused, particularly as the allegation was that the pistol was used as a club and not as a firearm (Dig. Op. JAG, 1912-40, sec. 451 (11)).

8. The name of deceased appears in the Specification as Gregorio di Francesco Palumbo while the evidence establishes it simply as Gregorio Palumbo, and his father's name as Di Francesco. There is no suggestion in the record of trial that accused was in any way misled, prejudiced or surprised by this slight variance or omission. The words "Di Francesco" may be regarded as surplusage. Accused could successfully plead the conviction in this case in bar of a subsequent trial for the murder of a person with the name that appears in the Specification. Accordingly the variance or omission was immaterial.

9. The charge sheet shows that accused Alexander is 25 years of age and was inducted into the Army 3 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 the sentence as to Alexander. A sentence to death or imprisonment for life is mandatory upon conviction of murder under Article of War 92. Although a disciplinary barracks was designated as the place of confinement, 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.

Walter R. Linn, Judge Advocate.
Cicero C. Lewis, Judge Advocate.
(on leave), Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
26 June 1945.

Board of Review

MTO 6808

UNITED STATES)

v.)

Private BENNIE H. KING)
(35 312 630), 697th Port)
Company, Transportation)
Corps.)

NORTHERN BASE SECTION

Trial by G.C.M., convened at
APO 386, U. S. Army, 23 April
1945.

Dishonorable discharge and
confinement for life.

U. S. Penitentiary, Lewisburg,
Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Private Bennie H. King, 697th Port Company, Transportation Corps, Casamozza, Corsica, did, at Torricelli, Corsica, on or about 1700 hours, 23 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Monsieur Pierre Albertini, a human being, by shooting him with a US Army Carbine rifle.

Specification 2: In that Private Bennie H. King, 697th Port Company, Transportation Corps, Casamozza, Corsica, did, at Torricelli, Corsica, on or about 1700 hours, 23 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Monsieur Andre Colli, a human being, by shooting him with a US Army Carbine rifle.

Specification 3: In that Private Bennie H. King, 697th Port Company, Transportation Corps, Casamozza, Corsica, did, at Torricelli, Corsica, on or about 1700 hours, 23 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Monsieur Roch Colombani, a human being, by shooting him with a US Army Carbine rifle.

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

3. The evidence shows that on 23 March 1945 accused, with Privates Charles B. Carr and Henry Baker, all members of the 697th Port Company, Transportation Corps, were at the Albertini farm, Torricelli (Corsica), about seven-tenths of a mile north of their company area, which was in the vicinity of Casamozza (Corsica) (R. 9,22,27,65,122). The farm consisted primarily of two buildings with a distance of approximately 48 feet between the front of the smaller building and the back of the larger. This space composed a courtyard. (R. 11,27,121) The three soldiers were drinking wine upstairs in the larger house about 1600 hours and when they started to leave they stated that they had no money with which to pay for the wine, but that they would return and pay for it that evening. The woman in charge said "All right. You can pay tomorrow. If you don't pay it does not matter!". Carr and Baker walked off, thinking that accused was with them. Andre Colli (deceased) who had been working on the farm approached accused in the courtyard and, proposing to "make them pay" struck him in the face with his fist. Charles Mariotti heard the discussion concerning payment for the wine, saw Colli with a tent pole fighting with the American soldiers and tried to separate them. Carr, who had walked slowly ahead, looked back and saw four or five people holding accused. He returned to help accused and a Frenchman struck accused and Carr with a tent pole. Carr and accused broke away from the fight and returned to camp. (R. 29,30,37,52,66,67)

Neither Pierre Albertini (deceased) nor Roch Colombani (deceased) were present during the fight but both arrived at the farm a few minutes later (R. 31,53).

About 1700 hours one of the three soldiers who had been at the farm earlier in the day entered the courtyard with a gun in his hand and went straight to the small house. Shortly thereafter approximately eight shots were heard and accused was seen pointing a gun toward the door of the canteen (wine shed) of the small house. Accused then left the farm and the bodies of Colli, Colombani, and Albertini were then discovered on the ground in the canteen. Colli's body had one bullet wound through the side. Colombani's body had six bullet wounds, three of which were in his back, and Albertini's, body had three bullet wounds, two of which were in his back. Colombani and

Albertini were dead. Although Colli was alive his pulse was weak and he died a few minutes later in an ambulance en route to the hospital. (R. 12-14, 22-25, 31-35, 42, 50, 51, 55, 56)

Captain Morris H. Stern, Northern Base Section Area "B" Dispensary, examined the bodies of the deceased and made notes of his observations of a superficial autopsy of deceased performed by a French physician. Without objection by the defense the notes were read in full to the court and introduced in evidence as Prosecution's Exhibits A, B and C. (R. 16-20, 124-126)

Colli's death was caused by "an internal hemorrhage due to penetrating bullet wound of the abdomen" (Ex. A). The cause of Colombani's death was either a bullet which entered the upper aorta and heart, or a bullet wound "where the spinal cord may have been injured" (Ex. B). The cause of Albertini's death was a bullet which entered the neck and upper chest (R. 16-20; Ex. C).

At approximately 1710 hours accused, coming from the north, approached a group of prisoners working under a guard just opposite the 697th Port Company camp. The guard did not want him near the prisoners and asked him to leave. Accused stated that he had just killed some men, that he "had to defend himself", and that any man who mistreated him would have to die. Accused then went over to some bushes about 40 yards away, picked up a carbine and, while putting a clip in the carbine, started back toward the prisoners. The guard seized the clip, which contained four bullets, and removed one bullet from the chamber of the carbine. Accused, who would not give the carbine to the guard, put it in his bosom under his fatigues and went to his tent. (R. 59-63) Accused walked straight and his speech was blurred "very little". However, he was "gloomy-eyed" and acted a "little dopey", as if he were intoxicated. (R. 63, 64) The guard went to the company area and reported the incident to the first sergeant. The latter saw accused coming out of the mess hall and asked him "King what is your trouble?" Accused replied "I was defending myself. Some Frenchman hit me in the mouth". The sergeant noticed that accused's mouth was bruised. (R. 63, 72)

About 1710 hours Captain Weldon M. Scott, First Lieutenant David W. Haycock and First Lieutenant George J. Strenk, 697th Port Company, went to the Albertini farm. There they saw three bodies lying in a little room and found eight empty carbine cartridge cases (Ex. E) on the ground in front of the entrance to that room. The cartridge cases were turned over to Lieutenant Haycock. (R. 74, 77, 90, 91) Mariotti accompanied the officers to the camp where they saw accused talking with the first sergeant in front of the company orderly room (R. 36, 80, 90). Captain Scott told the first sergeant to call a company formation immediately whereupon accused stated "There is no need for that. I'm the man you're looking for", and "I was jumped on and I defended myself". (R. 90) Captain Scott sent accused to the orderly room with Lieutenant Haycock and then went to accused's tent and took a carbine from a nail over accused's bunk. The carbine was dirty and had an odor of burned powder. The initials "B.H.K." were printed on the stock of the weapon. (R. 76, 94; Ex. D) As directed by Captain Scott,

Lieutenant Haycock took accused to the company orderly room and advised him that he did not have to make a statement and that anything he said would be used against him. Without coercion, persuasion, or threats accused voluntarily made an oral statement. (R. 76,77,80,81) While in the orderly room accused appeared to be normal in his actions (R. 95).

Later that night the 24th Article of War was read to accused and he signed a written statement, wherein it was stated that he had been warned of his rights under the 24th Article of War and that the statement was given without threats, promises, duress or coercion. The written statement, which was introduced in evidence without objection, is substantially the same as accused's prior oral statement and reads in pertinent part as follows:

"At about 1300 or 1330 hours, 23 March 1945, I went to a civilian home, located about $\frac{1}{2}$ mile from my bivouac area, for the purpose of drinking wine. I had been there frequently in the month or so that I have lived near this house but did not know the name of the people there. When I arrived at this house I found two of the boys from my camp, whose names I do not know, already there. I bought a bottle of wine for 200 francs from the woman there and sat around drinking it with the other two boys from my camp. There was another man in this room, which I believe was the kitchen, and a little later two other men entered whom I had never seen on previous visits. As soon as we finished drinking the wine which I had purchased one of the other boys bought another bottle. I did not see him pay for this wine but we all three drank it. As we just about finished the second bottle the other two fellows walked out of the kitchen. I did not know that they had left and thought that they had gone downstairs but were still around. Just as I was finishing the last drink in the bottle, the man who I knew came up and asked me to pay for the bottle I was just emptying. I told this Frenchman that I had bought the first bottle and had paid him for it; that one of the other boys was supposed to pay for the second bottle. This man then punched me in the mouth with his fist and as I jumped up to defend myself, the other two men jumped on me. The man who had punched me got a stick while I was struggling with the other two and then swung at my head with the stick. I threw my hands up to protect my head and ducked at the same time, and caught the blow on my wrist. I managed to break clear and ran out of the house. Because these men had jumped on me I walked back to my camp across the fields to get my rifle. It was because these men ganged me, two holding me while the other whipped me, that I decided to get my rifle and come back and shoot them. I went directly to my tent when I entered the area because my carbine rifle was kept there. I had two clips with ammunition in my barracks bag which I had brought with me from Italy

about two months ago. I put one of these clips in my pocket and left the tent with the carbine carried in my hand. There was no one in the tent and I did not speak to any one in the area nor did anyone stop me. As I crossed the fields going back to the house I put the clip loaded with ammunition into my rifle. I am not certain how many shells were in the clip. When I returned to the house the same three men were there. I went to the smaller house to the rear of the large house because it was on the second floor of the smaller house that I had been drinking when the three men attacked me. I don't remember whether I went up the stairs to the second floor or if I saw the men in a room located at the bottom of the stairs. As I stood just outside the door with the carbine in both my hands, the three men rushed at me. As these three men started toward me I held the rifle along my side and started pulling the trigger. As I fired I aimed at the man nearest to me. I kept pulling the trigger in rapid succession and believe that I fired about six shots in all. I then walked away and out of the driveway, carrying the rifle in one hand. I walked back to my camp, past the guard at the stockade and to my tent. I put the rifle in the tent and was sitting on my bed when someone told me to report to the Orderly Tent. I left my rifle in my tent and went to the Orderly Tent and stayed there until the CID arrived.

"I recognize my carbine rifle because it has my initials. 'B.H.K.' painted on the stock" (Ex. H; R. 104).

Lieutenant Haycock delivered the eight cartridge cases found at the Albertini farm to Agent Robert H. Harris of the Criminal Investigations Division (R. 77,99).

On 24 March 1945 two more cartridge cases were found just inside the door of the wine shed of the smaller house (Ex. E). Also two spent projectiles were discovered, one in the bin and the other in the center of the wine shed (Exs. F,G). These cartridge cases and projectiles were found in the presence of Agent Harris and were turned over to him. (R. 99-102) Agent Harris witnessed the firing of three cartridges from the "suspected carbine" into a cotton waste bin. After being fired the corresponding projectiles and cases were each marked T-1, T-11 and T-111. (Ex. I) Accused's carbine, the evidence and test projectiles and cartridge cases were transmitted to Agent John Kritko, a ballistics expert for the Criminal Investigations Division, Provost Marshal General's office (Exs. D,E,F,G,I; R. 105-107). Agent Kritko testified that he made a microscopic comparison of the evidence cartridge cases (Ex. E) and projectiles (Exs. F,G) found at the scene of the offense, and the three test cartridge cases and projectiles (Ex. I), fired from the carbine taken from accused's tent (Ex. D). He further testified that in his opinion the three test cartridge cases and projectiles and the evidence cartridge cases and projectiles were fired from the same weapon (R. 115-119).

Private Carr testified for the defense that he was present in the line-up at the company formation ordered by Captain Scott on 23 March 1945 and that a Frenchman looked over the company at that formation and did not identify anybody as being at the scene of the homicides (R. 127).

Accused testified that on the day of the homicides he was drinking wine with Privates Carr and Baker in a room of the smaller house at the Albertini farm. They bought and paid for some wine. Privates Carr and Baker left and three Frenchmen entered the room. The Frenchmen talked to the lady of the house and one of them asked accused if he had paid for the wine. When he replied in the affirmative the man hit him in the mouth with his fist. The other two Frenchmen joined in the fight and one of the three hit accused with a tent pole. Accused ran downstairs and was followed by the three men, who continued to fight him. Private Carr returned and helped to separate accused from the Frenchmen. The soldiers then returned to camp. (R. 130-133) Accused testified further that he went to his tent, secured his carbine and returned to the farm because "Those men had jumped on me for nothing. I wanted to find out why they jumped on me". He took his carbine with him "to keep them from jumping on me again". There was a clip in the carbine and the safety was off, but there was no bullet in the chamber. At the farm accused saw the three men who had fought him in the wine shed. He walked to the door and asked "why you guys jump on me". The Frenchmen, one with a stick in his hand, "made a break" for accused who shot the three men to prevent them from hitting him. He did not aim the gun or put it to his shoulder. (R. 133,134,138-140) He testified further that some of the shots entered their backs because "I was shooting and they was staggering all around the room" (R. 139). Accused then returned to his camp which took about seven or eight minutes. He was taken to the company orderly room and from there to a building in Bastia where there were three or four people, two or three of whom were officers and the others civilians. Accused testified further that he was in the building in Bastia for three or four hours where he was questioned, and that he was not told that he did not have to say anything. He did not write or dictate a statement but did sign one because a man handed it to him and said "Here, sign this". He did not remember whether or not the statement was read to him before he signed it. He did not intend to kill the Frenchmen or to do them any harm, and was sorry that he shot them. (R. 134-137)

4. It thus appears from the evidence, including accused's pre-trial statement and testimony, that at the place and time alleged accused killed Pierre Albertini, Roch Colombani and Andre Colli, the persons named in the Specifications, by shooting them with a carbine. Approximately 30 minutes before the homicide accused and two other soldiers were drinking wine at a farm about seven-tenths of a mile from their camp. An argument arose over the payment of the wine and an altercation ensued among accused, Andre Colli (deceased) and two other Frenchmen, neither of whom was Albertini or Colombani, during which Colli hit accused in the face with his fist and on the head with a tent pole. After the altercation accused went to his camp, obtained his carbine and returned to the farm where he saw Albertini, Colombani and Colli in the wine shed of the small house. He walked to the door and asked why they had "jumped on" him. The men started toward accused, one with a stick in his hand, and accused fired. He shot the men as they staggered around the room. Most of the bullets struck the victims in their

backs and sides. The three men died as a result of the wounds inflicted by accused. It was established by a ballistics expert that spent projectiles and empty cartridge cases found at the scene of the homicides were fired from accused's carbine.

The conflicting evidence whether or not accused actually paid for the wine was not a material issue.

The pre-trial statement and testimony of accused suggest that he shot Albertini, Colombani, and Colli in self-defense. To justify or excuse a homicide on the ground of self-defense, it is necessary to establish that the slayer was without fault in bringing on the difficulty, that is, that he was not the aggressor, and that the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or to prevent great bodily harm to himself. 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 (MCM, 1928, par. 148a; 26 Am. Jur., Homicide, sec. 126, p. 242). The initial altercation between accused and Colli terminated when accused left the scene, and his return approximately 30 minutes later, armed with a carbine, constituted another altercation in which accused clearly was the aggressor. When the three men started toward accused he was armed with a carbine. Other than the testimony of accused that one of the men had a stick in his hand, there is no evidence that the Frenchmen were armed. Instead of retreating accused deliberately fired at the three men who staggered around the room. Accused was not in immediate danger of great bodily harm, or of losing his life, at the time he fired and the court was justified in concluding that he did not fire in self-defense.

The fact that the deceased Colli struck accused in the face with his fist and hit him on the head with a tent pole in the initial altercation may well have enraged accused. However, the overt acts embodied therein would in no sense justify accused's use of a firearm approximately 30 minutes later. Moreover, ample time transpired between the altercations for accused to have regained control of himself and to have refrained from using a dangerous weapon in such a deliberate and brutal manner (MCM, 1928, par. 148a; MTO 6718, Southward). The circumstances exclude any theory of legal justification or excuse for the homicides.

There was testimony that accused had been drinking wine before the offense was committed and one witness testified that at a time which was shortly after the offense accused acted as if he were intoxicated. It is significant that accused did not testify affirmatively nor did it appear in his pre-trial statement, that he was drunk at any time on the day in question. Moreover, there was no affirmative testimony by any other witness that accused was drunk at the time of the commission of the offenses, and there was testimony that he appeared to be normal in his actions while at the company orderly room shortly after the homicide. The court was warranted in concluding that accused was not sufficiently intoxicated to prevent his entertaining the intent requisite in the offense of murder (MCM, 1928, par. 126a; MTO 6642, Massey).

Accused fired the fatal shots willfully, deliberately and with intention to kill. In shooting at the deceased repeatedly as they staggered around the room, he callously and brutally demonstrated complete indifference to the lives of his victims. The deliberation and malice which characterized accused's actions, are apparent from the fact that he walked over a half mile to camp in order to arm himself with a dangerous weapon and then returned to the farm, the manner in which he killed deceased, two of whom were not involved in the initial altercation, and the other circumstances in evidence. The evidence is completely devoid of any suggestion of extenuation or mitigation (MCM, 1928, par. 148a; NATO 2880, Watson; MTO 4750, Smith; MTO 5121, Crews). The Board of Review is of the opinion that the evidence supports the findings of guilty of murder.

5. The charge sheet shows accused is 33 years of age and was inducted 6 July 1942. He had no prior service.

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

Walter R. Lewis, Judge Advocate.
Diego C. Ferriss, Judge Advocate.
Henry C. Blumick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
13 June 1945.

Board of Review

MTO 6817

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| U N I T E D S T A T E S |) | PENINSULAR BASE SECTION |
| |) | |
| v. |) | Trial by G.C.M., convened at |
| |) | Naples, Italy, 30 March 1945. |
| Technicians Fifth Grade MICHAEL |) | As to each accused: Dishonorable |
| IAVECCHIA (33 319 250) and |) | discharge and confinement for |
| THOMAS A. HERBST (33 185 237), |) | life. |
| both of 149th Ordnance Motor |) | U. S. Penitentiary, Lewisburg, |
| Vehicle Assembly Company, and |) | Pennsylvania. |
| Privates JOSEPH POLOZZI |) | |
| (35 392 696), FRANK PASCOCCIELLO |) | |
| (36 650 893) and HARRY C. DALE |) | |
| (6 957 459), all of 458th |) | |
| Engineer Depot Company, Corps |) | |
| of Engineers. |) | |

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Technician Fifth Grade Michael Iavecchia, Technician Fifth Grade Thomas A. Herbst, both 149th Ordnance M.V.A. Company, Private Harry C. Dale, Private Joseph Polozzi, and Private Frank

Pascocciello, all 458th Engineer Depot Company, acting jointly, and in pursuance of a common intent, did at or near Calvizzano, Italy, on or about 21 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Vera Aruta.

Each pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, all members of the court present concurring. The reviewing authority approved the sentence as to each accused, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement as to each, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution, which was undisputed, shows that on 21 September 1944 Vera Aruta, 18 years of age, lived in (Piscinola), Italy, and had worked for two days in the Red Cross snack bar at the Capodichino airport (R.12,18). On that evening Private First Class Vernon H. Fayette, 302d Depot Repair Squadron, took Vera and an Italian boy in a "jeep" to their respective homes. He first took the Italian boy to his home and then proceeded toward the home of the girl. On the way the way the vehicle "stalled", and as Fayette was cranking the engine another "jeep" arrived in which the five accused were riding. They asked Fayette if he wanted a "shove", pushed his vehicle, and the engine started. They then followed Fayette and the girl to her home. (R.7,8,10-13,17; Exs. 2-6) As the girl entered her house about 2200 hours someone pushed her and slapped her face, and she began to scream (R.7,13,20,21). She cried "Momma, it is an American!". When the girl's mother said "This is my daughter!", "they" pushed her away. (R.20) Accused Iavecchia started to drag Vera to his vehicle and because she was struggling, accused Polozzi came to his assistance. The girl, who was screaming, was then carried out to the vehicle by Iavecchia on his hip. (R.8,9,13) Iavecchia said to Fayette "Stay out of it, fellow" (R.9). Vera was placed in the front seat of the "jeep" between Iavecchia, who was the driver, and Polozzi, who held his hand over her mouth. The vehicle was then driven away. (R.8,9,13,18)

The girl testified that the vehicle was driven along the road to Mingnano and that during the ride she saw a sign which read "Calvizzano". During the ride she could not get out because she was flanked by Iavecchia, and by Polozzi who was holding her. Finally the vehicle stopped and Iavecchia "drew" her out of the "jeep" and took her into a field about eight or nine meters away. Vera said "I am a young lady, don't do any bad thing to me!", but Iavecchia, who could speak Italian, threw her on the ground and asked her to remove her pants. As she did not want to do so, Iavecchia took off her pants with one hand and held his other hand over her mouth. He threatened to kill her but she did not see a weapon in his possession. She was screaming and told him that she "was a girl". Although she struggled he succeeded in penetrating her person and had sexual intercourse

with her. After the act was completed Vera arose and Iavecchia said "Keep quiet because another one must come". She could not run away because accused Polozzi, who was then present, threw her on the ground. (R.14,17,18) Despite her struggles and "telling him bad words", Polozzi also succeeded in penetrating her person. She then tried to escape but a third soldier who she believed was accused Pascocciello, and who, she thought, was drunk, arrived. She was crying and begged him "not to do anything", and although he "wanted to have intercourse" and had unbuttoned his trousers, he did not penetrate her person and did not have intercourse with her. "He was making a penetration but he didn't do it". (R.15,17,19) This accused then took her toward the vehicle but before they reached it a fourth soldier, whom she could not identify, took her to the field again. She tried to struggle but the fourth soldier succeeded in penetrating her vagina. She then became unconscious. (R.15-17,19) The girl testified further that a fifth soldier, whom she identified as accused Herbst, then came to her as she was lying on the ground (R.16).

Vera testified as follows:

"Q. What happened when the fifth soldier came?

A. I don't remember anything. I only remember that they took me again to the jeep.

Q. Did this fifth soldier make a penetration of your vagina?

A. I think yes, but I couldn't say because I was unconscious" (R.16).

"Q. You said that after the fourth soldier had contact with you you were unconscious, is that correct?

A. Yes, it is true.

Q. Do you remember what happened directly after you became unconscious?

A. I remember that another came and assaulted me.

Q. Do you know if he had sexual relations with you?

A. I think yes because I felt that he had. I felt the pain in my back" (R.17,18).

She testified that she fought against the soldiers, to prevent them from having intercourse with her, but they kept her quiet by holding her. "They wanted to kiss me but I didn't permit them to kiss me". (R.19). She

further testified that Iavecchia and Herbst then took her to the vehicle and Herbst lifted her into it. She was driven to her village. About 40 meters from her house, "They threw me out of the jeep and gave me the purse and went away". (R.16) The girl further testified that she was a virgin prior to the incident (R.17).

She returned to her home about 2400 hours. She was screaming, said to her mother "Momma, they did something no good to me" and fell to the ground. Her underclothing was soiled. She was then taken to the hospital by Fayette who, after reporting the matter to the military police, had returned to her home. (R.9,10,16,20)

Dr. Aldo Puglise testified that on the night of 21 September he examined Vera. Her hymen was broken and bloodstained and Dr. Puglise testified further that it was his opinion that the hymen was broken "a short time before". The "broken parts" near the hymen were swollen and ecchymotic. There were no abrasions or lesions on the vagina or labia. (R.21,22)

Agent Stephen J. Roth, assigned to the Naples office of the Criminal Investigations Division, interviewed each of the five accused. He advised Iavecchia, Pascocciello, Herbst and Polozzi of their rights under Article of War 24, and informed each that he did not have to make a statement but that if he did so the statement could be used for or against him in the event of trial. No promises or threats were made. Each of these four accused then made a statement and signed it in Roth's presence. The four statements, identified by Roth at the trial, were admitted in evidence only as against the makers thereof and over objection by the defense. Roth also interviewed accused Dale who at first stated that he preferred not to make a statement. Later Dale called Roth to his (Dale's) cell and said that he desired to make a statement. Dale then made a statement and signed it in Roth's presence. No promises or threats were made. The statement, which was identified by Roth, was admitted in evidence as against Dale only, and over objection by the defense. (R.22-29; Exs. 2-6)

The statement of Iavecchia, in pertinent part, is as follows:

"On 21 September 1944, at about 1830 or 1900 hrs, I left the company area with a trip ticket, in a jeep, TUP 13. I was accompanied by T/5 Thomas Herbst, who was out on pass. * * * we stopped at a bar at Marinella. We stayed there until about 2130 hrs, drinking and talking. * * * As we were about to leave, some GI's came up and complained that the headlights of our jeep were too bright. We began talking. They offered us some gin and after a while we had some of it. We then found out that they were at a camp near ours so we offered to take them there. We started out and on the road we passed a jeep with a girl in it and a GI out in front trying to crank it.

We pulled alongside and asked him if he was having some trouble. He said that the starter didn't work. I drove the jeep in back of his and gave him a push and the motor started. We stopped for a little while after the other jeep started and then someone said 'Let(')s go get the girl.' One of the fellows in the back said that he would start an argument with the fellow while one of us got the girl. So I drove after the jeep. When the first jeep stopped, I drove alongside it. Herbst and I got out and one of the fellows from the rear got out and went over to the driver of the other jeep. I followed the girl to the door of her home. She was trying to close the door when I got there and I pushed the door in. I grabbed her by the arm and walked over to the jeep with her and told her to get in. She sat on the cushion of the right side of the jeep and I pushed her feet in. Herbst, I and the fellow who had been talking to the driver of the other jeep all got in. The jeep was running and was in gear and jerkily moving when I got in, although I had turned off the motor and put the lights out when I got out of the jeep to follow the girl. Herbst put his hand over the mouth of the girl, who was yelling. I put the lights on, and the Mother who had run out, moved away from the front of the jeep. I then drove off. The Mother was yelling. I drove out of the village and along some back roads, past an area where some French and Arabian soldiers were camped, to a peach or walnut orchard. I drove into the orchard stopped and turned the motor and lights off. I got out, and one of the fellows in the back gave me a rain coat. The girl was still in the jeep. I talked to her in Italian, telling her to get out and go with me. One of the fellows handed me a flashlight. I was holding the girl by the arm as we walked about twenty or twenty-five steps away from the jeep. I placed the raincoat on the ground. I told her to get down on the coat and she did. I told her to lift her dress up, and she said no, you lift it off. So I lifted her dress up. She had pants on. I told her to take them off, and she said no, you take them off. I talked to her a few seconds and told her to take them off. Her pants were sort of flapped over and she put her hand over the flap and sort of ripped them off. She gave it one pull with her hand and pulled them over to her left side. She did not pull them down over her legs. While she was doing this, I was putting a condom on, and then I got down and told her to put my penis in. She said that she didn't want to. I talked to her some more and she put it in, herself. While I was having intercourse with

her she was saying 'Take me Home, Take me Home.' I told her to take it easy, that we would take her home. She started to sob, just as i finished. She acted like a professional. I mean by the way she grabbed my penis and put it in, and the way she moved during the intercourse. She kept saying, 'Momma Mia.' After I had finished, I went back to the jeep, the girl staying where she lay. Then Herbst went over to her and after him went the other three fellows in the back of the jeep. The fifth fellow brought her back to the jeep. One of the fellows said that he had come off like a rabbit and wanted to go another try at her. I said no and we all got into the jeep and drove back to near her home. We left her out there. She dropped her purse and all the things fell out onto the ground. Herbst reached down to help her and I said 'come on Herbie, let's go.' We took the other three fellows to their camp. We stopped at Dump E-250. They were with the Engineers. I didn't know these men, hadn't seen them before that night. * * * and drove into our camp, arriving there about 2330 hrs. I didn't get any blood on any of my clothing. I didn't know anything about her bleeding. I didn't notice. After the MP's came the next day, 22 Sept. 1944, and took our names, that is mine and Herbst's, we decided that we were going to say that we each paid her two dollars. We didn't pay her anything. The MP's didn't say anything to us about the case. But Herbst and I were scared and that's why we decided to make up the story. We were going to say that a civilian had told us that the girl that lived in that house was a whore and was doing business with everyone. But I didn't know how we were going to explain what the driver of the other jeep had seen. I told Herbst that we were in a pretty serious jam and that we might get hung for it. I said that I'd ask that we be put up against a wall and shot, instead. We decided to take our medicine and tell the truth. The girl whom I saw in the office of the CID, Naples, about 1230 hrs 25 September 1944, is the girl described in this statement as the one who we picked up and had the acts of intercourse with on the night of 21 September 1944, as described in the above statement" (Ex. 2).

The statement of Herbst substantially follows that of Iavecchia in regard to meeting the three soldiers and then continues, in pertinent part, as follows:

* * * * They got into the jeep and we started on the way home. On the way we passed a jeep with a civilian girl in it, and a soldier out in front of the jeep trying to crank it. As we passed him we

asked him if he was having some trouble, and he replied that he was having trouble starting the car. Mike drove our jeep in back of the other jeep and pushed until it got started. Then we followed along after this jeep with the soldier and the girl in it. A short distance later the jeep pulled around a corner, pulled to a stop and the girl started to get out. We pulled up on the other side of the jeep and stopped. The girl got out of the jeep and started for the house. That's when somebody in the jeep made the remark about her, 'She'd be a pretty good lay job, let's try and grab her.' Mike was closest to that jeep and he got out of the jeep and started for the door of the house, and I got out of the jeep and stood alongside of the jeep. One of the soldiers in the back of our jeep got out and walked over to the driver of the other jeep and talked to him. What they said I don't know. The girl started into the door and Mike got there about the time she got just inside. He pushed the door in and grabbed the girl. He brought her over to the car. He had a tight grip on her arm and when he got to the jeep he picked her up and put her into the jeep. After Mike put her in I got in the right hand front seat. During the time Mike was bringing the girl from the door over to the jeep the girl was yelling and crying, and a woman, whom I took to be her mother was also yelling. I held the girl after Mike put her in the jeep, and as she kept yelling I put my hand over her mouth. As Mike started away with the jeep, the mother got down to the door and was yelling. I saw her pulling the door open and heard her yell. The soldier who had been talking with the driver of the other jeep had gotten back into our jeep before Mike put the girl in. Mike kept driving until he drove into a field. The girl was crying all the while. When we got into the field Mike put out the lights, then took the girl and walked off with her. It was very dark, but I could see the girl's coat or dress which was white. They went about twenty-five steps from the jeep. What happened there I don't know because I could not see. The girl was crying, yelling and screaming. There wasn't a house near the place where this took place. He was gone for a while, then returned alone to the jeep. When Mike got to the jeep he said he had taken her panties off, and then he told me: 'Go ahead, Herbie, pretty good. She's good and tight.' I then went to the place where the girl was. She was lying on the ground and crying. I had intercourse with her, and she didn't resist or fight me.

She was crying and wanted to go home. She said that she was no longer a virgin, and that she wanted to go home. When I had finished having an act of intercourse with her she laid there and I returned to the car. After that the other three soldiers took turns going out to where she lay. After that she came up to the jeep and asked us to take her home, she was still crying. I was sitting in the front seat, smoking. I got out and let her into, we backed up, turned around and drove near her house and let her out. She didn't say anything all the way home, but she cried all the way there. When she got out of the jeep she forgot her pocketbook. I handed it to her, and as I did so, everything spilled out of it onto the ground. I began helping her pick the things up, but Mike said come on, let's go, so I got in the jeep and we left her. * * * I didn't get any blood on my clothes. I used a condom while having intercourse with her. After we left her, we drove the three soldiers to their camp at the 250th Depot. * * * then drove back to our camp and signed in at 2330 hours. The next day, an MP came out and got my name and serial number, and asked me if I was out in a jeep, on pass, the night before, and what time I got in. I told him I was out on a pass, in a jeep, and that I got in at 2330 hours. Mike talked to me after the MP left and said that we were to say that we were at a bar in the small town, where we actually had been, early in the evening, and that about nine-thirty we went for a ride and drove into Naples. We were not in Naples that night. I told Mike that I didn't know whether I would tell that story or not. That I was worried. He told me not to worry. Later I told him again that I was worried, that at night I worried about it, so finally he said, well then tell the truth. The girl whom I saw in the CID office about 1230 hours today, 25 September 1944, is the girl we had in the jeep on the night described above, and the girl with whom I had intercourse as I described in this statement. I used no force to have the act. and I got no blood on any of my clothes" (Ex.3).

The statement of Pascocciello, in pertinent part, is as follows:

"At about 1800 or 1830 hours 21 September 1944, I and two other fellows from my company left the camp. These other two men were Pvt. Harry Charles Dale, 6957459, and Pvt. Joseph (NMI) Polozzi, 35392696. We went to Piscinola and stayed there until about 2130 or 2200 hours drinking vermouth. We then walked to another little town, Marianelli, where we met two G.I.'s in a jeep. We began a con-

versation with them. Had some gin to drink, then got in the jeep and started out for home. These other two G.I.'s I didn't know previously. * * * As we rode along on our way home we passed a jeep with a girl in it and an American soldier out in front of it, trying to crank it. We stopped and asked if he was having trouble and he said he couldn't get it started so Mike drove our jeep in back of the other jeep and gave it a push to get it started. After the other jeep got started and went down the road, somebody in our jeep said 'Let's get the girl'. I don't know who it was that said this. All I know is that I didn't say it. We remained standing there for a while and then started after the jeep. Dale said something to the effect that he would start an argument with the driver when we got up to them. When the first jeep stopped, we pulled up alongside and Mike followed the girl to the door or entrance-way, and Dale went back to the driver of the other jeep and started talking to him. Mike then came over to the jeep with the girl. I don't know whether he put her into the jeep or not, or whether he had a hold on her on the way over to the jeep. I do know that he pushed her feet or legs into the jeep. The girl wanted to know what we wanted and the mother, who had run out was hollering and yelling. The boys got in the jeep and we started off. The girl was in the middle in front between the two front seats. I don't think anybody was holding her. She kept wanting to know what we were going to do to her and what we wanted. When we stopped in the field she got out of the jeep by herself. It was dark and I couldn't see whether Mike had a hold of her or not when he took her away from the jeep a distance. Mike went with her first. Then the blonde fellow in the right front seat. I was the third one to have intercourse with her. She wanted to know if we would take her back home. I told her we would take her home. Dale followed me in having intercourse with her. Joe Polozzi was the last to have intercourse with her. When we had finished there was some talk among us about having 'seconds' but none of us did have any. The girl was not crying and she kept asking about going home. We drove her to a point some distance away from her home and let her out of the jeep. When she got out, her pocketbook fell and everything in it went on the ground. The boy in the front helped her pick up some of the things but the rest of us said 'Let's go'. We left and Mike drove us to our camp and let us out at the gate. * * * We got in about 2330 hours that

night. I used a condom while having intercourse with the girl. I didn't know the girl previous to that night. I did not get any blood on any part of my clothing" (Ex. 4).

The statement of Dale substantially follows that of Pascocciello in regard to meeting the two soldiers with the "jeep", and then continues, in pertinent part, as follows:

"* * * we got into the jeep and they were going to take us to our camp. On our way we passed a jeep with a girl in it and an American soldier in front cranking it. * * * We gave him a shove and got his jeep started. The fellow named Mike was driving our jeep. We stopped for a moment or two after getting the other jeep started. Somebody suggested getting the girl. I don't know who made the suggestion to get the girl. We then started after the jeep. The jeep with the girl in it had stopped at her house. The girl got out and went into the entrance of her building. Mike went over and got her by the arm. Then he either put her in the jeep or she got in. Meanwhile I had gotten out of the jeep and started to talk to the driver of the other jeep. When we had first gotten there, I had said that I would get out and start arguing with the driver of the other jeep. I may have shoved the driver of the other jeep into his jeep, but I am not sure. I had been drinking. I did not see the mother of the girl at all. I did hear some yelling and hollering, but if it was the mother or the girl who was doing it, I do not know. We went through several small towns after getting the girl. Which town, I don't remember, but we finally ended up in an orchard. Mike then turned the motor and lights off. He took my raincoat or one of the other boys raincoats, and he had a flashlight. Mike took the girl some distance from the jeep. He had his hand on her shoulder. I don't know if they struggled or not. After Mike came back, the other boy from the front seat went out to her. Then Frank went out. After him, I had intercourse with the girl. I used a condom. I didn't get any blood on my clothing. She was lying on the ground when I got to her. She did not struggle while I had intercourse with her. She asked me to tell the others to take her home. Joe Polozzi was the last to have intercourse with her. She came back to the jeep with him. Then we all got into the jeep and left. There was something said among us about having another intercourse with her. However, none of us did have a second act of intercourse with her. We left the orchard and drove the girl to within a short distance of her home and let her out of the jeep. When she got out, the blonde boy in the front seat handed her purse to her and it fell on the ground, with everything spilling

onto the ground. This fellow picked some of the thing(s) up and handed them to her, but we pulled away then and left her there picking up the remainder of the things. I didn't pay the girl anything. I didn't know the girl prior to that time. If the girl did any crying at any time, that she was with us, I didn't notice it. Of course, I was in the back seat" (Ex. 5).

The statement of Polozzi recounts the meeting with the two soldiers and continues, in pertinent part, as follows:

"* * * The three of us then got into the jeep with these two G.I.'s and started to go to our camp. On the way we saw a jeep with a girl in it and an American soldier out in front of it trying to crank it. * * * Mike drove our jeep in back of the other and gave it a shove and got it started. Then we stayed standing there for a few minutes. Then somebody, I believe Mike, the fellow in the driver's seat with the garrison cap on, suggested that we grab the girl. The way he put it was 'five to one, we ought to get that', meaning I suppose, that there were five of us to the one fellow with her, and if he said or did anything we wouldn't have too much trouble. We gave chase to the jeep with the soldier and the girl in it. When the jeep stopped and the girl was getting out we pulled up and Harry Dale said 'I'll get out and argue with the driver', and Mike said he'd get the girl. Dale was talking with the driver of the other jeep and the girl went to the door and through it. Mike got to the door and pushed it open and grabbed the girl. I believe he walked over to the jeep with the girl, holding her arm. He told her to get in. I don't know what she said but he finally got a hold of her and set her in the jeep. When Mike got a hold of her at the door the girl yelled to her mother. She kept yelling as she was brought over to the car and was put in. The woman, whom I took to be the girl's mother, ran out in front of the jeep and was hollering and yelling. When Mike started to pull away with the jeep the mother jumped out of the way. The girl kept hollering as we drove away and she was explaining that she was a good girl and also said that she worked at the Red Cross at Capodochino. I never got out of the jeep while we were in front of the girl's house. Mike was zig-zagging down through muddy roads. There was a lot of ammunition piled along the roads. I don't think I could find the place again. Mike drove into a field, turned off the motor, and put out the lights. He said he was going first. The girl got out of the jeep and went with Mike. Mike took a raincoat from Frank or Harry. He also had a flashlight. I don't know whether there was any struggle between Mike and the girl or not. After Mike

finished, the other boy in the front seat went over to the girl. After him, Frank went to the girl, then Harry and I was last. The girl was not sobbing or crying when I got there. She told me to tell Mike to take her home. I understand Italian as does Frank and also Mike. On the way out, the girl kept explaining that she was a good girl and that she was a virgin. She did this in Italian. When I had finished she held on to me and walked back to the jeep with me. The girl and I got in and then we drove out of the field and up to about a block of her home and let her out. When the girl got out of the jeep the fellow in the right front seat handed her her pocketbook. One of them dropped it and the things fell into the jeep and on the ground. He picked up the stuff which fell in the jeep and handed it to her. We drove off then and she stayed there picking the stuff up. When I finished having intercourse with the girl, as she lay there with her arms out to the side I put a dollar into the hand. I didn't get any blood on my clothes. She didn't struggle with me at all. * * * I think the girl was scared we were going to leave her out in the field. I don't think the girl knew where we were. I know I didn't" (Ex. 6).

Each of the accused elected to remain silent and no evidence was introduced by the defense (R.31).

4. There is thus direct and positive evidence that at the place and time alleged in the Specification accused Iavecchia, Polozzi and Herbst forcibly and without her consent had unlawful carnal knowledge of Vera Aruta, the woman named in the Specification. Together with accused Dgle and Pascocciello they followed the "jeep" in which Vera was riding with another soldier, Fayette, to her home. As she started to enter the house, some one pushed her and slapped her face, and she began to scream. When her mother attempted to interfere and said "This is my daughter", she was pushed away. Iavecchia started to drag Vera to his vehicle and while she was struggling Polozzi came to his assistance. Iavecchia then carried the screaming girl on his hip to the vehicle and placed her in the front seat beside him. Polozzi sat on her right and, as the vehicle drove away, held his hand over her mouth. During the ride Vera was unable to get out of the vehicle because Iavecchia was sitting on one side of her and Polozzi was holding her on the other.

When the vehicle stopped Iavecchia "drew" her out of the vehicle and took her into a field eight or nine meters away. Vera, who was a virgin, said to Iavecchia, "I am a young lady, don't do any bad thing to me", but Iavecchia threw her to the ground and asked her to remove her pants. As

she did not wish to do so, Iavecchia tore off her pants with one hand and held his other hand over her mouth. He threatened to kill her but she saw no weapon in his possession. She was screaming, and telling him that she was "a girl". Although she struggled to prevent it he succeeded in penetrating her person and had sexual intercourse with her. After the act was completed Vera got up to leave but Iavecchia said "Keep quiet because another one must come". She was unable to run away because a "second one", whom she identified as Polozzi, came and threw her on the ground. Despite her struggles and "telling him bad words", Polozzi also succeeded in penetrating her vagina. She then tried to escape but a third soldier, whom she believed was Pascocciello, arrived. She was crying and begged him "not to do anything". Although he had unbuttoned his trousers and "wanted to have intercourse" he did not penetrate her person. "He was making a penetration but he didn't do it". He then took her toward the vehicle but before she reached it a fourth soldier, whom Vera was unable to identify, took her to the field again. She tried to struggle but he succeeded in penetrating her person, and she lost consciousness. A fifth soldier, whom she identified as Herbst, then came to her as she lay on the ground. He "assaulted" her and she believed he had sexual relations with her and penetrated her vagina. She was then placed in the vehicle and returned to her village. Vera testified that as the soldiers were having intercourse with her she struggled against them but they kept her quiet by holding her. They wanted to kiss her but she did not permit it. It is clear that she resisted to the extent of her ability, that her resistance was overcome by force, and that she did not consent to the acts of intercourse. The testimony of the victim as to the fact of penetration was corroborated by the pre-trial statements of Iavecchia, Polozzi and Herbst and by the medical evidence. Upon the facts and circumstances disclosed, the court was clearly warranted in finding accused Iavecchia, Polozzi and Herbst guilty of rape as charged.

As to accused Pascocciello the evidence also supports the findings of guilty. Vera testified that the third soldier, who she believed was Pascocciello, did not penetrate her person and did not have intercourse with her. "He was making a penetration but he didn't do it". Pascocciello, in his pre-trial statement, said "I was the third one to have intercourse with her", and "I used a condom while having intercourse with the girl". However, whether or not he in fact penetrated the woman's person, that he acted jointly and in pursuance of a common intent with the other accused, joined in the unlawful enterprise and counseled and encouraged it by his presence throughout its accomplishment, is amply shown by the facts and circumstances. He voluntarily remained with the other four accused after it was suggested that they "get the girl" and separate her from her companion, Fayette, after the victim was pushed into the vehicle and despite her mother's shouted protests. There was more here than mere casual presence at the scene of a crime. It might well be inferred that he was at the scene with a conscious purpose to give courage to the others and to render such help as they might need or call for. As an aider and abettor Pascocciello was clearly charged as a principal and the motion by defense

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for a finding of not guilty as to this accused was properly denied (NATO 385, Speed; NATO 1142, Bagley, et al; MTO 6411, Steedley, Willis).

As to accused Dale the evidence also supports the findings of guilty. Vera was unable to identify the fourth soldier who assaulted her but testified positively that there were five separate and distinct soldiers who had, or attempted to have, intercourse with her and that the fourth soldier penetrated her person. In his pre-trial statement Dale asserted, in part, that after "Mike" and "the other boy from the front seat" had gone out to the girl, then "Frank went out" and "After him, I had intercourse with the girl. I used a condom. * * * She did not struggle while I had intercourse with her". The circumstances of the assault were similar to those related by the victim and it is abundantly clear from the record that in fact Dale was the fourth soldier, whom Vera was unable to identify. The court properly found him guilty of rape as charged.

Each accused in his statement admitted having intercourse with prosecutrix but did not confess to employing force in accomplishing the act and suggested passive consent. Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par. 148b). It follows that the admissions of accused left in issue only the question of consent. This was a fact issue for determination of the court. There is in the record ample evidence warranting the court's action in determining this issue adversely to accused.

5. Pre-trial statements of each of the five accused were admitted in evidence over objection by defense. The grounds of the objection as to Iavecchia's statement were not stated and as the evidence shows it to have been voluntarily made the objection was properly overruled. With regard to Pascocciello's statement the basis of the objection was that the testimony of the victim was "specific" that Pascocciello had not accomplished penetration. As pointed out above, regardless of that fact, he was properly charged as a principal and found guilty as an aider and abettor. Inasmuch as his statement was shown to have been voluntarily made it was properly admitted in evidence. The objection of the defense to the admission of Herbst's statement was that there was no proof of the corpus delicti as to him, nor proof that he had accomplished penetration. Herbst was identified by the victim, who testified that she thought he had sexual relations with her and penetrated her vagina. Whether he did or did not is immaterial as it is clear from the evidence that he too was actively participating in the wrongful joint venture and was properly charged as a principal. This is ample proof of the corpus delicti and warranted the court in admitting the statement of Herbst. The grounds of the objection to the admission of the statements of Dale and Polozzi were that because the statements of three accused had already been admitted and the victim had testified to only three acts of penetration there was no proof of the corpus delicti that would support statements of any additional accused. Vera specifically identified Polozzi and testified that he had penetrated her vagina. She did not identify Dale but testified

that the fourth soldier who assaulted her penetrated her vagina. The "evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense" (MCM, 1928, par. 1114a). As pointed out above Vera testified that there were five separate and distinct assaults and at least three of the soldiers had penetrated her person. She identified four of the accused. This is sufficient proof of the corpus delicti, as to both Polozzi and Dale, to satisfy the requirements of the rule stated. As all the statements were shown to have been voluntarily made, after due warning with regard to the rights of each accused, the objections of the defense were without merit and the statements were properly admitted in evidence.

6. Although two or more 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 five accused was not, therefore, 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 more 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. Musisl, 349, 111. 516, 182 N.E. 608) (NATO 779, Clark et al).

The Board of Review is of the opinion that as to each accused the evidence fully supports the findings of guilty of rape.

7. The charge sheets show that accused Iavecchia is 26 years of age and was inducted 7 July 1942; that accused Herbst is 24 years of age and was inducted 4 July 1942; that accused Polozzi is about 30 years of age and was inducted 20 August 1942; that accused Pascocciello is 21 years of age and was inducted 15 March 1943; and that accused Dale is about 23 years of age and enlisted 31 May 1940. No prior service is shown as to any accused.

(170)

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

William P. Linn, Judge Advocate.
Orlando Sessions, Judge Advocate.
Henry C. Leitch, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
13 June 1945.

Board of Review

MTO 6866

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

PENINSULAR BASE SECTION)

v.)

Trial by G.C.M., convened at
Leghorn, Italy, 17 February
1945.

Privates FRED A. McMURRAY)
(38 184 335) and LOUIS TILL)
(36 392 273), both of 177th)
Port Company, 379th Port)
Battalion, Transportation)
Corps.)

As to each accused: Death.

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

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

McMURRAY

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

Specification 1: In that Private Fred A. McMurray, One Hundred Seventy-Seventh Port Company, Three Hundred Seventy-Ninth Port Battalion, Transportation Corps, did, at Civitavecchia, Italy, on or about 27 June 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Anna Zanchi, a human being by shooting her with a pistol.

Specification 2: In that Private Fred A. McMurray, One Hundred Seventy-Seventh Port Company, Three Hundred Seventy-Ninth Port Battalion, Transportation Corps, did at Civitavecchia, Italy, on or about 27 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Benni Lucretzia.

Specification 3: In that Private Fred A. McMurray, One Hundred Seventy-Seventh Port Company, Three Hundred Seventy-Ninth Port Battalion, Transportation Corps, did at Civitavecchia, Italy, on or about 27 June 1944, forcibly and feloniously against her will, have carnal knowledge of Freida Mari.

CHARGE II: Violation of the 93d Article of War.
(Not arraigned).

Specification: (Not arraigned).

TILL

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

Specification 1: In that Private Louis Till, One Hundred Seventy-Seventh Port Company, Three Hundred Seventy-Ninth Port Battalion, Transportation Corps, did at Civitavecchia, Italy, on or about 27 June 1944, with malice, aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Anna Zanchi a human being by shooting her with a pistol.

Specification 2: In that Private Louis Till, One Hundred Seventy-Seventh Port Company, Three Hundred Seventy-Ninth Port Battalion, Transportation Corps, did at Civitavecchia, Italy, on or about 27 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Benni Lucretzia.

Specification 3: In that Private Louis Till, One Hundred Seventy-Seventh Port Company, Three Hundred Seventy-Ninth Port Battalion, Transportation Corps, did at Civitavecchia, Italy, on or about 27 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Frieda Mari.

CHARGE II: Violation of the 93d Article of War.
(Not arraigned).

Specification: (Not arraigned).

Each accused pleaded not guilty to and was found guilty of the Charge and Specifications pertaining to him. Evidence was introduced as to McMurray of four previous convictions by summary courts-martial, one for being away from his organization and in the city of Naples after prescribed curfew hours in violation of Article of War 96, two for absence without leave in violation of Article of War 61, and one for improperly wearing his identification tags in his pocket, and absence without leave in violation of Articles of War 96 and 61 respectively; as to Till of two previous convictions by summary courts-martial, one for absence without leave in violation of Article of War 61 and one for disobeying a standing order by absenting himself from the area without a pass in violation of Article of War 96. Each was sentenced to be hanged by the neck until dead, all members of the court present concurring in the findings and the sentences. The reviewing authority 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, Mediterranean Theater of Operations, confirmed the sentence as to each accused and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 27 June 1944 both accused were members of the 177th Port Company, 379th Port Battalion, stationed at Civitavecchia, Italy (R. 33-35,53,72). Ernesto Mari, with his wife and their daughter Freida Mari, and Benni Lucretzia and her daughter occupied a small shack near an American water point in Cisterna, a suburb of Civitavecchia (R. 11,13,19,20,53). About 2230 hours on the date mentioned the occupants of the shack were asleep when an antiaircraft barrage commenced. Freida got up and opened the door of the shack "in order to be able to run out". As she did so three colored men, wearing black masks pushed past her and entered the shack. (R. 11,12,20,26,30) Ernesto grabbed one of the men who was advancing toward his daughter Freida. One of the other men then seized Ernesto from behind, put his hand over his mouth and struck him on the head twice with a pistol, knocking him unconscious. (R. 13,21,22,31-33) A big man and one of the others who was smaller then approached Benni Lucretzia saying "'Down, down. Work, or else I'll kill you.'" (R. 13). They struck her on the forehead, mouth and shoulder, tore off all her clothing and carried her to, and threw her down on, a bed (R. 13,14,39). The two men then engaged in an argument, pushed each other, and each said "'Let Me'" (R. 14). One of them then held Lucretzia's legs apart while the other one got on top of her and struck her. She testified he struck her because she would not open her legs. (R. 14) She was kicking and pushing with her arms and struggling, "trying to send him away" (R. 19). She testified she had to open her legs because

one of the men "was spreading them, and I was forced" (R. 14,19). She testified further that the man on top of her inserted his entire penis into her vagina and held it there for ten minutes, until he had an emission (R. 14,15). He then arose and the other man got on top of her, held his hand over her mouth and, while the first one held her legs, inserted his penis into her vagina and held it there for five or six minutes (R. 15). One of the men grabbed Freida Mari and threw her on the floor beside the bed on which Lucretzia was lying. She testified he then got on top of her and inserted his penis into her vagina and held it there for about ten minutes. (R. 23,24,28) Her legs were held apart and she struggled and tried to push him away (R. 28). The man on top of Freida was saying "Work! Work! We are not colored we are white" (R. 17). When the man got off of Freida she got up to run and "the one standing near the door", grabbed her, threw her down, spread her legs apart and inserted his penis into her vagina and held it there for about five minutes (R. 24,28). Freida testified that both men employed force to enter her vagina and that the first one who assaulted her afterwards assaulted Lucretzia (R. 27,28). She testified further that she lifted the mask of the first man who assaulted her and saw that he was a mulatto and that she saw no one in the court room that color (R. 29). At the time of the assaults both Benni Lucretzia and Mari were pregnant. The morning following the attack Lucretzia had a miscarriage and 20 days after the assaults Freida gave birth to a child. (R. 16,19,24,25)

During the perpetration of the assaults a heavy antiaircraft barrage was in progress and many searchlights were flashing about the sky. Lucretzia, Freida and Ernesto testified that although they could not identify their assailants they could see from the illumination resulting from the barrage and searchlights, and from the light of matches struck by the intruders, that their hands were colored. (R. 13,16,17,21,23,24,26,29,31,54) There is evidence that one of the men who entered the shack was tall and the two others were small (R. 12). One witness testified that all the men had pistols in their hands (R. 21,25,26). One wore a cap with a visor, another wore an overseas cap and their pants and caps were the same "sun tan" color (R. 20,23,31).

The antiaircraft barrage continued for about half an hour. Either immediately following the barrage or within 15 minutes thereafter the men left the shack together (R. 24,26,42).

About a half hour after the antiaircraft barrage ceased someone knocked on the door of another house located about 150 yards from the water point in Cisterna and said "Un poco di vino, per favore!" (R. 54, 55). This house was occupied by Anna Zanchi (the deceased), her son, her daughter and her daughter's fiance John Masi (R. 52,53,64,65).

John Masi, who had lived in the United States for 15 years, went to the door and replied in English "I am sorry, we don't have no wine. Go back to the camp because it is late" (R. 54,55,59,65). The door was then forced open and Masi was confronted by two masked men, one tall and one short, each holding pistols pointed at his chest. The tall one was armed with an automatic pistol. (R. 55,56) They were dressed in "working uniform", coveralls, pants and jackets. The tall one lit a match and Masi saw that his hands were "quite black". (R. 55,58,64) The men told Masi to "Get in and shut up" (R. 55,56). Masi asked them to keep quiet and to return the following morning and maybe he could help them. The tall one then said "Listen, if you don't go inside, I am going to bust your head" (R. 56) and "I'll give you a count to three, and if you don't get inside, I'll kill you" (R. 64,66). Masi then re-entered the house and told his fiancée and Anna Zanchi to "Lay down on the floor, because they are going to start shooting" (R. 56, 66). Everyone in the house lay on the floor. Anna Zanchi then got up, went out and said to the two men "Go, or otherwise tomorrow morning I go to the MP's and tell them who you are. I am not scared of you", whereupon the two men then began firing their weapons. (R. 56,64) The tall one fired twice and the other one fired once (R. 56). Anna Zanchi said "They got me, they got me" and fell to the floor bleeding from a wound in her stomach or chest (R. 56,57, 64,67,70). The masked men disappeared. An American military policeman was summoned and about 0100 hours Anna was taken to an American station hospital where her wound was dressed and morphine administered. She was then taken to an American evacuation hospital. (R. 64,67,70; Ex. 2) About 0830 hours that day (28 June 1944) her remains were returned to her home and she was buried that night (R. 58,67,68,71). Prior to the shooting Anna Zanchi had been in good health (R. 57,58).

About five minutes after the shooting Masi found a cap near the door to the house (R. 57,59,64). The night of the shooting American military police found, about five meters from the house, a soiled air mail envelope addressed to "Pvt. Fred McMurray, 379th Port B.N.T.C. A.P.O. 765, c/o Postmaster, New York, N. Y. 177 Port Co." The envelope was postmarked "Los Angeles, Calif. April 15, 12:30 P.M. 1944". The word "laundry" was written in pencil on the back of the envelope, following which was what appears to be a laundry list. The envelope was identified and admitted in evidence at the trial. (R. 68; Ex. 1)

Masi testified that he had lived in Brooklyn 15 years where he went to school with white and colored boys and that he could recognize colored people by their manner of speech. He testified further that he recognized that the masked men were colored by the way they talked. (R. 59,63,64)

Three bullet holes were found in the door of Anna Zanchi's house after the shooting. Two empty .45 caliber shell cases and one shell case, described by one witness as .32 caliber and by two others as "9 millimeter", were found in front of the house. A .45 caliber shell fitted into two of the holes and the third hole appeared to be about the size of a .38 caliber shell. (R. 57,60, 61,64; Exs. 2,3)

Private James Thomas, a member of accused's company, testified that about 2130 hours on 27 June 1944 he met accused McMurray at their camp in Civitavecchia and with McMurray and a British soldier went to "the water point where all the other fellows hang out" in Civitavecchia to see if they could get some wine (R. 33-35). The three of them met accused Till near the water point. About 2200 hours the four of them went to a near-by Italian camp where they got about two quarts and a pint of wine which they drank. (R. 36,50) They then returned to the water point where they spent 45 minutes planning a "raid" on the "little house over to the right" (R. 37,50). McMurray was armed with a .32 automatic pistol and Till had an "Army .45" automatic pistol (R. 37,38,45). McMurray crawled in back of the house and in about eight minutes returned and reported there was a man in the house, and also women, because he heard them talking (R. 43, 44). The four then discussed their plans and decided that McMurray and the British soldier would knock the door down and enter the shack followed by Till, and that witness would enter the shack last with the matches (R. 44). The four men wore Navy weather masks which completely covered their faces (R. 45). McMurray, Till, the British soldier and witness then approached the shack and were standing in front of the door when an air raid began. Someone inside the shack opened the door and the four walked in (R. 38,44). Witness was the last of the four to enter the house. He struck a match and saw an old man lying on the floor bleeding from a wound on his face, and an old woman kneeling down crying. (R. 38,39) Witness also saw McMurray and Till standing near another woman. They had an argument as to who would be "first". Till won and had sexual intercourse with this woman and remained on top of her about ten minutes. (R. 40-42). Witness struck several more matches and saw another woman (R. 39). McMurray then grabbed this other woman and pulled her over near the bed. The woman was "dragging back and trying to push away from him". (R. 51,52) McMurray laid her on the floor beside the bed occupied by Till and the other woman and remained on top of her for about ten minutes (R. 41,42,52). The four men remained in the shack from about 2245 hours to about 2330 hours and all left together after the air raid (R. 41,42). They started toward their camp and enroute Till stated he wanted to make another "raid" and said "he was going back towards the water point, and we should go" (R. 43). Till with McMurray turned back toward the water point. McMurray took his .32 caliber weapon from the Englishman who had it at that time. Witness and the British soldier continued on to their camp. (R. 43,45) Witness did not have intercourse with any of the women in the shack because he had a "shanker" on his penis (R. 44,48,49). Witness testified further that he saw Till "use force" when he shoved the

woman on the bed, that she resisted being put on the bed, and that after she was on the bed he heard her say "'Buone cose'" (R. 46,47, 51). Witness did not see her struggle after she was on the bed (R. 47). McMurray had intercourse with one woman, Till with the other and the British soldier had intercourse with each of these two women (R. 42,46-48). The woman with whom McMurray had intercourse struggled with him (R. 48). Witness struck 14 or 15 matches (R. 48, 49). Witness testified further he would not be able to recognize any of the women he saw in the shack and he did not see any blows struck (R. 42,50-52).

An agent of the Criminal Investigations Division, Delta Base Section, testified that on 19 July 1944 he read and explained Article of War 24 to McMurray, told him he did not have to make a statement and that if he did make a statement anything he said could be used either for or against him. Accused replied that he understood Article of War 24 and made an oral statement which witness reduced to writing and had typed. (R. 72,73) The following day the statement was submitted to McMurray and signed by him in the presence of the witness and sworn to before an Assistant Adjutant General (R. 73; Ex. 4). Witness made no promises to McMurray (R. 75). The defense objected to the admission of the statement in evidence on the ground it had not been shown that it was voluntary and further because it involved co-accused Till (R. 77). The profert was then qualified and the statement offered solely as against its author, McMurray (R. 78). The court was instructed that it would be considered solely as against its author and it was admitted in evidence (R. 77,78). The statement, after reciting that the author had been informed of his rights under Article of War 24 and that the statement was made without threats, promises, duress or coercion, reads:

"A week or ten (10) days before I went AWOL, on 5 July 1944, I met German Jones at the company and he tried to sell me a pistol. I looked at the pistol and told him that I would buy it. At this time someone approached us and I put the pistol in my pocket and told Jones that I'd see him after chow (supper). I didn't see Jones after chow so I kept the pistol.

"Just before dark, about 9:00 P.M., I saw Jr. Thomas and an English soldier going up the hill toward the water point. I had seen the English soldier hanging around the area for a couple of days before this. I whistled and Jr. stopped. I asked where they were going and Jr. said they were going after vino up on the hill. Jr. asked me if I wanted to go and I told him to wait because I was looking for Jones. Jr. told me that Jones had gone so I went along with them. When we reached the water point, we met Louis Till, who already had a bottle of vino. Till asked us to have a drink and after we finished one bottle, Till went after another, while Thomas, the English soldier, and I waited at

the water point. The English soldier gave Till three (3) packages of American cigarettes because Till said they wouldn't take money for the vino.

"After drinking several bottles of vino, the four of us walked down the road and sat down. Thomas told me to go into a house across the field from where we were sitting and get some more vino. When I entered the house, there was a jeep parked in front and several white soldiers were inside. I asked an Italian man for some vino and the soldier told me that they got the last bottle. I left the house and found two (2) jeeps were now parked in front of the house. It was almost dark but I could see an American sailor in a white uniform, Till, Thomas, and the English soldier all standing around the second jeep which was painted in the navy color. I heard the sailor tell Thomas: 'Well he shouldn't have hit me'. The sailor and the English soldier left to look for vino. (The Englishman was carrying the pistol I had gotten from Jones. I had given it to him earlier because I didn't know how to operate it and he did.) After they left I asked Thomas what the trouble was and he told me to ask Till. Till said: 'Aw he's just another one of those smart guys.' A few minutes later the sailor returned alone. I told Thomas that I was going to get the English soldier because he had my gun and might shoot somebody and I'd be responsible. I went in the house in the rear of the house I'd previously entered and found that the Englishman had several civilians backed up in a corner with the pistol and was demanding vino. I called to him: 'Are you crazy? Come out of there. If you shoot anyone with that gun I'll be responsible.' He came out and we went back to where the two (2) jeeps were parked. Just as we got there the sailor pulled away in his jeep. I said: 'Let's get away from here. You all is disturbing everybody.' As we were leaving Till pulled a .45 out from under his belt and said: 'How do you operate this thing?'. Thomas said: 'Hand it here and let me show you.' While Thomas was trying to show Till how to operate the .45 a shot was accidentally fired.

"Till said that he wanted another drink of vino and the four of us walked up to an Italian camp where they keep vino all the time. Till went after the vino while we waited for him on the road in front of the camp. Till came back with half a gallon of vino and we sat down by the road and began drinking and

singing. After drinking about a quart of the vino, we went down the road to a house where a woman was playing the piano and some Italian soldiers were singing. About half an hour later, we went on down the road below the water point and finished the rest of the vino. By this time all of us were drunk. A few minutes later we went back up to the water point and sat down on a rock wall.

"About this time the air raid alarm went off and the guns started to shoot. Till said: 'Everybody follow me: If anybody turns back I'll blast him.' I asked him where he was going and he told me that there were some women in the house back of the water point and that they would be scared during the air raid and might give us some cunt. We approached the house and Till held his ear against the door. The Englishman had my gun and was directly behind Till. Thomas and I brought up the rear. Thomas said to Till: 'Break in.' The English soldier said: 'Wait a minute, I hear somebody getting up.' Sure enough someone did crack the door to look out and we pushed in. Till went in first and hit the old man and Till said: 'To make him be at ease.' After we were inside, Till and the English soldier both said 'Fiky - Fiky' to the women who were inside. The two (2) who were in the front room said 'si.' One of them caught me by the hand and the other caught the English soldier by the hand and both said: 'VIENI QUA.' The old man was laying across the foot of the bed crying so we all went into the back room where we found another woman in bed. Thomas asked this woman to 'fiky - fiky' and she said 'si', so she and Thomas went into the front room. The woman I had got in the bed and pulled up her dress. I got on the bed and was trying to get my rod out. Just as I got my rod out, Till came up to me with his cock in one hand and the .45 automatic in the other. He told me to get up and after a little argument I did as he said because I was afraid of him. (Till is bigger than I am and he also had the gun on me.) The Englishman was fucking his woman on the floor so I went back into the front room where the old man, Thomas and his woman were. I lifted the old man up to a sitting position to see how bad he was hurt and the Englishman came in and told me not to bother with him because I might get some blood on me. A few minutes later all of us left the house and started to camp. Till, Thomas and the English soldier all got some tail, but I didn't. The English soldier stated that he was laid twice.

"On the way back to camp Till stopped. The rest of us kept going and after I was down the road a way Till called me back. I got my gun from the Englishman and went back to see what Till wanted. Till told me to get his mask from the English soldier and bring it to him. While we were in the house with the women Till, Thomas and the Englishman wore masks which had been taken from the Boat we came up from Naples on. I got the mask from the Englishman and throw it across the ditch to Till. Till wanted me to go back up the hill with him to get more vino. I was afraid to refuse him so we took off together. Till was still wearing his mask and when he knocked at the door of another Italian house on the hill he told me to put on the mask I had gotten from the Englishman. A man inside asked who was there and Till said: 'Louis Paesano, VIENI QUA.' At this time a light went on inside and a man came to the door. Till asked for vino and the man said: 'Finish.' Till kept on asking for vino and finally insisted that the man allow him to look in the house for it. The Italian said all of his people were in bed. Till told the man that he'd give him 'FIVE' to open the door and let him in. The man cracked the door and Till and I saw that the lights were out. Till then said: 'I'll give you FIVE to tell 'am to turn the lights on.' Till started counting and when he said 'FOUR' I walked between them and begged Till not to shoot. Till Flicked the safety off and told me to move or he'd shoot. The Italian had grabbed me for protection and I told him to turn me loose. When the Italian didn't do as I said I put my gun on him because Till was very mad and drunk and I was afraid he would shoot me. The Italian released me and Till fired a shot into the house, and I broke into a run. A few seconds later another shot was fired but I had already crossed the field on the way to camp. When I got down to the road I saw Till running across the field. Till whistled and I waited for him. We went on down the road toward camp and Till asked me to give him his mask. I gave Till the mask and went on up to bed. Till had stopped to talk to a soldier who came out of 175 Company's door on his way to the latrine so I didn't wait for him. Till came up about Twenty (20) minutes later and found the Englishman in his bed. Till got the Englishman out and gave him two (2) blankets so he could sleep on the floor.

"The pistol that the M.P.s took away from me in Naples is the same one that was used by the

Englishman and myself during the night.
 I haven't seen the .45 since the shooting
 and don't know what Till did with it"
 (Ex. 4).

No evidence was introduced by the defense and both accused elected to remain silent (R. 80).

4. It thus appears from the evidence that at the place and about 2230 hours on the date alleged in the respective Specifications 2 and 3, two or more masked colored men forcibly and without their consent had carnal knowledge of Benni Lucretzia and Freida Mari, the women named in the Specifications.

It further appears from the evidence that on the night Lucretzia and Freida were ravished both accused were armed and with two companions planned a "raid" on a little shack in the vicinity of where Lucretzia and Freida were assaulted. Just as they were about to force an entry into the shack an air raid commenced, the door was opened from the inside and the four entered. Freida testified that immediately preceding the entry of the intruders who assaulted Lucretzia and herself an air raid began. She arose and opened the door, and as she did so three masked colored men entered. Freida's father was immediately knocked unconscious by one of the intruders. A companion of accused testified that he was with accused on the night of the offense, that he was the last one of the group to enter the shack and saw an old man on the floor bleeding from a wound on his face. He testified further that he saw Till have sexual intercourse with one woman and that he saw McMurray throw another woman on the floor and lay on top of her for about ten minutes. This witness testified further that the fourth member of the group, a British soldier, had sexual intercourse with each of the two women. He testified further that both Till and McMurray employed force in accomplishing copulation. Lucretzia and Freida each testified that she was assaulted by two of the men, that she resisted her assailants and that she was forced to submit to having her person penetrated by both men. Neither was able to identify her attackers. In a voluntary pre-trial statement admitted in evidence solely against its author, McMurray admitted that on the night in question he, in company with an armed companion, a British soldier and Private Thomas, forced their way into a shack near "the water point" just as an air raid began. He stated further that he had a woman in bed and was about to consummate the sexual act with her when his companion, with a .45 automatic pistol in his hand, forced him to desist. He stated further that the British soldier had intercourse with another woman on the floor, and that he saw his companion hit an old man and later saw the man on the floor bleeding. In his statement McMurray maintained that he did not engage in sexual intercourse while in the shack.

There is ample evidence warranting the conclusion that Till and McMurray were two of the three or four masked men who forced an unlawful entry into the shack and that each accused forcibly and without her consent had carnal knowledge of at least one of the women named in the respective Specifications 2 and 3. Whether each accused had carnal knowledge of both women is immaterial. They were engaged in a common unlawful venture and each was legally responsible for the acts of the other and both are guilty of rape as principals (NATO 385, Speed; 18 U.S.C., sec. 550; 52 C.J., Rape, sec. 50, p. 1036). The court was warranted in finding both accused guilty of rape as charged.

It further appears from the evidence that accused Till and McMurray, with Thomas and the British soldier, left the shack where the first "raid" was accomplished shortly following the air raid and started for camp. This was shown to have been about midnight or a little later on 27 June 1944. En route to their camp Till stated he wanted to make another "raid" and that he was going back to the water point and his companions should go with him. With McMurray he turned back toward the water point in Cisterna. Till was armed with a .45 caliber automatic pistol, McMurray was armed with a .32 caliber pistol and both accused had masks. About half an hour after the air raid two masked colored men knocked on the door of a house near the water point. This house was occupied by Anna Zanchi, the person named in the respective Specifications 1. The two masked men asked for wine. One of the men was tall and armed with an automatic pistol. The other was small and also armed. An Italian opened the door and told the men no wine was available. They then pointed their pistols at his chest and told him to get back in the house or they would kill him. He re-entered the house and told the occupants to lie on the floor. Anna Zanchi approached the masked men, told them she was not afraid of them and that unless they left she would reveal their identity to the military police the following morning. Three shots were fired, two by the tall man (the one armed with the .45 caliber automatic pistol) and one by his companion. Anna cried out "They got me, they got me!" and fell to the floor with a bullet wound in her stomach or chest.

About 0100 hours Anna was taken to an American station hospital where her wound was dressed and morphine administered. She was then taken to an American evacuation hospital and about 0830 hours the same day (28 June 1944) her body was returned to her home. That night she was buried. Anna was shown to have been in good health before the homicide. There is no suggestion in the record that she received other than prompt, normal and approved medical attention. The facts proved warrant the inference that Anna died as a result of the gunshot wound. (Wharton's Crim. Ev., 11th Ed., Vol. 2, sec. 872, p. 1506; 40 C.J.S., Homicide, sec. 186, p. 1088; NATO 696, Pokorney; NATO 2295, Lavender, Bull. JAG, July 1944, sec. 450)

Following the shooting two empty .45 caliber shell cases and another shell case were found near, and three bullet holes were observed in, the door to the shack where Anna was shot. One witness described the third shell case as .32 caliber and two others described it as "9 millimeter". Two of the holes appeared to have been made by .45 caliber bullets and the third appeared to be about the size of a .38 caliber bullet. Also near the scene following the shooting was found a soiled postmarked air mail envelope addressed to McMurray, with a laundry list on the back thereof.

With respect to the offense charged in Specification 1 McMurray in his voluntary pre-trial statement, admitted in evidence only as against McMurray, stated that on the date alleged, after leaving the shack where the first "raid" was staged, he and Till, with Thomas and the British soldier, started back to camp but en route Till stated he wanted to make another "raid" and coerced McMurray into accompanying him. He stated further that he and a companion, both armed and masked, knocked on the door of a house near the water point and asked for wine. Following an argument with an Italian who opened the door, McMurray's companion fired a shot into the house and he (McMurray) ran and a few seconds later he heard another shot and saw his companion running across a field and joined him.

The principal issue presented by the evidence under Specification 1 pertains to the identity of accused. Participation of an accused in a homicide may be established by circumstantial evidence. This question, like any other question of fact, was for the determination of the court in the light of all the circumstances in evidence. From the size of the three empty shell cases and the bullet holes found in the door of the shack following the shooting, and the caliber of the weapons carried by both accused, it may be inferred that both accused fired into the house. The conclusion that one of accused fired the bullet that killed Anna Zanchi is amply supported by the evidence. It is immaterial which accused fired the fatal bullet as both were engaged in a common unlawful venture and each was legally responsible as a principal for the acts of the other. (Authorities supra)

No legal justification or excuse for the commission of the homicide was shown. Malice is inferable from the deliberate use of deadly weapons and the callous indifference to human life displayed by both accused. The court was warranted in finding each accused guilty of murder as charged (MCM, 1928, par. 148a).

5. The court overruled a motion by defense on behalf of Till, made at the conclusion of prosecution's evidence, for a finding of not guilty of Specification 1, on the ground that no evidence had been presented establishing his participation in the alleged homicide. There was no error in the court's action. It was shown

without contradiction that shortly before the shooting Till was in the vicinity of the house where the homicide was committed, that he was armed with a .45 caliber automatic pistol; that shortly preceding the shooting he announced to his companions that he wanted to make another "raid", stated that he was returning to the water point and invited them to join him. With McMurray, who was also armed, he turned back in the direction of the locale of the crime. It was shown further that Till and McMurray both had masks, that the two men who appeared at the home of deceased and fired the fatal shot wore masks, that the tall one was armed with an automatic pistol and that two of the three bullet holes found in the door following the shooting were apparently made by .45 caliber bullets. A letter addressed to McMurray and two empty .45 caliber shell cases were found near the door to the house following the homicide. These facts with other circumstances in evidence fully warranted the overruling of the motion.

6. A motion on behalf of both accused for a finding of not guilty of all Specifications was also overruled by the court. This motion was based upon the premise that except for the uncorroborated testimony of an accomplice (Thomas), no competent evidence was presented identifying accused as the perpetrators of the crimes alleged. The court's action in overruling the motion was proper. The premise of the motion in so far as it is based on the contention that an accused cannot be convicted on the uncorroborated testimony of an accomplice is fallacious. Paragraph 124a, of the Manual for Courts-Martial, 1928, provides:

"A conviction may be based on the uncorroborated testimony of an accomplice, but such testimony is of doubtful integrity and is to be considered with great caution".

This is the prevailing rule in the United States and has often been reiterated and applied by Boards of Review in cases tried before courts-martial (CM 228524, Moser, 16 B.R. 219,221; CM 237711, Fleischer, 24 B.R. 89,99-100; Wharton's Crim. Ev., 11th Ed., Vol. 3, sec. 1400, p. 2289). This is also the rule at common law (22 C.J.S., Criminal Law, sec. 810, p. 1388).

Moreover, the testimony of the accomplice was corroborated in most of its important aspects. Dehors such testimony it was established without contradiction that the offenses alleged actually occurred at the places and time designated, that the perpetrators of the crime in each instance were colored, that they wore masks, that two were armed with pistols, one with an automatic. McMurray's identity was further established by his voluntary statement and by the introduction in evidence of the air mail envelope hereinbefore referred to. It is a well founded principle of law that in such cases identity may be established by circumstantial evidence.

7. The action of the court in overruling the objection to the admission in evidence of the statement of McMurray was also proper. The statement was offered and accepted as evidence only as against its author. The testimony that it was given voluntarily and after McMurray had been fully informed of his rights under Article of War 24, was uncontroverted.

8. The charge sheets show that accused McMurray is 24 years of age and was inducted 30 June 1942, and that accused Till is 22 years of age and was inducted 9 July 1942. Neither accused had prior service.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence as to each accused. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder and rape in violation of Article of War 92.

William R. Linn, Judge Advocate.
Cyprus C. Sessions, Judge Advocate.
Henry C. Hewick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
13 June 1945.

Board of Review

MTO 6866

UNITED STATES)

v.)

Privates FRED A. McMURRAY)
(38 184 335) and LOUIS TILL)
(36 392 273), both of 177th)
Port Company, 379th Port)
Battalion, Transportation)
Corps.)

PENINSULAR BASE SECTION

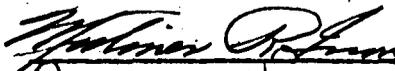
Trial by G.C.M., convened at
Leghorn, Italy, 17 February
1945.

As to each accused: Death.

HOLDING by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

The record of trial in the case of the soldiers named above has been examined by the Board of Review and held legally sufficient to support the sentences.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

MTO 6866

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
13 June 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Privates Fred A. McMurray (38 184 335) and Louis Till (36 392 273), both of 177th Port Company, 379th Port Battalion, Transportation

MTO 6866, 1st Ind.
13 June 1945 (Continued).

Corps, 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 separate general court-martial orders in this case as to each accused, nine copies of each order 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 orders to the record in this case, please place the file number of the record in parenthesis at the end of the published orders as follows:

(MTO 6866).



ELLWOOD W. SARGENT

Colonel, J.A.G.D.

Acting Assistant Judge Advocate General

(Sentence ordered executed. GCMO 88, 89, MTO, 13 Jun 1945)



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

(189)

APO 512, U. S. Army,
29 June 1945.

Board of Review

MTO 6867

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

v.

Private ERNEST JACKSON
(34 064 433), (casual attached),
400th Replacement Company, 13th
Replacement Battalion, 1st
Replacement Depot.

) PENINSULAR BASE SECTION

) Trial by G.C.M., convened at
) Naples, Italy, 15 March 1945.
) Dishonorable discharge and
) confinement for life.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 (Nolle Prosequi).

Specification: (Nolle Prosequi).

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

Specification: In that Private Ernest Jackson, casual attached, 400th Replacement Company, 13th Replacement Battalion, 1st Replacement Depot, did, at Naples, Italy, on or about 13 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Gregorio di Francesco Palumbo, a human being by striking him on the head with a pistol.

A nolle prosequi was entered with respect to Charge I and its Specification. He pleaded not guilty to and was found guilty of Charge II and its Specification. Evidence was introduced of one previous conviction by summary

(190)

court-martial for failure to obey a lawful company order to return to place of duty after lunch in violation of Article of War 96. He was sentenced to be hanged by the neck until dead. All members of the court present concurred in the findings and the sentence. 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, Mediterranean Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that accused, Private Milton M. Alexander and Private Chester Davis (all members of 400th Replacement Company, 13th Replacement Battalion, 1st Replacement Depot), were together in Naples (Italy) from about 1200 hours to about 2200 hours on 13 September 1944 (R. 25,28,32,37). Early in the evening each of the three drank a small glass of cognac and a glass of vermouth (R. 36). Alexander testified that while they were walking in the streets at about 1700 hours accused, the only one armed, had an Italian automatic about the size of a .45 caliber pistol. Accused suggested that they "stick up" an Italian whom accused wanted to rob. (R. 28,29,31-33) Alexander and Davis declined because they did not want to get in trouble but accused asked them "over and over" (R. 28). Accused denied that he had a pistol, or was armed with a German Mauser rifle barrel obtained from the home of one Cecilia Farina, also referred to as "Lia", at 12 Via Conservazione dei Grani, near the square known as Piazza Dogana, Naples, which all three had visited earlier in the day (R. 17,23,28,30,35; Exs. 1,2). About 2200 hours accused, Alexander and Davis were walking together in the vicinity of Piazza Dogana, wherein was located the barracks of 504th Port Battalion (R. 17,23,29,30,32,34; Exs. 1,2). Accused looked back, saw an Italian civilian approaching from the rear and said to his companions, "'Let's stick up that Italian'" (R. 29). Alexander and Davis declined. Accused then transferred his pistol from his right back pocket to his right front pocket (R. 29,32,33). The Italian passed to the left of them, and had reached a point about ten feet in front of accused and his companions when accused left Alexander and Davis, walked up to the Italian from behind and struck him with his pistol, knocking him to the ground (R. 29,30,32,37; Exs. 1,2). When accused's companions approached the Italian, the latter arose and, holding his head with his right hand, walked "pretty stout" about 15 feet to the building at 12 Via Conservazione dei Grani, wherein he lived. Accused and his companions followed him into the building and went to the home of Lia on the second or third floor thereof. (R. 29-32,34,36,37; Exs. 1,2) Alexander denied telling Lia or anyone that he was going to "bash some Italian's skull in" (R. 36). Alexander and accused stayed in Cecilia's house for about an hour after the Italian was assaulted (R. 33).

About 2130 hours on 13 September 1944, Raffaele Calabrese testified that he was walking on Vico Leone near Piazza Dogana toward his home about 50 meters from the square. Another man was walking toward him about 20

meters away. Witness then saw three other people, "three shadows", whom he could not identify, also coming toward him, and who approached the first person in Piazza Dogana. Calabrese heard a scream in Italian, "Mamma del Carmine", and saw someone fall to the ground. (R. 7,8,11,12,14,16-18; Ex. 1) Calabrese ran away and returned to Piazza Dogana about ten minutes later, at which time he met at Vico Leone and saw three shadowy figures. He knew they were the same three figures he had seen before because there was only one way in or out of Piazza Dogana, where he had been the whole time, and no one else could have entered or left without his seeing them. (R. 8,12,14-16) No one was on the ground (R. 15). Calabrese ran away again, and upon returning to Piazza Dogana about ten minutes later saw a crowd of people carrying an injured man out of a house on Via Conservazione dei Grani. Three colored soldiers were also present. They were the same three figures he had seen twice previously, were illuminated with a flashlight and he could see that they were soldiers dressed in khaki. One of the soldiers wore staff sergeant's stripes and another wore glasses. (R. 10) One of the soldiers showed him a knife, and Calabrese again ran away (R. 9-13,15,16). Calabrese did not know the injured person but assisted in carrying him to an American first aid station and from there to the Pellegrini Hospital (R. 9-11,15). The entire incident lasted about 25 minutes (R. 19).

Between 2130 and 2200 hours on 13 September 1944, Angelino Domenico, wife of Gregorio di Francesco Palumbo (the deceased), was at home at Via Conservazione dei Grani Number 12, the doorway of which is about 30 meters from Piazza Dogana (R. 19,20). Deceased walked into his home between 2130 and 2145 hours. He was very weak and bleeding. Deceased's statement made to Angelino a few minutes after he entered the house "that he was assaulted by a colored soldier" was admitted as part of the res gestae over objection by the defense. (R. 20,24,25; Exs. 1,2) Five or ten minutes later Angelino, Calabrese and others carried deceased to an American first aid station about 200 meters away around Piazza Dogana (R. 9,10,12,15,16,19,21). Calabrese showed Angelino blood spots on the ground in Piazza Dogana (R. 22,23; Ex. 2). Shortly thereafter deceased was taken to the Pellegrini Hospital, where he became unconscious, saying only, "I'm cold. I'm cold" (R. 10,21,22). Angelino was present when a priest arrived to administer last rites to deceased. Angelino testified that deceased died in the hospital 48 hours after his admission. (R. 22)

While in the hospital deceased called for a priest, and Alfonso de Lauro, a priest and chaplain of the Pellegrini Hospital, was called by the attending doctor (R. 22,37-39). De Lauro testified that he visited deceased "when he was taken to the hospital". Deceased had a head injury and was "finishing his life". (R. 38) De Lauro administered the last rites to deceased. Deceased could not speak very well but told the priest "While I was going back I was struck by three negroes". (R. 37-39) De Lauro testified that Gregorio died three nights and two days later (R. 39).

On or about 16 September 1944 a civilian doctor representing the Regia Procura, an Italian tribunal, examined the injury to Palumbo's body. The rest of the body was not examined nor was there an autopsy performed. (R. 41-43) The injury to deceased consisted of "a contused wound on the

top of the head" (R. 41) three to four inches long, and a "breaking of the bones". Deceased's death was caused by "breaking of the cranium and lesion of the brain". (R. 42)

Accused testified that he was a member of 400th Replacement Company, 13th Battalion, 1st Replacement Depot, stationed across the river from Caserta (Italy) (R. 47). Concerning the events of the night of 13 September 1944, he testified:

"I don't know exactly what day it was, but the day the incident happened, I met Davis, Alexander and King on the corner near Number One Gate. We left there and we went down to Garibaldi Square and bought three quarts of American whiskey and we brought it back to the 524th Port Battalion and sold it to the boys inside there for Ten Dollars a bottle. After that we went around to Lia's house. The four of us, we messed around Lia's house until about chow time - chow or supper. Alexander, Davis and King and myself was at the house and Lia and a girl named Uscintina and a girl named Anna. We left Alexander and King at Lia's house and went around to the 524th Port Battalion and ate supper, Davis and myself. After that we came back to Lia's house, which was almost just dark, and Alexander and myself left Lia's house and left Davis and King at the house" (R. 48).

And

"It must have been around 6:30 or 7:00. He and I we went down near Gate Number Three, and we came back and after we came back we asked Davis and King did they want to go back to camp that night or were they going to stay over there and they said they were going to stay at Lia's house. Alexander and myself went into a room and talked together and our intention was to go and steal a jeep and the girl gave us a piece of iron which used to be an old German rifle and I had a small Beretta in my shirt pocket. He and I left the house and went behind the port building and looked if we could find a jeep. We didn't find one so we came back and entered this alley. We was going back and stopped near the corner of the 524th buildings. 'There's an Italian coming behind us' and he told me just before the Italian reached us, 'I've a notion to cave that mammy dodger's head in'. And he asked me didn't I believe it and I said 'You're saying so. You said that you would'. About this time the Italian passed us and he taked a couple of steps behind the Italian. He didn't make no sound whatsoever, but went down, and just about this time there was some light shining out of the 524th Port

Battalion upstairs, flashlights, and he didn't touch him. He and I turned and went across the square, opposite this circle which was in the square and there was an old building by the barbed wire fence and he threw this rifle barrel into this place. He and I went around the block and came back the same way we had already been and this Italian had gotten up and gone. We went up to Lia's house and we got there and knocked at the door. Davis unbarred the door and let us in. After we got in, Alexander went to the window and looked back toward the place where he struck this Italian at. Davis was sitting on the side of the bed and I went to the window and took a quick look around. He called Davis in the next room and said 'I just killed a man by bashing his head in. I should kill all of the sons-of-bitches. The best thing we could do is none of us stay in this house tonight. The police might come around for investigation'. King was on the floor. We waked him and I forget the guy's name, but the First Sergeant at 524th, he was in with one of the girls and we didn't tell him anything. We waked King up and we, all four, left the house. King went across the street to some Italian woman's house. Alexander, Davis and myself came back out of the place and Davis shined his flashlight on the spot where the blood was and Davis was going to the 524th Port Battalion and spend the night and I was going across Via Roma to spend the night and I didn't see them any more until the next morning. I didn't have any further discussion with them until the second Sunday" (R. 48,49).

Accused denied talking to Alexander during the day about "sticking up" anyone (R. 49). He further testified that Alexander obtained the rifle barrel, which the latter carried the night of 13 September 1944 as a weapon, from inside the door of Lia's house as they left the house with the intention of committing a crime and stealing a jeep (R. 49,51-53). Accused carried his Beretta in his shirt pocket and never removed it. He knew that it was against the law to carry a pistol, which he carried for protection because he had been attacked once before by Italians in Naples. He did not think the Italian in the Square was going to attack him. (R. 49,52,53) Alexander and Davis wore staff sergeant's stripes and Alexander wore glasses, and accused wore "O.D.'s" and a field jacket but no stripes (R. 50,51). Accused reiterated that he and Alexander only were present at the time of the assault and that it was decided to attack the Italian as he was ten or fifteen paces away approaching them from the rear (R. 51,52). Accused admitted he made no effort to prevent Alexander from striking the Italian although he was only a few steps away, that he intentionally did not report the incident and planned to keep it a secret. Alexander hit deceased "real hard", hard enough to mash in his head. (R. 50) The only blood accused saw was where the Italian fell. Accused saw the Italian walk toward the building at number 12 (Via Conservazione dei Grani), but did not see him enter. (R. 51) He did not know the man but knew that he lived in that building (R. 52).

The assault occurred between 2130 and 2200 hours but accused did not remember the date (R. 51). Accused had not had a drink that afternoon or night and was perfectly sober (R. 50). Alexander also was sober (R. 52). Upon their return to Lia's house, accused and Alexander found the door barred with rocks and a small piece of iron (R. 51,52).

Lia testified for the defense that the rifle barrel was found in the street by children. She had used it for a door stop, but it had disappeared about six days before the incident, and she was using a piece of wood for a door stop the night of the incident. (R. 44,45,54,55)

4. It thus appears from the evidence that at the place and time alleged accused struck Gregorio di Francesco Palumbo, the person named in the Specification, on the head with his pistol from which injury Gregorio later died. Accused, who was armed with a pistol, was walking at night in the vicinity of a public square with two companions when deceased approached them from the rear. Accused suggested that he and his companions assault and rob deceased. After Gregorio had passed and was about ten feet in front of them, accused drew his pistol, caught up with Gregorio, and struck him over the head from the rear with his pistol. Gregorio fell to the ground. It does not appear that Gregorio was armed. When accused's companions approached him, Gregorio arose and, holding his head with his hand, walked a short distance to the building where he lived. He was followed into the building by accused and his companions, who knew that he lived there. About two days later, Gregorio died as a result of the injury to his head.

The principal evidence for the prosecution was adduced from Alexander, a companion of accused at the time of the homicide. His testimony and that of accused were in accord in placing them both at the scene of the assault, but display sharp variances in other material aspects. Alexander testified that Davis was present, which appeared to be corroborated by deceased's dying declaration that he "was struck by three negroes", and by the testimony of Calabrese. This was contradicted by accused, who testified that he and Alexander alone were present. The prosecution's version of the assault contemplates the presence of all three, and the variance in testimony presented an issue of fact which the court had ample basis for resolving against accused.

Alexander's testimony, corroborated in some but not all material respects by other evidence, establishes convincingly that the assault was conceived, suggested and committed by accused. His uncontroverted testimony that accused repeatedly suggested earlier in the evening that an Italian be assaulted and robbed, and accused's suggestion that deceased be assaulted and robbed at the place and time alleged, followed by accused striking deceased on the head with his pistol from the rear, amply support the inference that the motive of the homicide was intent to rob. Further support therefor is afforded by Calabrese's version of the activities of the four persons he saw in the square. Deceased's dying declaration that he was assaulted by three colored soldiers supports an inference that all of them, and not one only, participated in the attack. The admissions of

accused in his testimony at the trial unequivocally placed him, admittedly armed with a pistol, at the scene of the offense. But his assertion that Alexander attacked deceased squarely presented to the court the issue of identity of the assailant as between accused and Alexander. Under all the circumstances established by the evidence, the court was warranted in resolving this question against accused.

Accused's version of the homicide does not relieve him of criminal responsibility therefor, and tends to establish his guilt even if his testimony that Alexander was the assailant is true. Accused admitted that he and Alexander on the evening in question were searching for a jeep to steal. If by this testimony accused meant, as appears probable, that he and Alexander were pursuing the criminal intent of committing larceny of a government vehicle, the assault upon deceased was not in furtherance thereof, as it nowhere appears that deceased was in custody or possession of such a vehicle which could have been stolen by them. But it sufficiently appears from accused's own testimony that if Alexander was the actual assailant, he was impelled and motivated by another intent than that of stealing a jeep. Accused knew, according to his own testimony, that Alexander was armed with a Mauser rifle barrel, which he was carrying as a weapon. The assault came as no surprise to accused, as he encouraged and incited Alexander to perpetrate it by replying to Alexander's query whether accused believed he would assault deceased, "You're saying so. You said you would". Under the circumstances recited by accused, it exceeds credulity to attempt to draw therefrom the conclusion that deceased was an innocent, casual bystander, devoid of criminal interest or intent in the homicidal attack. The inference that they intended to rob Gregorio may be drawn from their pursuance of criminal intent in roaming the streets of Naples armed at night, the deliberate, unprovoked and brutal assault upon deceased, which accused made no attempt to prevent but actually encouraged, and the appearance of lights in a near-by building preventing further molestation of their victim, together with the other circumstances in proof. This inference is further founded upon the uncontradicted testimony of Alexander that accused had been earlier imbued with the idea of assaulting and robbing Italians. Moreover, accused's admitted intention of keeping the entire affair secret does not comport with any theory of innocence predicated upon accused being present casually at the scene. The circumstances shown by accused's own testimony establish the contrary beyond doubt (Bull. JAG, July 1944, sec. 450).

It thus appears that under either version of the homicide, and on the evidence as a whole, the homicidal assault was in furtherance of a pre-concerted felonious design or intent by accused and his companions to assault and rob deceased. The natural and probable consequence of the pursuance of that criminal intent involved the contingency of taking human life. It was of no material importance whether accused or Alexander struck the fatal blow. The surrounding facts and circumstances afford substantial legal basis for imputing to accused the specific intent of whichever one of them, he or Alexander, actually struck the blow which caused Gregorio's death (NATO 2221, Harris, et al; MTO 6308, Goods, et al). Under these circumstances Alexander was at least an accomplice of accused, but accused could not have been prejudiced by the admission of his testimony, though it was uncorroborated.

in part (MCM, 1928, par. 124a; Bull. JAG, July 1944, sec. 450; MTO 6866, McMurray, et al; Wharton's Crim. Ev., 11th Ed., Vol. 3, sec. 1400, p. 2289).

Shortly after the assault Gregorio was taken to an American first aid station and then to a civilian hospital. His wife testified that he died "after" 48 hours. A priest who received a dying declaration from deceased in the hospital testified that Gregorio died about three nights and two days later. A civilian doctor viewed Gregorio's body on or about 16 September 1944, and his testimony established that the cause of death was an injury to the head. There is no suggestion in the record that Gregorio received other than prompt, normal and approved medical attention. The facts proved warrant the inference that Gregorio died as a result of the blow on his head (NATO 696, Pokorney; NATO 2295, Lavender, Bull. JAG, July 1944, sec. 450; MTO 6866, McMurray, et al). The exact date of death does not appear in the evidence, although the Italian doctor who testified as to the cause of his death viewed his dead body on or about 16 September. Consequently the death occurred subsequent to 13 September 1944, the date he was struck, and prior to 15 March 1945, the date of the trial, "which fulfills the requirement that death must take place within a year and a day from the act that caused it" (CM 239304, Stennis, 25 B.R. 119,124).

The assault upon deceased was a vicious and deliberate attack from the rear, without warning and without affording him an opportunity to escape or defend himself. In thus striking deceased on the head from the rear with his pistol, accused demonstrated a wanton, callous and brutal indifference to the life of his unarmed victim. Malice stems not only from the unjustified and deliberate employment by accused of the dangerous weapon with which he was aimed, but also from the manner thereof, and from the perpetration of such a deliberate homicidal assault in furtherance of a preconcerted criminal intent to rob deceased (MCM, 1928, par. 148a). The Board of Review is of the opinion that the findings of guilty of murder are supported by the evidence.

5. Although no copies of the charges against Alexander and Davis accompany the record of trial, the trial judge advocate announced to the court that the convening authority had directed a common trial of accused, Alexander and Davis (R. 2,3). From papers accompanying the record of trial, it is indicated that the same offense alleged against accused in the Specification, Charge II, was separately charged against Alexander and Davis. The Manual for Courts-Martial, paragraph 27, provides, inter alia:

"In joint offenses the participants may be separately or jointly charged. See forms in App. 4 (Instructions, f)."

Appendix 4, Instructions f, provides in part as follows:

"In the case of a joint offense each accused may be charged as if he alone was concerned or the specifications may be in accordance with the principles of the following examples, depending on the decision of the person preferring the charges as to how the persons concerned should be tried:
***."

It is obvious that the offense was susceptible of being charged as a joint

offense against all of the accused, or separately against each one of them individually. The form of pleading was not erroneous (MCM, 1928, pars. 27, 448a; App 4 (Instructions, f)).

After announcement of the direction of a common trial, and after introduction of special defense counsel for accused Jackson, the following transpired at the trial before arraignment:

"Defense: At this time the accused Milton Alexander expresses his intention to stand upon his right for separate trial.

President: Accused Milton Alexander will withdraw from the common trial and the reviewing authority will be notified to that effect.

Prosecution: Yes Sir.

Defense: The accused Chester Davis stands upon right for separate trial.

President: Accused Chester Davis will withdraw from the common trial and the reviewing authority will be notified of that fact.

Special Defense Counsel: As special defense counsel for the accused Jackson, I wish that the accused be tried jointly. To the best interest of accused Jackson, they cannot be tried otherwise. I further wish to put before the court a motion that the accused Alexander be tried first, because only in this manner can the accused Jackson be given a fair trial.

President: The court would like you to go into detail and explain why.

Special Defense Counsel: Well, Sir, in this case we have contradictory evidence insofar as two of the accused are concerned, against the third man. It is believed that the interests of accused Jackson cannot be served unless they are tried jointly, because of the possibility of evidence being withheld or rather, testimony being withheld.

President: The motion for a joint trial, subject to objection by any member of the court, is denied.

President: The motion to delay the trial of the accused Jackson until after the trial of the other members of the three accused present now in court, subject to objection by any member of the court, is denied. Proceed.

Prosecution: May the record show that in the absence of any objection, the ruling is final.

Prosecution: With the permission of the court, the prosecution will proceed with the trial of Private Ernest Jackson, 34060433." (R. 3,4)

The first question presented is the validity of the granting of the motions for severance over the objection of accused Jackson. It is well settled that under these circumstances a common trial of separately charged accused is not improper when directed by the convening authority and the accused do not object (CM 195294, Dig. Op. JAG, 1912-40, sec. 395 (33); CM NATO 1070, Bull. JAG, January 1944, sec. 450; NATO 2373, Di Mauro, et al; MTO 5229, Reynolds, et al). But accused Alexander and Davis expressed their objection to a common trial in their respective motions for severance. Even though the same offense was charged separately but identically against each of the three accused, but could have been charged jointly, the action of the court was proper as to Alexander and Davis. Although denominated a "motion for joint trial", Jackson's objection to the severances was no more than a motion for common trial. Employment of erroneous phraseology by the defense and the court could not convert the originally proposed proceedings to a joint trial when they were in fact a proposed common trial (MTO 5229, Reynolds, et al). It necessarily follows from the foregoing that when the court properly accedes to the objection of one or more accused to a common trial, another accused who desires a common trial is not vested with the right to have a trial in common with the other accused. The ruling of the court was proper (23 C.J.S., "Criminal Law", sec. 934, p. 223).

The situation presented by Jackson's motion for a continuance is analogous to that accruing upon the granting of a motion for severance in a joint trial. In the latter case it devolves upon the court to decide "as to which accused the court will proceed to trial" (MCM, 1928, par. 71b). It is elementary under such circumstances that some one of the accused must be tried first, else there would result a judicial stalemate. Similar decision by the court was necessary here. The request of accused to have another accused separately tried first for the same offense, because of possible contradictory evidence, was addressed to the sound discretion of the court. It does not appear that the court abused its discretion in denying the continuance (AW 20; MCM, 1928, pars. 52,71b).

6. Testimony by the wife of deceased that upon arrival at his home about 2130 hours, 13 September 1944, deceased told her he had been assaulted by a colored soldier, was admitted by the court as part of the res gestae, over objection by the defense. It does not affirmatively appear how much time elapsed between the assault and the making of the statement. It is shown, however, that deceased's head was bleeding at the time, he lived only a short distance from the locus of the assault, and all the circumstances proved indicate that his declaration to his wife was made a very short time after the assault. It appears that the statement was a spontaneous expression of a state of mind created by the assault, and was made under circumstances excluding any suggestion of design, premeditation or fabrication. It properly formed part of the res gestae, and the objection to its admission was without merit (MCM, 1928, par. 115; NATO 440, Gilbert; 22 C.J.S., "Criminal Law", sec. 671, pp. 1060-1063).

7. Although not objected to by the defense, a question is presented as to whether or not testimony of a purported dying declaration made by deceased was properly admitted. Deceased's wife testified that while in the Pellegrini Hospital deceased asked for a priest. The attending doctor sent for a priest. The priest who was called testified affirmatively that deceased "was finishing his life", and received the last rites of his church. The precise date of this visit was not established, although it appears to have been shortly after deceased was admitted to the hospital. The priest observed the injury, and although deceased could not speak very well, heard deceased say, "While I was going back I was struck by three negroes." There is further proof that deceased became unconscious that night, but did not die until approximately 48 hours later. Whether or not a person fears impending death within the purport of paragraph 148a, the Manual for Courts-Martial, 1928, ordinarily is provable by circumstantial evidence. It sufficiently appears from the evidence that deceased was in the belief that he was to die soon, and the circumstances warrant the inference that he spoke in fear of death. The statement was properly admitted as a dying declaration (MCM, 1928, pars. 115a, 148a; Bull. JAG, January 1943, sec. 395 (22a)).

8. The charge sheet shows accused is 23 years of age and was inducted 14 October 1941. He 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 Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence to death or imprisonment for life is mandatory upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

William R. Linn, Judge Advocate.
Clara C. Linn, Judge Advocate.
(on leave), Judge Advocate.

MTO 6867, 1st Ind.
29 June 1945 (Continued).

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:

(MTO 6867).



ELLWOOD W. SARGENT

Colonel, J.A.G.D.

Acting Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 99, MTO, 17 Jul 1945)



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
28 June 1945.

Board of Review

MTO 6868

UNITED STATES)

PENINSULAR BASE SECTION)

v.)

Trial by G.C.M., convened at
Leghorn, Italy, 10 February
1945.)

Private ALVIN WILLIAMS)
(37 061 985), 690th Port)
Company, Transportation)
Corps, 480th Port Battalion,)
Transportation Corps.)

Dishonorable discharge and
confinement for life.)
U. S. Penitentiary, Lewisburg,)
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 Alvin Williams of the Six Hundred Ninetieth Port Company, Transportation Corps, Four Hundred Eightieth Port Battalion, Transportation Corps, did, at Leghorn, Italy, on or about 7 January 1945 at about 2330 hours, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Staff Sergeant Mansfield F. Burris of the Six Hundred Ninetieth Port Company, Transportation Corps, Four Hundred Eightieth Port Battalion, Transportation Corps, a human being, by shooting him in the stomach with a pistol.

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

Evidence was introduced of three previous convictions, two by summary courts-martial, one for exceeding the speed limit in violation of Article of War 96 and one for failure to obey order in violation of Articles of War "61 and 96", and one by special court-martial for wrongfully striking Anna Asotta in the face in violation of Article of War 96. He was sentenced to be hanged by the neck until dead, all members of the court present concurring in the findings and the sentence. 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, Mediterranean Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that at about 2100 hours 7 January 1945, accused, Staff Sergeant Mansfield F. Burris (the deceased), Private Johnnie Lewis, Corporal James D. Pettigrew, Corporal William H. Burns, Corporal James T. Ansley, and Private Henry L. Williams, all members of 690th Port Company, Transportation Corps, 480th Port Battalion, Transportation Corps, were engaged in a poker game in the organization's recreation hall at Leghorn, Italy (R. 8,9,15,16,20,25). Seated at one end of a long table was Lewis; on his left was accused; on accused's left was Burris; on a table a few feet in back of accused one Charles Hubbard was sitting (R. 9,10,12,15-17,19,20). During the course of the game accused brought in a bottle of cognac and had three drinks (R. 13,14). Accused left the room at some time during the game and returned. Neither Lewis nor Pettigrew saw him hand a pistol to Hubbard when he left. (R. 13,14,19) The game progressed until about 2340 hours, when Ansley won a pot and laid money for the next hand. Accused placed \$18 in the pot and, as Lewis testified, Burris "told him that that wasn't anything; he had lost all his money, too". (R. 10) Accused said to Burris "you are crazy" and called him "a black son-of-a-bitch" (R. 10,11). He then drew from his right-hand pocket a "P-38" automatic pistol, "threw it across his left arm", pointed it directly at Burris, and said "I'll shoot you". Accused fired one shot at Burris, who fell out of his chair to the floor. (R. 10,11,17,18)

The players rose from the table and Burris asked to be taken to a doctor (R. 11). Some noncommissioned officers took him to a dispensary where First Sergeant George T. Saunders of accused's organization, observed that Burris had a wound in the right arm and a wound in the lower part of the chest (R. 11,12,20,21). Saunders and accused, with the assistance of other soldiers, took Burris from the dispensary to the 81st Station Hospital at Leghorn, where he was attended and treated by Captain Edward J. Fisher, Medical Corps, and Major William A. Geer, Medical Corps (R. 21,22,25-27). Burris had two bullet wounds, one a perforated wound of the right wrist, with a complete compound fracture of both bones of the right forearm, and the other a puncture wound of the abdomen or lower chest (R. 26,27). He died several hours later, at 0744 hours, 8 "February" (January). His death was due to a penetrating bullet wound of the liver. (R. 27,28)

While at the hospital Saunders asked accused how the shooting had occurred and where the "gun" was. Accused "simply said 'I don't know how it happened', and that he didn't know where the gun was". (R. 22,23) Sometime before that "someone mentioned" to Saunders that "Private Hubbard had been given a gun" (R. 24).

First Lieutenant Meryl C. Jerbi, 480th Port Battalion, testified for the defense that he talked to accused about the shooting when the latter returned to the hospital. Accused showed the officer a hole in the left sleeve of his field jacket and said that "that was where the bullet had gone through". There appeared to be some sort of powder on the inside of the sleeve. When accused was asked who fired the shot and who had the gun, he replied that he knew nothing about it. (R. 28,29)

Accused testified that on 7 January 1945 he was in the company recreation hall playing poker, and

"I came in the rec hall, Sir, sitting down at the table just about like that, started playing poker with six more guys, and along about 9:30, I handed Charlie Hubbard a P-38 pistol. I had it in my right pocket, and I leans out and goes towards the door and comes back and goes to the Italian rec hall and starts shooting dice, and it was around almost ten o'clock, 20 minutes to ten, I came back, and as I came back, I sat down in the same place on that side of the table, and Hubbard raised my jacket, as I was sitting on a bench that didn't have no back to it, like he was sitting behind me, like on this table here, and he raised my jacket here and pulled it out, and handed it back to me. He said, 'This gun is about to fall out of your pocket.' and I pull it out and handed it to him and told him to hold it and he said to, he said he had the gun between his legs, and he said 'I am getting ready to go.' and I handed the gun went—I went to get it, it went off, and that is when it shot Sergeant Mansfield through here",

indicating two holes in the upper portion of the left arm (R. 31,32). The weapon accused had was a "P-38" automatic pistol, loaded with a clip, which he had obtained about a week before from an Englishman and which accused scarcely knew how to use (R. 34,39). About 20 minutes before the shooting he had had a conversation with Burris about Ansley winning the pot. Both accused and Burris had lost money and when Burris asked accused to lend him ten dollars, accused refused and told Burris he "didn't have any money to give him". (R. 32,33,39) Accused testified that he did not call Burris a black son-of-a-bitch and did not say to him "I'll shoot you". There was no exchange of words. (R. 32) Neither Lewis nor Pettigrew, accused testified, heard him threaten to shoot anyone (R. 38).

Accused testified further that he left the recreation room twice, once to go to a lister bag, and once to go to the battalion recreation

hall to shoot craps. Immediately before he left to go to the lister bag, while he was sitting down, Hubbard said to him "'That gun is about to fall out of your pocket'". Accused reached back and gave Hubbard the gun, which Hubbard held between his legs. (R. 33-37) When he returned from the dice game, Hubbard said he was going to leave and accused "leaned around to get" his pistol, and

"I went to put it up to my bosom. I had this hand here on the table. I had about three cards, and I held the cards with this hand, and got the pistol with this hand, and went to put it in my bosom, and it went off" (R. 32,33,38).

He also testified that when he came back from the lister bag he took "the gun" from Hubbard, and as far as he could remember he had it with him when he went to the battalion recreation hall. After he returned from the dice game he played poker again and had the gun then, but "I didn't have the gun during all that time - couldn't have had it". (R. 36,37) He also testified that when he returned the second time to play poker he did not have the gun in his possession, but he did not remember "what happened then, because Ansley was talking" (R. 37). Accused had been in the Army about five years, his only instruction in pistols during that period had been "on the .45", which he had fired five times in 1940 (R. 40).

Private First Class Charlie Hubbard, a member of accused's organization and a witness for the court, testified that on the evening of 7 January he was sitting beside the radio watching the poker game from about 2230 hours to about 2400 hours, when Burris was shot (R. 40,41). Accused was standing beside witness and, immediately prior to leaving the building, gave witness his pistol and asked him to keep it until he came back. Accused then laid the gun on the table beside witness and left the building. When accused returned, 20 to 25 minutes later, he took the gun from the table and sat down at the card table. About five to ten minutes later, "perhaps longer", a shot was fired and witness saw Burris falling from his chair. (R. 42-44) From the time accused picked up the gun from the table and put it in his hand to the time when the shooting occurred there was a substantial passage of time: "it was at least five minutes" and it could have been longer than ten minutes (R. 44,45). Witness heard no conversation about shooting, about any losses that had occurred, or cursing of any sort, but he was listening to the radio and was not paying attention to what was taking place (R. 42,43). Accused went out only once while witness was in the room (R. 42).

4. It thus appears from uncontradicted evidence that at the place and time alleged accused killed Staff Sergeant Mansfield F. Burris, the person named in the Specification, by shooting him in the abdomen with a pistol. Before the homicide accused and Burris were engaged in a poker game with other soldiers. After one of the soldiers had won a pot accused and deceased, both of whom had lost, engaged in a verbal argument. There is evidence that accused called Burris "a black son-of-a-bitch" and said "I'll shoot you".

Accused aimed his pistol directly at Burris and fired one shot at him which penetrated his wrist and abdomen. Burris was taken to a near-by hospital, where he died about seven hours later.

Accused testified in substance that he had given his pistol to another soldier to hold for him while he left the room for a few minutes and that upon his return, as he reached around in back to retrieve it, the pistol was accidentally discharged and Burris was shot. He denied categorically calling Burris a son-of-a-bitch or threatening to shoot him. There were a number of witnesses to the shooting but none of them corroborated accused's version thereof. Hubbard, to whom accused claimed to have given his pistol, testified that accused did not give him the weapon but laid it on the table beside Hubbard and that accused had the weapon back in his possession "at least five minutes", possibly ten, before the shooting. Other witnesses who were present did not see accused give the pistol to Hubbard. There was no evidence that Burris had a weapon in his possession or that he threatened accused in any manner. Accused's credibility, as well as the weight to be given his testimony, was within the discretion of the court which, acting within its prerogative, rejected accused's version of the homicide and determined the issue adversely to him. In this, it was warranted. It is significant that accused did not in his own testimony raise the issue of self-defense, but it is observed that the conduct of the victim during the poker game, as stated by witnesses, was not such as to form reasonable grounds for a belief by accused that he was in imminent danger or that resort to firearms was necessary in self-defense. Although there was evidence that accused had three drinks during the course of the game, there was no evidence that he was drunk and the issue of intoxication was not raised by the defense. Deceased's conduct offered no provocation or justification sufficient in law to condone or excuse the homicidal use of firearms or to reduce the degree of the homicide.

Rejecting accused's version, the homicide was without legal justification or excuse. Malice was inferable from the use of a deadly weapon, the willful, deliberate, and wanton manner in which it was fired, and the opprobrious epithet and threat to shoot with which he addressed his victim. The evidence furnished a reasonable basis for the inference that accused shot Burris because he was angered at losing money in the poker game. His violent, though possibly impetuous, conduct, in the absence of any circumstances whatsoever which would in the slightest degree excuse or justify the shooting, fully warranted the court in finding accused guilty of murder in violation of Article of War 92 as charged. The possibly impetuous nature of his act was not a defense (MCM, 1928, par. 148a; MTO 6040, Grant; MTO 6165, Brooks; MTO 6525, McGhee).

5. The charge sheet states that accused is 25 years of age and was inducted into the Army on 7 March 1940. He had no prior service.

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

sufficient to support the findings and the sentence. A sentence to death or imprisonment for life is mandatory upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Walter R. Hunt, Judge Advocate.
Cicero C. Sessions, Judge Advocate.
(on leave), Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
28 June 1945.

Board of Review

MTO 6868

UNITED STATES)

v.)

Private ALVIN WILLIAMS)
(37 061 985), 690th Port)
Company, Transportation)
Corps, 480th Port Battalion,)
Transportation Corps.)

PENINSULAR BASE SECTION)

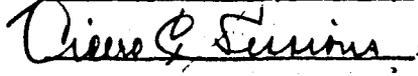
Trial by G.C.M., convened at)
Leghorn, Italy, 10 February)
1945.)

Dishonorable discharge and)
confinement for life.)
U. S. Penitentiary, Lewisburg,)
Pennsylvania.)

HOLDING by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

 , Judge Advocate.
 , Judge Advocate.
_____, Judge Advocate.
(on leave)

MTO 6868

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
28 June 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private Alvin Williams (37 061 985), 690th Port Company, Transportation Corps, 480th Port Battalion, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that

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MTO 6868, 1st Ind.
28 June 1945 (Continued).

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:

(MTO 6868).



ELLWOOD W. SARGENT

Colonel, J.A.G.D.

Acting Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 98, MTO, 16 Jul 1945)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
7 June 1945.

Board of Review

MTO 6869

UNITED STATES)

v.)

ARMY AIR FORCES SERVICE COMMAND
MEDITERRANEAN THEATER OF OPERATIONS

Trial by G.C.M., convened at
Pisa, Italy, 8 March 1945.
Dishonorable discharge and
confinement for life.
U. S. Penitentiary,
Lewisburg, Pennsylvania.

Private ERWIN F. GREGORY)
(31 135 291), 1967th Quarter-)
master Company Truck (Aviation),)
6569th Ordnance Battalion (Air)
Force Overhead).)

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 Erwin F. Gregory, 1967th Quartermaster Company Truck (Aviation), did, at Calcinaiia, Italy, on or about 3 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Filidei Faustino di Giuseppe, a human being, by shooting him with a Carbine.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. All members of the court present concurred in the findings and the sentence. 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, Mediterranean Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge,

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

3. The evidence for the prosecution shows that on 3 January 1945 Filidei Faustino di Giuseppe (the deceased), his wife Cavallini Assunta fu Nicola, his brother Filidei Antonio di Giuseppe, and one Pieracci Ines, were at a farm (apparently deceased's) at Calcinaia, Italy (R. 7,8,12,17,19). About 1800 hours accused, a colored soldier, entered the open door of the house without permission and began to talk with the women present (R. 7,10,14,17,20). It was the first time accused had been at the house (R. 7,17). He asked Ines if she knew "Alfonso", and showed her his "dog tags" which bore the name Gregory (R. 12,13). Assunta and Faustino did not converse much with accused who, in Assunta's opinion, was not drunk (R. 7). Later, Filidei Lido, Faustino's son, a student who had never before seen accused, returned from Leghorn with two white soldiers (R. 14,17). The two white soldiers were not military policemen and one brought Lido home every night (R. 14,21). The two white soldiers had a glass of wine. Accused also had a glass of wine but did not drink it. He talked with the two white soldiers who left the house about five minutes later. (R. 10,11,13,14,17) Accused then charged Lido with being an informer in the pay of the American military police, and told him that he (Lido) was stupid. Lido, who could not understand English, tried to make accused understand that this was not true, that he (Lido) "was a mechanic with the Americans at Leghorn", and showed accused his pass. Accused continued to berate Lido and attempted to strike him in the face. Faustino told accused to leave and accompanied him to the door. At the time, Faustino was carrying a chair which he was going to give to Lido's grandfather who was very elderly. As accused was leaving he picked up a rock and struck Faustino on the head. (R. 8,9,13,14,16-18) Accused said "'at the camp I have a big gun'" and then departed in a truck (R. 9,13,14,18).

Lido ate his meal and about 15 minutes after accused's departure, left on his bicycle to inform the police of the incident. About 150 meters from his home he met accused who was driving a truck slowly toward Lido's home. Accused, who was alone in the vehicle, opened the door of the truck, put one foot on the running board and attempted to stop Lido who managed to pass the truck. Lido then went to the police station and told about the occurrence. (R. 14-16)

Accused returned alone to Lido's home in the truck. Antonio, who was standing at the door, saw him approach the house with a "raised gun". Antonio entered the house, the door was closed, and Assunta, Faustino and Antonio put their shoulders to it. Several sharp blows were struck on the door which broke the latch. The blows then ceased. Faustino called "'who is it'" but there was no answer. A shot was then fired and Faustino, wounded in the head, fell to the floor. More blows were then struck on the door, and Assunta opened it to seek aid. It was then about 1900 hours and not very dark. Assunta and Antonio saw accused leaving. He was about six feet away, walking swiftly, and turned to look over his shoulder. He then departed in the truck. (R. 9-12,18-21) When Lido returned to the house with "two American

police" his father was dead (R. 14). Assunta, Ines, Antonio and Lido identified accused at the trial (R. 7,12,14,21).

On 3 January Dr. Truehi Renzo, who knew Faustino "by sight only" examined the latter at the house. Faustino was dead and in Dr. Truehi's opinion the cause of death was a "shot in the brain". It was Dr. Truehi's further opinion that Faustino died about 1930 hours. (R. 21,22)

On 3 January Agent David A. Szewczyk, Criminal Investigations Division, stationed at Leghorn, Italy, visited the scene of the shooting and observed a bullet hole in the door of the house, about five feet above the ground. The lock on the door was "about ready to give way". (R. 22,23) About 2300 hours 3 January, he interviewed accused, informed him that he need not make a statement and that whatever he said would be used against him in the event of trial. Accused thereafter made a statement, corrected it and then read and signed the statement in Szewczyk's presence. Szewczyk identified the statement at the trial and it was admitted in evidence over objection by the defense to the effect that accused did not receive a sufficient explanation of his rights under Article of War 24. (R. 22-27; Ex. A)

On 18 January 1945 accused, who desired to "clarify" his first statement, saw Captain Robert L. Neal, Chief of the Criminal Investigations Division, who told accused that he need not make a statement and that if he did make any incriminating statement it could be used against him. Accused replied that he understood his rights, that he still desired to make a statement, and told Captain Neal his version of the shooting, as to which Captain Neal testified. The defense moved to strike his testimony from the record, which motion was denied by the court. (R. 29-32) Captain Neal turned accused over to Szewczyk who had not been present at the interview. Szewczyk, in the absence of Captain Neal, again advised accused of his rights under Article of War 24, told him that he need not say anything which would incriminate him and that if he made a statement it would be used against him. Accused then made a second statement in the absence of Captain Neal. He then read and signed the statement in the presence of Captain Neal and Szewczyk, both of whom identified it at the trial. (R. 32-36) It was admitted in evidence over the objection of the defense that "Under such circumstances a basis of a complete free confession is not laid down. This man (Szewczyk) did not know how long the man had been questioned, nor how much, or what he had told the other man (Captain Neal)". (R. 36; Ex. B) The oral statement of 18 January, and the written statements of 3 January and 18 January are, in essence, of the same effect, though the written statement of 18 January is more detailed and is more favorable to the accused. Accordingly, the pertinent part of the latter only is quoted as follows:

"On 3 January 1945, at about 1540 hours, I left my camp area to have two pairs of shoes repaired at Ponsocco and also to pick up some pictures that I had developed. With my truck, I returned to Pontedera, Italy and drove on thru to Fornacette to report to the Control Point in that town. At this Control Point, a corporal there, whose name I don't know, ordered me to take an Italian civilian

to the ferry which I did. I then returned to a house located in Fornacette where I visited an Italian family and had three drinks of grappa which was given to me by the family. I had a few more drinks and left the house after visiting for about one hour. I then visited another Italian home to pick up a friend of mine named Veasey, an American soldier, but he was not there. This Italian family and I talked for about 5 minutes and then they offered me a drink. I took the drink and set it on the edge of the table and we just started talking. While we were talking, I handed three cigars to three of the men in the house and one package of gum to two of the Italian women. In the meantime, while talking, I walked an Italian civilian with two American soldiers. It was dark at the time. One of the women then got up from her chair and got a large covered bottle and two glasses and offered both soldiers a drink which they took and drank. She then changed the glass of red wine to a glass of white wine and set it back on the edge of the table where the other glass she had handed me was, because the other one I didn't drink because I don't like red wine. I drank the white wine and started talking to one of the soldiers. I said to him 'wherever I go, I see you'. He then went out of the house after he laughed and left with the other soldier. As they went out, I said to the Italian civilian that came in with them, 'do you know them'. I asked him this in Italian and he answered 'no', so I told him that they were two M.P.'s and he said they were not because he worked in the same camp as they did. We then started arguing back and forth about the two soldiers. I then told him that they were from the Military Police and I also told him he was stupid. So he then walked over to me from the other end of the table with his fists 'balled-up'. I then asked him if he wanted to fight, and from behind me, one of the men grabbed me by the throat and one by the arm. After two or three minutes, I broke loose and one of the men started at my throat again, I pushed him back against the wall and ran outside. About two feet from the door, an instinct inside me, told me to turn around and as I turned, I saw the same Italian who had me by my throat, coming toward me with a chair up-raised. I then grabbed the chair with my right hand and the Italian civilian with my left hand. I had grabbed him by the shirt-front. I wrenched the chair from his hands and pushed him back lightly. He then went towards the corner of the house on my left. I then thought about the chair I still held in my hand and threw it in his direction. I then ran to my truck and returned to the Control Point. The mixture of drinks then began working on me more.

At the Control Point, where my carbine rifle was, I took it and returned to the same house where I had been fighting, which was later identified to me by Daniel A. Szewczyk, Agent, CID, as Via Chiesino, #5, Calciniaia, Italy. I returned to this house with intentions of putting a scare into the men of the house. It was about 1830 hours or 1900 hours, when I returned, at which time, it was dark. I kicked on the door of this house but it wouldn't open. I tried to force it open by kicking it with my foot and it opened a little and was immediately pushed shut by someone on the inside. I then spoke 'O.K.' and took two steps backwards and fired one shot from my carbine rifle which was pointed towards the door. I then went to my truck and returned to the Control Point to clean my rifle, which I did, and later put the carbine rifle behind the operator's control box at the Control Point. About 3/4 of an hour later, the Military Police and the Italian civilian who I had the argument with, came into the Control Point and the Military Police apprehended me" (Ex. B).

For the defense, Private Albert H. Glover testified that he was with accused on the afternoon of 3 January 1945. About 1400 hours they began to drink cognac, rum and "vino". When they separated about 1545 hours both were "feeling pretty good" and accused was staggering. Glover asked him "Can you make it?" and accused said "Yes". Accused's speech was normal at that time. (R. 36,37) Glover testified further that accused "told me that he didn't drink and I kept after him until he kept on drinking". Glover could not say whether or not accused was drunk. (R. 38) Glover was on guard that evening and next saw accused about 1845 hours when the latter drove out of the motor pool in a truck. Accused, at the time, was supposed to be in a truck convoy but drove out about 15 minutes after the convoy had departed. Glover did not know where accused went. (R. 38,39)

Accused elected to remain silent (R. 40,41).

Glover, recalled as a witness by the court, testified further that after he went on guard at 1800 hours he did not observe accused enter the motor pool area but that the place where witness was on guard did not constitute the only entrance to the area. When accused drove out at 1845 hours, Glover saw the butt of accused's carbine beside accused on the seat of the vehicle. At the time all drivers were carrying their carbines because "it was during the alert". (R. 41)

4. It thus appears from the evidence, including the pre-trial statements of accused, that at the place and time alleged accused fired one shot from a carbine through a closed door, which mortally wounded Filidei Faustino di Giuseppe, the person named in the Specification. Before the homicide, shortly after accused arrived at the house on deceased's farm, Lido, the son of deceased, entered with two white soldiers. Wine was served, and

after a short conversation the white soldiers departed. Thereupon accused precipitated an argument with Lido about the white soldiers, and accused Lido of being stupid and a paid informer of the American military police. Lido became angry. Accused continued to berate Lido and attempted to strike him in the face. Faustino asked accused to leave and, carrying a chair in his hand, escorted accused to the door. Accused struck Faustino on the head with a rock, said that he had a big gun at camp, and departed in his truck. About fifteen minutes later Lido left the house on his bicycle and saw accused about 150 meters away approaching the house slowly in a truck. Accused attempted unsuccessfully to stop Lido. Deceased's brother Antonio, seeing accused approach the house with a "raised gun", ran indoors and he, deceased, and the latter's wife put their shoulders to the door. Several sharp blows were struck on the door, breaking the latch, and Faustino asked "who is it". A shot was fired through the door about five feet above the ground, wounding Faustino in the head, after which a few more blows were struck on the door. Accused was then seen about six feet away, leaving swiftly. Faustino died of his wound shortly thereafter.

The pre-trial statements of accused show that he had been drinking. One witness testified that in her opinion accused was not drunk at the time of the first altercation. In his written statement of 18 January 1945 accused stated that after he initially left the house "the mixture of drinks then began working" on him. It is thus suggested that accused was drunk at the time he fired the shot which killed deceased. There was no evidence introduced by the defense, nor was it otherwise established by competent proof, that at the time of the homicide accused was so intoxicated that he could not entertain the specific intent requisite to the offense of murder. The court was justified, therefore, in resolving the issue of drunkenness against accused (MCM, 1928, par. 126a).

There is a variance between accused's pre-trial statements and the evidence for the prosecution as to the violence and aggressiveness exercised against accused by deceased and the others present at the time of the altercation before the homicide. The gist of accused's statements is that he was violently assaulted by the men present in the house, which attack he repelled and then made his escape. The testimony for the prosecution, however, shows accused to have been the aggressor and the only one to resort to physical violence. The issue thus presented was one of fact for determination by the court. The animus with which accused was imbued when he left the house the first time was demonstrated by his reference to the gun he had in camp. He unquestionably departed with the deliberate intent of arming himself and returning, and his journey by truck for that purpose required at least 15 minutes travel. Accused admitted in his written statement of 18 January 1945 that he armed himself and returned to the house "with the intentions of putting a scare into the men of the house", thereby showing the malicious purpose which motivated his deliberate attempt to force re-entrance into the house. Upon his return no violence was offered him, he was not in the slightest danger of death or grievous bodily injury, and was met with no opposition other than the locking and bracing of the door against him. Moreover, had accused ever been in any danger, the court was warranted in concluding that upon his return that danger had been completely dissipated,

and that accused at that time was an aggressor against the unarmed occupants of the house (MCM, 1928, par. 148a).

The circumstances of the initial altercation, as related in accused's pre-trial statement, may have so provoked accused that his passion was suddenly aroused, but ample time transpired during accused's journey to obtain his carbine, for him to have regained control of himself (MCM, 1928, pars. 148a, 149a; Bull. JAG., May 1943, sec. 450 (1); Bull. JAG., August 1944, sec. 450). Moreover, the purported conduct of the occupants of the house as stated by accused offered no provocation or justification sufficient to condone or excuse his use of a firearm (MTO 5918, Mack).

Accused admitted that he knew people were inside the house holding the door against his violent attempt to enter. The mere fact that he could not see them does not dispel the showing of his intent by the deliberation with which he stepped back and callously fired a shot through the door at about the height of a man's head. Although none of the witnesses saw accused fire, their testimony coupled with accused's pre-trial statements, identify accused as the assailant beyond question. Every circumstance tends to show that his purpose was unlawful, and that the natural and probable consequence of the execution thereof involved the contingency of taking human life. The shooting was wanton and malicious, and the circumstances proved amply justified the court in concluding that accused willfully and deliberately fired the shot which fatally wounded deceased. Malice may be inferred from accused's use of a deadly weapon, the manner thereof and from other circumstances in evidence. The evidence is completely devoid of any mitigating or extenuating circumstances (MCM, 1928, par. 148a; MTO 6308, Goods, et al; NATO 2221, Harris, et al). Accused was properly found guilty of murder in violation of Article of War 92 as charged.

5. The defense objected to the admission in evidence of accused's pre-trial statement dated 3 January 1945 on the ground that sufficient explanation was not afforded accused of his rights under Article of War 24. The testimony of Szewczyk and the statement itself show affirmatively that accused received a full explanation of his rights. The defense moved to strike from the record the testimony establishing the facts pertinent to accused's verbal pre-trial statement of 18 January 1945 on the grounds that the statement was a confession, and there was circumstantial evidence only as to how it was obtained, but no proof that it was freely made. The uncontradicted testimony of Captain Neal establishes that accused was fully advised and was aware of his rights. The motion to strike the testimony mentioned was properly overruled by the court. The defense objected to the admission in evidence of the written statement of accused dated 18 January 1945, because it was an involuntary confession, made to a person unacquainted with the contents of the prior verbal statement made to Captain Neal and with the circumstances surrounding the making thereof. Accused actively solicited an opportunity to make both statements dated 18 January 1945. The written statement is neither a part or continuation of the previous oral statement, is complete within its ambit, and requires no reference to the former statement for full understanding of its purport and contents. The person taking it (Szewczyk)

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was not required to be present at the making of the previous oral statement before Captain Neal. The testimony and the statement affirmatively show that accused received an explanation of his rights by Szewczyk, and that the statement was voluntarily given, without threats, promises, duress or coercion. The objection to its admission by the defense was without merit.

6. The charge sheet shows accused is 28 years of age and was inducted 20 June 1942. He had no prior service.

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

William R. Linn, Judge Advocate.
Cigero C. Sessions, Judge Advocate.
Henry C. Reisch, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
7 June 1945.

Board of Review

MTO 6869

UNITED STATES)

v.)

Private ERWIN F. GREGORY)
(31 135 291), 1967th Quarter-)
master Company Truck (Aviation),)
6569th Ordnance Battalion (Air)
Force Overhead).)

ARMY AIR FORCES SERVICE COMMAND
MEDITERRANEAN THEATER OF OPERATIONS

Trial by G.C.M., convened at
Pisa, Italy, 8 March 1945.
Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

William P. Irion, Judge Advocate.
Cicero G. Sessions, Judge Advocate.
Henry C. Remick, Judge Advocate.

MTO 6869

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
7 June 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private Erwin F. Gregory (31 135 291), 1967th Quartermaster Company Truck (Aviation), 6569th Ordnance Battalion (Air Force Overhead), attention is invited to the foregoing holding by the Board of

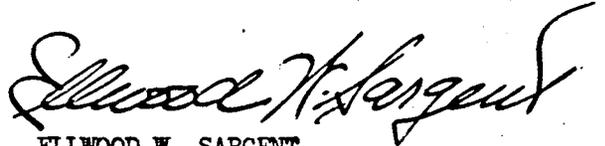
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MTO 6869, 1st Ind.
7 June 1945 (Continued).

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:

(MTO 6869).



ELLWOOD W. SARGENT
Colonel, J.A.G.D.

Acting Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 85, MTO, 7 Jun 1945)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
24 June 1945.

Board of Review

MTO 6956

UNITED STATES)

v.)

Private PORTER L. GORDON)
(36 399 335), 53d Chemical)
Processing Company.)

PENINSULAR BASE SECTION

Trial by G.C.M., convened at
Naples, Italy, 24 March 1945.
Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 Porter L. Gordon, 53rd Chemical Processing Company, did, at Marchianese, Italy, on or about 8 December 1944, forcibly and feloniously, against her will, have carnal knowledge of Anna Capone.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. All members of the court present concurred in the findings and the sentence. 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, Mediterranean Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 8 December 1944 the 53d Chemical Processing Company, of which accused was a member, was stationed on the Ponterotto road between San Arpino and Marcianise, Italy, about two and one-half miles from Marcianise (R. 5,8,15,30).

About 1630 hours on that day, Anna Capone, who was also called "Marie" by the American soldiers, was returning to her home at San Arpino from the camp of accused's organization, where she had taken laundry and had sold bottles of liquor to the soldiers. Anna met accused, coming from the direction of San Arpino, at a place called Ponterotto. She knew accused and spoke to him, whereupon he slapped her several times and threw her to the ground. A soldier intervened and made accused stop hitting her. When accused departed Anna joined her friends who were in the vicinity. (R. 5,6,14,15,16,20,21,49) About five to fifteen minutes later accused returned with a pistol. Anna saw him coming and ran to an Italian camp approximately 400 meters away where she "took shelter" near an Italian sentry. Accused threatened an Italian boy with the pistol and demanded that he tell him where Anna had gone. Upon being told where Anna was, accused went to the Italian camp and ordered the sentry to turn her over to him. Accused then fired his weapon and all of the people, including the sentry, ran away. (R. 7,16,21) Accused took Anna by the arm, pointed the pistol at her head and said "'come on baby, come on baby'". Although she did not want to go with him she did so because he told her "'if you don't come I will kill you'". She was crying as he took her across a field and he threatened to shoot her if she did not stop crying. (R. 16) Accused took her to a place where there were ammunition boxes and "things" on the ground. He threw her to the ground, put his pistol on a box, unbuttoned his trousers and ordered her to take off her "undertrousers". Anna testified that she took off her "undertrousers" and that accused "came on me and put his penis in my vagina". She did not consent to accused having intercourse with her, and permitted the act "Because he was saying 'I have a pistol'". (R. 17) She was crying during the act of intercourse. After the intercourse was completed accused arose, returned her "undertrousers", and said "'don't tell anything to anybody because I will tell nothing to anybody'". (R. 17,18) Anna testified further that "After the intercourse I felt myself wet" and that she dried herself with a shirt that she was wearing, as a result of which she got blood stains on the shirt. On her way home she met her brother and Jackson, an American soldier. The latter told her that he was going to take her to the camp and report the incident to his captain. (R. 19,20; Ex. 2)

About 1725 hours, shortly after a company meeting, Technician Fifth Grade James W. Jackson, a member of accused's organization, met accused more than 100 yards from camp and asked him "'where's Marie'" (R. 30-32). Accused answered that "she was up the road" and that "if he caught hold of her he would kick her ass" (R. 32). Jackson went "up the road" with Anna's brother and another person, and they found Anna lying in a ditch on the side of the road. They picked her up and told her they were taking her to camp. Anna stated "'no, don't take me there, Porter will finish me'" (R. 11,19, 32) While they were carrying her to camp Anna was "fainting off and having spells one right after another" (R. 11,32). Jackson was a friend of Anna's and had been to her home several times (R. 33).

About 1700 hours, from a distance of approximately 200 yards, another member of accused's company saw accused and Anna in a field used by the Army as a chemical depot and which was about one-half mile from the camp. Several smoke pots and boxes were in that vicinity. Wheat or oats, 12 to 18 inches high, were growing on the field. Several people were running across the field. Accused hit Anna several times and knocked her to the ground. Two or three seconds later accused also went to the ground and "from that distance it seemed like he was on top of her". (R. 9,10,12) Anna and accused both remained on the ground for four or five minutes, but because of the distance and the wheat or oats in the field, the witness could not see what they were doing on the ground. Accused was the first to get up and when he arose he began to fire a weapon. About 20 minutes later this witness saw Anna some distance from where he had previously seen her knocked to the ground. She was being assisted by Jackson and Private Spurlock. (R. 10,14)

A Criminal Investigations Division agent took Anna and accused to the 32d Station Hospital around 2300 hours on 8 December, where they were both examined by a medical officer (R. 22,26). The latter testified that Anna "had three small lacerations of the hymenal membrane, one which was still oozing blood". The lacerations were recent. In his opinion "she had been subject to trauma", that is, a violent injury, which could result from normal intercourse in a woman who had a very small vagina. Anna had no other wounds. (R. 24,25) He further testified that there was "a rather large blood stain inside on the fly" of the trousers which accused was wearing but that accused had no wounds from which the blood could have come (R. 27-29; Ex. 3).

Captain Leslie S. Jolliffe, Medical Corps, 15th Medical General Laboratory, made tests on the brown-red stains found on Anna's shirt and accused's "O.D." trousers worn respectively by them on the day of the assault. As a result of the tests, he concluded that the stains on each garment "contained substances of human blood, and blood of

human origin". (R. 23,26-28,50; Exs. 2,3)

Staff Sergeant Roosevelt Johnson testified for the defense that about 1600 hours on 8 December 1944 he saw accused leave the company day room and go to the company area. "Chow" that night was about 1700 hours and accused was present immediately afterward at a company meeting, which lasted 15 or 20 minutes. He further testified that he played ping-pong with accused between 1830 and 1900 hours. (R. 39-42) Staff Sergeant Rossie L. Patterson testified for the defense that the company meeting lasted 25 to 30 minutes and that it occurred before "chow". Between 1700 and 1800 hours he saw accused in the day room where he remained until "he was picked up by the guard" later in the evening. (R. 35,36,38) Private Glover H. Vance testified for the defense that he and accused were the day room orderlies on 8 December, and that he saw accused in the day room between 1600 and 1700 hours. He left accused in the day room when he went to eat at 1700 hours, and when he returned 15 or 20 minutes later accused was still there. He testified also that he attended the company meeting on that day but did not remember whether it was before or after the evening meal. (R. 43,44) Technician Fifth Grade James H. Young also testified for the defense that he saw accused at evening "chow", and also at the day room before "chow" on 8 December (R. 45).

Accused testified that between 1615 and 1700 hours on 8 December 1944, he met Anna as he was walking toward the company and about 125 yards from the company area. She asked him for \$6.50 which he owed her for wine, and when he told her that he did not have the money she made a "number" of "nasty remarks". He slapped her three or four times. Judson Hayes, a member of his organization, intervened and told him "to leave her alone". Accused then went to the company day room, arriving about 1650 or 1700 hours, and from there he went to "chow". Following the evening meal an announcement was made after which he returned to the day room where he remained until he was arrested by the corporal of the guard. He had never touched Anna before that day and did not see her from the time he slapped her until after he was arrested. Accused testified further that he knew Anna and had seen her frequently, but did not know whether or not she was a prostitute. He did not know any reason why the witness Jackson should lie against him except that he (Jackson) had been "going with" Anna. Accused also testified that the blood spots on the trousers which the Criminal Investigations Division agent took from him that night, might have come from one of the prostitutes "that hang out by the area". (R. 48-50; Ex. 3)

4. It thus appears from the evidence that at the place and time alleged accused had unlawful carnal knowledge of Anna Capone, the woman named in the Specification, by force and without her consent. About 1630 hours on 8 December 1944, as accused was going toward camp he met Anna who was on her way from the camp to her home at San Arpino.

Anna spoke to accused after which he slapped her several times and threw her to the ground. A soldier intervened and made accused stop hitting Anna. Accused left and approximately 15 minutes later returned armed with a pistol. Anna, upon seeing accused returning, ran to an Italian camp near by and hid near a sentry for protection. Accused threatened an Italian with the pistol and forced him to disclose where Anna had gone. He then went to the Italian camp and ordered the sentry to turn Anna over to him. Accused fired the pistol several times, and the sentry and the other people who were present ran away. Accused then pointed his pistol at Anna, threatened to kill her if she did not accompany him, and took her with him across a field to where there was some ammunition boxes and smoke pots on the ground. He threw her to the ground and had sexual intercourse with her without her consent. Upon completion of the sexual act accused arose and told Anna not to say anything about the incident. Both accused and Anna were examined by a medical officer that night. There were blood stains on the shirt Anna was wearing and on the inside fly of the trousers accused was wearing on the day of the alleged rape. The stains were caused by human blood. Accused had no injuries from which the blood could have emanated and the only injury on Anna from which the blood could have come was one of the three recent lacerations of the hymenal membrane which was still bleeding. The medical officer was of the opinion that the lacerations were due to trauma.

There is a variance between the evidence for the prosecution and the testimony of accused and witnesses for the defense as to the whereabouts of accused at the time the alleged rape occurred. The gist of accused's testimony is that he met Anna approximately 125 yards from camp between 1615 and 1700 hours. She made nasty remarks to him, whereupon he slapped her several times and returned to camp, not seeing her again until after he was arrested later that night. The testimony of defense witnesses shows that accused was seen at the company day room between the hours of 1600 and 1700, at 1700 hours and approximately 20 minutes later, between 1700 and 1800 hours, and from 1800 hours until later that night when he was arrested. He was also seen at evening "chow" which was either 1700 or 1730 hours, and at a company meeting which was either immediately preceding or subsequent to the evening meal. One of the witnesses for the defense, however, testified that he saw accused leave the day room and go to the company area around 1600 hours. The evidence for the prosecution establishes that about 1630 hours, accused met Anna a short distance from camp where he slapped her several times and threw her to the ground. Accused left after another soldier intervened. Approximately 15 minutes later accused returned with a pistol with which he forced Anna to accompany him across a field to a place where he engaged in an act of sexual intercourse with her. About 1700 hours, about half a mile from camp, one witness saw accused throw Anna to the ground, two or three seconds later follow her to the ground, and both remain on the ground four or five minutes. Another witness saw accused about 1720 hours approximately 100 yards from camp and asked accused where he could find Anna. Accused replied that she was "up the road". The witnesses for the

prosecution were unequivocal in their identity of accused. The issue thus presented was one of fact solely for consideration and determination by the court, which was warranted in resolving it against accused.

Anna did not expressly testify that she resisted accused to the extent of her ability or that her resistance was overcome by force or prevented by fear. She did testify, however, that she did not consent to the act and permitted it only because accused had a pistol. The evidence shows that accused was armed, that he fired the weapon several times and threatened to kill Anna if she did not accompany him across a field to the place where he had sexual intercourse with her, and that Anna was crying as they crossed the field and during the act of intercourse. The evidence also shows that after the act of intercourse Anna was afraid to go to the camp because of accused and that while being carried to the camp she was "fainting off and having spells one right after another". These facts together with the other acts of violence visited upon the victim by accused, justify the inference that she did not in fact consent, and that any lack of resistance was attributable to her fear of great bodily injury or death induced by the violent manner in which accused laid his hands upon her, and threatened her verbally and with the dangerous weapon with which he was armed. It is rape though a female may yield through fear. Under the circumstances the court was warranted in concluding that rape was committed by accused (MCM, 1928, par. 148b; Bull. JAG, 1942, sec. 450 (9), pp. 363,364; NATO 3940, Maxey, et al; MTO 6436, Mason). The Board of Review is of the opinion that the findings of guilty of rape are supported by the evidence.

5. After the prosecution had rested and the witnesses for defense, with the exception of accused, had testified, defense moved for a continuance for the purpose of obtaining an additional witness, Private First Class Judson Hayes, 53d Chemical Processing Company. In support thereof the defense stated that based

"on what the accused has told me himself concerning his association with this Hayes during that period * * * we believe we can produce testimony showing that the accused in this case was in that witness's company in the company area of the 53rd Chemical Warfare Company on the 8th of December 1944, from approximately 1600 to 1645 hours" (R. 46,47).

Defense counsel stated that accused did not inform him of the nature of the expected testimony until noon on the day of the trial. The prosecution objected to a continuance and offered to stipulate that the desired witness would testify to the facts contained in a pre-trial statement made by the witness to the investigating officer. Defense rejected this offer on the ground that the pre-trial statement did not contain the expected testimony. The law member of the court ruled that

"Unless objected to by any member of the court, it is believed by the court that the defense has had sufficient time to obtain this witness, had

he desired to do so. The accused could have told his counsel that he expected favorable testimony from that witness. Since it was not done, and since the defense has had ample opportunity to prepare for his defense, the motion by the defense counsel is denied". (R. 47)

There was no objection to the ruling of the law member.

The charges were served on accused on 11 February 1945 and trial was held on 24 March 1945. The defense had 40 days in which to prepare its defense after the charges were served on accused. Insofar as appears no effort was made during this period to procure the testimony of the witness. Under the circumstances there was no showing of due diligence in attempting to secure the testimony of the proffered witness. After the motion for continuance was denied accused testified that he met Anna about 125 yards from the company "on the afternoon of the 8th of December 1944, approximately between about a quarter after four and five o'clock" (R. 48) and that after seeing Anna he arrived at the camp "as close as I can figure to it, it was between 10 minutes to five and five o'clock" (R. 49). The proffered testimony might possibly have served only to impeach the testimony of accused. Further, with reference to the contention of defense counsel that he was not informed of the nature of the expected testimony until noon on the day of the trial, the court convened at 1115 hours and defense did not move for a continuance until after prosecution had rested and the witnesses for defense, with the exception of accused, had testified. The proper time for making an application for continuance to the court is after the accused is arraigned and before he pleads. It does not appear that the court abused its discretion in denying the continuance (AW 20; MCM, 1928, par. 52c; MTO 4331, Thomas; CM 236323, McClain, 22 B.R. 379,381, 382).

6. Testimony that about 1720 hours, 8 December, Anna objected to being taken to accused's camp and stated "No, don't take me there, Porter will finish me" (R. 11), was admitted by the court over objection of defense on the grounds that it was not part of the res gestae. The statement was made approximately 20 minutes after the alleged assault and while she was in a highly nervous state and clearly acting under the influence of the fright and shock induced by the lustful assault. It is unnecessary to determine whether or not the statement was part of the res gestae, as it was clearly admissible, under the circumstances, as tending to corroborate Anna's testimony that she had been assaulted and had been put in fear, and to show her mental condition and demeanor such a short time after the offense, also in corroboration of the state of fear induced in her by accused. The objection to the testimony was without merit (Vol. 1, Wharton's Crim. Law, 12th Ed., sec. 724, pp. 972-980; 52 C.J., "Rape", sec. 97, pp. 1072-1073).

7. The "O.D." trousers worn by accused on the day of the assault were admitted in evidence over objection of the defense. On the inside fly of the trousers was a large blood stain. The blood was of human origin. There were no injuries on accused. Anna sustained a laceration of the hymenal membrane, which could have been the source of the blood. The criterion of the relevance of circumstantial evidence is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry. The trousers were properly before the court for its consideration, together with the circumstances pertaining to the blood stain on the fly thereof, in determining whether accused did in fact have sexual intercourse with Anna, which was an essential element of the alleged assault. Moreover, they were part of the real and demonstrative evidence, connected with the offense, and tending to identify both accused and the offense (MCM, 1928, pars. 111, 112b; Wharton's Crim. Ev., Vols. 1, 2, 11th Ed., secs. 224, 369, 761, pp. 268, 586, 587, 1290; 22 C.J.S. "Criminal Law", sec. 604, pp. 928, 929). The objection to the admission of the trousers in evidence was properly overruled.

8. The charge sheet shows that accused is 25 years of age and was inducted 10 April 1942. He 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 Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence to death 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.

(on leave) _____, Judge Advocate.

Gregory C. Sessions, Judge Advocate.

Henry C. Kewich, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
24 June 1945.

Board of Review

MTO 6956

UNITED STATES

v.

Private PORTER L. GORDON
(36 399 335), 53d Chemical
Processing Company.

PENINSULAR BASE SECTION

Trial by G.C.M., convened at
Naples, Italy, 24 March 1945.
Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

(on leave), Judge Advocate.

Cigero C. Sessions, Judge Advocate.

Mary C. Remick, Judge Advocate.

MTO 6956

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S.
Army, 24 June 1945.

To: Commanding General, Mediterranean Theater of Operations, U. S.
Army, APO 512, U. S. Army.

1. In the case of Private Porter L. Gordon (36 399 335), 53d

(230)

MTO 6956, 1st Ind.
24 June 1945 (Continued).

Chemical Processing Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50¹/₂, 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:

(MTO 6956).



ELLWOOD W. SARGENT
Colonel, J.A.G.D.

Acting Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 97, MTO, 16 Jul 1945)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
11 July 1945.

Board of Review

MTO 7029

UNITED STATES)

92D INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Rear Echelon, 92d Infantry
Division, 14 May 1945.

Private First Class NATHANIEL
MORROW (14 187 867), Company K,
370th Infantry Regiment.)

Dishonorable discharge, sus-
pended, and confinement for
20 years.)

MTOUSA Disciplinary Training
Center.)

OPINION by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

Original Examination by Hall, Judge Advocate.

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Nathaniel Morrow, Company K, 370th Infantry Regiment did, in the vicinity of Querceta, Italy, on or about 6 April 1945, misbehave himself before the enemy, by refusing to advance with his command, which had then been ordered forward by Captain

Herbert C. Little to engage with the enemy, which forces, the said command was then opposing.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification "except the words, 'advance with his command', substituting therefor the words, 'occupy a defensive position'; of the excepted words, Not Guilty; of the substituted words, Guilty" and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 50 years, three-fourths of the members of the court present concurring. The reviewing authority approved only so much of the findings of guilty of the Specification of the Charge "and of the Charge" as involves findings that accused, "did, at the time and place alleged, misbehave himself before the enemy by refusing to occupy a defensive position, as ordered by Captain Herbert C. Little", approved the sentence but reduced the period of confinement to 20 years, ordered execution of the sentence as thus modified but suspended execution of the dishonorable discharge until the soldier's release from confinement, and designated the MTOUSA Disciplinary Training Center as the place of confinement. The proceedings were published in general court-martial orders No. 175, Headquarters 92d Infantry Division, 29 May 1945.

3. The evidence shows that on or about 6 April 1945, Company K, 370th Infantry Regiment, of which accused was a member, was within approximately 600 yards of the enemy in the vicinity of Querceta, Italy. On that day the company had been ordered to withdraw about 300 yards to its former positions and to organize defensive positions, after it had failed to gain its objective in a daybreak attack because of enemy mortar and artillery fire. (R. 6,7,10,11) After the defensive positions were "set up", his platoon leader ordered accused's section leader to establish two sections of light machine guns on the right flank. The section leader reconnoitered and informed the section, including accused, of the section's mission. Accused's section was then about 2000 yards from the enemy. Accused thereupon picked up his equipment and requested and obtained his section leader's permission to see the company commander. The section leader did not see accused thereafter. After accused left his section, the machine gun positions were established, but the section fired no missions on 6 April. (R. 8,9) About 1500 hours on 6 April, accused received permission from his acting first sergeant to speak to the company commander (R. 10)

Captain Herbert C. Little, accused's company commander, testified that when he granted permission through the first sergeant for accused to speak to him, he was in the company command post 300 yards north and on the edge of Querceta, Italy. The "unit" was in combat at the time. Accused's squad was about 400 yards north of the command post. Accused told Captain Little that "he was nervous and afraid". Captain Little immediately made arrangements for accused to be examined at the aid station. Accused departed for the aid station, returned about 30 minutes later and stated to Captain Little that "the medical officer had not been able to do anything for him".

(R. 6,7) Captain Little testified further,

"When I was informed that he was marked duty status, I told him there was nothing I could do but tell him that he was to return to duty with his squad. We were short of men, and I gave him an order directly to report to his squad" (R. 7).

Witness did not know whether accused returned to his squad. He testified further that, "The order was issued to occupy the positions at 1500, military time". No friendly units were between Company K's front line and the enemy. (R. 7)

The acting first sergeant of accused's company testified that he asked accused what the Captain had said, and accused

"said the Captain ordered him back to join his section, but that he was going to turn in to the MP's. I didn't see him anymore" (R. 10).

No witnesses testified for the defense and accused elected to remain silent (R. 12).

4. The only question in this case requiring consideration here is as to the legal effect of the findings. Accused was charged with misbehavior before the enemy in violation of Article of War 75 by

"*** refusing to advance with his command, which had then been ordered forward by Captain Herbert C. Little to engage with the enemy, which forces, the said command was then opposing".

At the conclusion of the evidence defense made a motion for a finding of not guilty on the grounds that accused was charged with failing to advance with his unit whereas the evidence showed that the unit was not advancing at the time accused was given the order. The court overruled the motion and found accused:

"'GUILTY' except the words 'advance with his command', substituting therefor the words 'occupy a defensive position'; of the excepted words 'NOT GUILTY': of the substituted words 'GUILTY'", and of the Charge "GUILTY".

A court-martial is authorized in its findings to except one or more words or figures from the specification and, where necessary, to substitute others provided, among other limitations, that such action

"does not change the nature or identity of any offense charged in the specification" (MCM, 1928, par. 78c).

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With reference to charges under Article of War 75 it has been authoritatively stated:

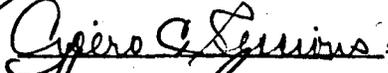
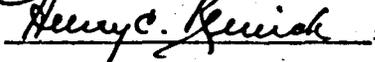
"The defense against this charge is sufficiently difficult when it is alleged with approximate precision, without placing the additional burden upon the accused of such wide variance" (Dig. Op. JAG, 1912-40, sec. 433 (4)).

The effect of the approved findings of guilty was to find accused not guilty of the offense of having refused to advance with his command which had been ordered forward by Captain Little, but guilty of having refused to occupy a defensive position as ordered by Captain Little, an offense with which he was not charged.

The findings not only acquit accused of the specific act of misbehavior with which he was charged but find him guilty of an act of misbehavior entirely separate and distinct from the one on which he was arraigned. That a court may not legally find an accused guilty of an offense with which he has not been charged in the arraignment and which does not comprise a lesser included offense therein, is too elementary a rule of law to require discussion (MTO 4977, Emory, Bull. JAG, May 1945, p. 178, sec. 433 (2); CM 211377, Short, X B.R. 57).

It has been authoritatively held that where an accused is charged with specific acts of misbehavior before the enemy he cannot legally be found guilty of other and distinct acts of misbehavior (MTO 4977, Emory, Bull. JAG, May 1945, p. 178, sec. 433 (2); Dig. Op. JAG, 1912-40, sec. 433 (4)).

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

 , Judge Advocate.
 , Judge Advocate.
 , Judge Advocate.

MTO 7029

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
11 July 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. There is transmitted herewith for your action under the fifth subparagraph of Article of War 50¹/₂ the record of trial by general court-martial in the case of Private First Class Nathaniel Morrow, 14 187 867,

MTO 7029, 1st Ind.
11 July 1945 (Continued).

Company K, 370th Infantry Regiment, together with the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. I concur in the opinion of the Board of Review and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the findings of guilty and the sentence be restored. There is inclosed herewith a form of action designed to carry this recommendation into effect should it meet with your approval.



ELLWOOD W. SARGENT
Colonel, J.A.G.D.

Acting Assistant Judge Advocate General

- 2 Incls.
Incl. 1 - Form of Action
Incl. 2 - Record of Trial

(Findings and sentence vacated. GCMO 105, MTO, 26 Jul 1945)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
19 June 1945.

Board of Review

MTO 7034

UNITED STATES)

91ST INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Cormons, Italy, 29 May 1945.

Private JOHNNIE G. BROWN
(37 403 264), 4064th Quarter-
master Service Company.)

Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 Johnnie G. Brown, 4064th Quartermaster Service Company did, at Cormons, Italy, on or about 11 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Willie Mitchell, 4064th Quartermaster Service Company, a human being by striking him on the head with an axe.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50¹/₂.

3. The evidence shows that on or about 11 May 1945, the 4064th Quartermaster Service Company, of which accused was a member, was stationed near Cormons, Italy (R. 6,7,13,24,30,36). About 1930 hours on 11 May, accused, Private Willie Mitchell (the deceased), and Private First Class (acting corporal) Walter E. Jones, also members of the 4064th Quartermaster Service Company, were in their tent in the company area. Accused and Mitchell were arguing and "there were some bad words passing between the two". (R. 14,22,31) Mitchell was on accused's side of the tent and was apparently trying to engage accused in a game known as "the dozens", which consists of a contest between the participants to see who can make the most derogatory remarks about the other's female relatives (R. 14,17,22,33,35,37). Accused told Mitchell that he did not play "the dozens" (R. 14,34,35), and Mitchell responded, "I'll play them with you" (R. 35). Accused said "Don't talk about my mother" (R. 22). Jones stopped the argument, left the tent, and went to the orderly room where he was on duty as charge of quarters (R. 30,31). About 2000 hours Mitchell also left the tent and went to a place about 30 feet away where Percival Means, Thomas Young, James Murphy, and Lee E. Williams were playing poker. Mitchell lay on the ground on his stomach between Young and Means, and watched the game. (R. 14,15,19,20) Approximately ten minutes later Williams and Means heard a sound "like someone busting a pumpkin" (R. 15,19), looked up from the game and saw accused with a woodchopper's axe in his hand standing next to Mitchell, who was then "lying flat on his back" (R. 20) on the ground. Mitchell was breathing loudly, and was bleeding from his mouth and the back of his head (R. 7,15, 16,19,20). Williams took the axe from accused who started to search Mitchell's pockets. Accused apparently did not find that for which he was searching. (R. 20,21) Mitchell was taken immediately to the 171st Evacuation Hospital, about one mile away, where he was attended by Captain Willard B. Weary, Medical Corps (R. 6,8,10,21,37). Upon his arrival at the hospital Mitchell was unconscious and was suffering from a severe head injury consisting of a fracture at the base of the skull. He died about 2205 hours that night as a result of this injury. (R. 10-13)

Captain Weary testified that from his examination of Mitchell it was his opinion that the injury was caused by a blow from a blunt metal object, such as the blunt edge of an axe, that the blow was from behind, and that Mitchell died as a result of "the force that was exerted to produce this wound that fractured the base of the skull which protects the vital centers of the brain". The depressed bone fragments penetrated the brain. (R. 11, 12)

Private First Class Charlie L. Doyle, 4064th Quartermaster Service Company, testified that on the evening of 11 May 1945 accused went to the motor pool, obtained an axe, and asked as he passed witness' tent "Whose axe is this?" (R. 24,26). Doyle answered that he did not know to whom the axe belonged and did not pay any more attention to accused. Doyle then went from his tent to the orderly room and later took Mitchell to the hospital. (R. 24-26)

About 2010 hours First Sergeant Leo L. Woody, 4064th Quartermaster Service Company, heard a disturbance and saw Mitchell lying on his back on

the ground in the company area. As he started toward Mitchell he met accused who was pale, had a blank expression on his face and appeared to be rather dazed. When Woody asked accused what was the trouble the latter stated "I just hit Private Willie Mitchell with an axe" and that he had killed Mitchell. Woody then sent accused to the orderly room and proceeded to the scene of the disturbance. A soldier near the spot where Mitchell was lying had an axe which the first sergeant carried to the company commander. It was "a regular G-I issue axe" and there was blood on the lower part of its handle. (R. 27-30,36; Ex. A)

Also at approximately 2010 hours Jones, who had run out of the orderly room in response to a call for transportation to carry someone to the hospital, met accused who told him that he (accused) had killed Mitchell with an axe because of the same argument which Jones had previously "stopped". Accused stated that Mitchell had threatened to, and did "draw a pistol on him ***" so he (accused) left the tent. (R. 31,32)

Major Abraham L. Kauffman, Medical Corps, Headquarters 91st Infantry Division, testified for the defense that:

"Upon psychiatric examination of the accused I came to the conclusion that he was mentally deficient but it was my opinion that he is mentally responsible and able to distinguish between right and wrong but because of his mental deficiency, his limited mental capabilities, he would have trouble in adhering to the right. By that I mean that his judgment is defective, not totally defective but his judgment is limited" (R. 39).

He further testified that as a result of this examination, which was given on 15 May 1945, he was of the opinion that accused was sane and had the mental capacity to formulate an intent to commit a crime (R. 40,41).

Accused elected to remain silent (R. 41).

4. It thus appears from the uncontradicted evidence that at the time and place alleged accused struck Private Willie Mitchell, the person named in the Specification, on the head with an axe and that as a result of the injury inflicted Mitchell died approximately two hours later. Before the homicide, accused and Mitchell were engaged in a verbal altercation in their tent, during which accused refused to play with Mitchell, despite the latter's insistence, a so-called game involving the exchange of derogatory and obscene remarks concerning the female relatives of the participants. After a tent mate intervened and terminated the argument, Mitchell left the tent and went to a poker game about 30 feet away. He had been lying on his stomach watching the poker game for approximately ten minutes when accused struck him on the back of the head with an axe. Mitchell died shortly thereafter as a result of this injury.

Although no witness saw accused strike deceased, immediately after the blow was heard accused was seen standing over deceased with an axe in his

hand. This fact, coupled with the statements made to witnesses by accused immediately after the homicide, together with the other circumstances in proof, establish accused as the assailant beyond any doubt.

Although the issue of self-defense was not raised or supported by affirmative defense evidence, accused asserted to a witness shortly after the homicide that deceased drew a pistol during the initial altercation, in consequence of which accused withdrew from the tent. Whether accused obtained an axe from the motor pool before or after the initial altercation was not established, although it was proved that he secured an axe on the same evening before the homicide. If accused had ever been in imminent danger of great bodily harm, or of losing his life, it is clear that such danger no longer existed when he assaulted Mitchell. It is indicated that accused attacked deceased from the rear while the latter was lying on his stomach watching a poker game. There was no evidence that deceased was armed at the time. Under such circumstances, it was impossible for accused to have been in any danger whatever. Even if deceased had drawn a pistol approximately ten minutes earlier, as asserted by accused, the latter was not legally justified in assaulting deceased from the rear in such a brutal and vicious manner. The court was fully justified in concluding that accused was the aggressor in the assault which resulted in the death of deceased and that accused did not act in self-defense (MCM, 1928, par. 149a).

Considerable evidence was adduced as to the nature of the game denominated "the dozens", which deceased was endeavoring to play with accused. That game involves a contest between the participants in applying the most obscene and vile epithets possible to the female relatives of the respective opponents. Although the evidence did not establish that any such contumelious remarks were in fact made by deceased as to any of accused's relatives, the fact that accused told deceased not to talk about accused's mother, the manner in which the game is played as shown by the evidence, accused's statement immediately after the homicide that he had killed Mitchell over the same argument stopped by Jones, and deceased's insistence upon playing the game over accused's refusal, all strongly support the inference that deceased did make derogatory remarks about accused's relatives. Such remarks may have provoked accused and suddenly aroused his passion. But sufficient time elapsed thereafter, under the circumstances of this case, for accused to regain control of himself, and to refrain from resuming the altercation in the role of an aggressor in a violent, physical assault upon deceased. Moreover, where intent to kill is shown by the evidence, no words of reproach, however grievous, are provocation sufficient to justify the killing (Wharton's Crim. Law, Vol. 1, 12th Ed., sec. 584, p. 802). Whether or not deceased opprobriated accused's female relatives during the course thereof, the initial altercation furnishes no basis for legal justification or excuse for accused resorting to a subsequent assault upon deceased with an axe (MCM, 1928, pars. 148a, 149a; Bull. JAG, May 1943, sec. 450 (1); Bull. JAG, August 1944, sec. 450; MTO 6869, Gregory; MTO 6718, Southward).

The court was justified in concluding from all the evidence that accused deliberately and willfully struck deceased on the back of the head

with an axe from the rear, while deceased was lying on his stomach. Thereby accused demonstrated callous and brutal indifference to the life of his unarmed victim. From his vicious and deliberate employment of an axe in assaulting deceased in such manner stems the inference of the malice which impelled accused. The evidence suggests no matter of extenuation or mitigation (MCM, 1928, par. 148a). The Board of Review is of the opinion that the findings of guilty of murder are supported by the evidence.

5. A medical officer testified that from an examination of accused on 15 May 1945, he was of the opinion that accused could distinguish between right and wrong but because of mental deficiency "would have trouble adhering to the right". However, he was also of the opinion that accused was sane and had the mental capacity to formulate an intent to commit a crime. Although the medical officer testified that accused would have "trouble" in adhering to the right, the court was justified, upon all the evidence, in concluding that at the time of the commission of his offense, accused was able both to distinguish right from wrong and adhere to the right. Its conclusion to that effect is implicit in the findings of guilty (MCM, 1928, par. 78a; Bull. JAG, December 1942, sec. 395 (44a); NATO 2238, Payne).

6. The charge sheet shows that accused is 25 years of age and was inducted 12 December 1942. He had no prior service.

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

(on leave) _____, Judge Advocate.

Gregory C. Sessions, Judge Advocate.

Henry C. Reunick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U.S. Army,
23 June 1945.

Board of Review

MTO 7095

UNITED STATES)

PENINSULAR BASE SECTION)

v.)

Trial by G.C.M., convened at
Leghorn, Italy, 22 May 1945.)

Private DAVID R. POWE)
(35 094 046), 3402d Quarter-)
master Truck Company, 27th)
Quartermaster Battalion.)

Dishonorable discharge and)
confinement for life.)
U. S. Penitentiary, Lewisburg,)
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 David R. Powe, 3402nd Quartermaster Truck Company, 27th Quartermaster Battalion (Mobile), did, near San Vincenzo, Italy, on or about 3 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Tolomei.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions by summary courts-martial, one for absenting himself from his camp and duties without proper authority in violation of Article of War 61, one for wrongfully leaving his vehicle unattended in violation of existing standing orders in violation of Article of War 96, and one for breaking restriction in violation of Article of War 96. He was sentenced to be shot to death with musketry. All members of the court present concurred in the findings and the sentence. 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, Mediterranean Theater of Operations, confirmed the sentence but

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commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 3 April 1945, the 3402d Quartermaster Truck Company, of which accused was a member, was stationed north of Venturino, Italy, about three or four miles from San Vincenzo, Italy (R. 12, 13,26,29-33).

About 1300 hours on 3 April, Maria Tolomei, 23 years of age, was riding a bicycle on "the white road" from Castagneto to Piombino, Italy, on her way to work. As she rode out of an opening in some woods about three or four kilometers from San Vincenzo, she saw accused standing by the roadside approximately ten meters away. He had a jacket in his arms, his shirt was "sticking out", and he was not wearing a hat. He started toward Maria and prevented her attempt to turn away. Maria asked accused what he wanted and to "please leave me go", to which accused replied "'solo momento'. 'only a minute'". He threw his jacket to the ground and pulled the bicycle away from Maria. The bicycle was left lying on the road. He hit her with his hands and she fell to the ground. Accused then seized Maria by the arms and dragged her across the road and a ditch into the "pines" three or four meters from the road. Maria screamed and scratched accused on the face and neck with her fingernails and bit him on the neck. (R. 12-15,18,20, 22-24,26) He threw her to the ground and while sitting on her stomach unbuttoned his trousers (R. 15,21). Maria tried to reason with accused. She told him that she lived near-by and asked "why didn't he come to my house", which was not true, but was merely an effort to reach some people who would assist her. Accused ignored her pleas and she continued to struggle, and scratched accused with a pin. Accused tore off her skirt and drawers, pushed her to the ground, put his hands on her mouth, nose and throat, and got on top of her. She felt "a pain and a terror" in her female organs of reproduction which was caused by his penis being inside her female organs. (R. 15,16,23) Maria had never had sexual intercourse before (R. 18). While accused was on top of her, she "lost all sense of everything". After accused had been on top of her for a short period of time he arose and started "getting ready" to leave. Endeavoring to prevent accused from escaping unpunished, Maria tried to detain him by telling him that he should come back to her. He gave her a pen and an envelope on which to write her address. (R. 16,17,19) As Maria and accused were standing there talking two Italian men stopped at the place on the road where the bicycle and jacket were lying. Maria saw the men and yelled "'Help me, grab him'", whereupon accused snatched the pen and envelope out of her hands, pushed her and ran away. Immediately Maria went to the Italian men and, referring to accused, said that "he had ruined her". (R. 17,25,26,28) She was wearing only one undergarment and was not wearing "pants". On her legs there were marks of blood. (R. 16,28) Maria was taken to an American camp and from there to the 99th Field Hospital, where she was examined by Captain Samuel Fox, Medical Corps, about 1700 hours on 3 April 1945 (R. 7,11,18). Captain Fox testified that Maria was crying, her dress was wrinkled, and

her pulse was abnormally high. There were bruises about three-fourths of an inch in diameter on her forehead and chin and abrasions about the size of a United States 25-cent piece on both of her knees. There was a recent "laceration of the periphery of the vaginal opening" and "a perforation of a pre-existent hymen, with blood in the vaginal opening". (R. 7,8) It was witness' opinion that the instrument causing the wound in the vagina was blunt, smooth, and small enough to enter the vagina and that penetration would be necessary in order to create such a wound (R. 9). About 1730 hours on the same day Captain Fox also examined accused. Witness testified further that

"Private Powe had abrasions and lacerations of a minor nature on the right side of his cheek, chin and neck, of a linear character". (R. 10)

He was of the opinion that the instrument that caused accused's wounds "would be quite sharp and pointed". At the time of the examination accused was dressed in "OD" shirt and trousers. Dirt was on the front of both garments. The tail of accused's shirt was hanging out and he did not have a hat. Captain Fox sent accused to the 114th Station Hospital because he was not fully oriented. There was no indication that accused was under the influence of alcohol. (R. 9-11)

Accused, though restricted to the company area, was absent from the area between 1300 and 1600 hours on 3 April. He was seen in the area about 1600 hours standing in the latrine. His shirt "was unbuttoned and outside his pants". He was not wearing a hat or a field jacket and he had some scratches on his face. He acted peculiarly and did not recognize the acting first sergeant of the company. (R. 29-35)

No evidence was presented by the defense and accused elected to remain silent (R. 36).

4. It thus appears from uncontradicted evidence that at the place and time alleged accused had unlawful carnal knowledge of Maria Tolomei, the woman named in the Specification, by force and without her consent. Upon encountering Maria riding a bicycle on a road, accused forced her off the bicycle, despite her attempts to evade him, struck her and knocked her to the ground. Accused then seized Maria and dragged her into the woods near the road. He threw her to the ground, tore off her clothes, put his hands on her mouth, nose and throat, and got on top of her. Maria screamed and bit and scratched accused, who unbuttoned his trousers while sitting on her stomach. She then endeavored to reason with accused, and employed the stratagem of suggesting that accused take her to a near-by house where she lived. This was untrue but she hoped thereby to reach people who would assist her. Accused ignored the ruse, and Maria continued to resist him to the extent of her ability and scratched him with a pin. Accused overcame Maria's resistance by force, and without her consent penetrated her vagina with his penis, causing her to suffer pain and terror.

After accused had concluded his lustful assault, Maria endeavored to

detain him, and in furtherance thereof was writing her address on an envelope with a pen furnished by accused when two Italian men approached on the near-by road. She immediately called to them "'Help me, grab him'". Thereupon accused took his writing materials from her, pushed her and made his escape. This public outcry and plea for assistance at the first opportunity immediately after accused's sexual assault upon her tends to support the inference established by Maria's testimony that the intercourse was without her consent. After accused's escape she told the Italians that accused had ruined her. Under the circumstances, Maria's denunciation of accused as her rapist, though made after he had departed the locus of the assault, corroborated her testimony relative to the corpus delicti of the offense and was admissible as part of the res gestae. The objection by the defense to proof of her statement was without merit (MCM, 1928, par. 115b; CM 218643, Bright, 12 B.R. 103,112; CM 228891, Bull. JAG, January 1943, sec. 395 (22); Wharton's Crim. Ev., Vol. 1, 11th Ed., sec. 520, pp. 823-829). Testimony as to the meager clothing worn by Maria and her physical condition immediately after the assault was also admissible in establishment of the corpus delicti and in further corroboration of her testimony of lack of consent (52 C.J., "Rape", secs. 97,98, pp. 1072,1073).

The medical testimony substantiated Maria's testimony that she was a virgin prior to the assault. The injuries to her sexual organs showed forcible perforation of a pre-existent hymen, and support the inference that the penetration which necessarily caused them was of sexual nature. The medical testimony also corroborates Maria's testimony as to the fact of penetration. Maria's identification of accused as her assailant was unequivocal and uncontroverted. This and the other circumstances in evidence justified the court in concluding that accused overcame Maria's resistance and had sexual intercourse with her by force and without her consent (MCM, 1928, par. 1148b). The Board of Review is of the opinion that the findings of guilty of rape are supported by the evidence.

5. There was testimony that the alleged rape occurred on 3 April, about 1500 hours and that about 1600 hours accused was acting peculiarly and did not recognize the acting first sergeant of his company. About 1730 hours on that day accused did not appear to be oriented and for that reason a medical officer sent accused to the 114th Station Hospital. The diagnosis and disposition made of accused at the hospital were not established. In weighing the evidence the court had before it other testimony showing that accused willfully and deliberately assaulted Maria, forcibly overpowered her desperate efforts to resist, and had sexual intercourse with her without her consent. After the act he furnished her with pen and paper in order to obtain her address so that he could see her again thereafter. When some men approached he snatched the pen and paper from her and ran away. There was no evidence of insanity and the presumption of sanity contemplated in paragraphs 63 and 112a, Manual for Courts-Martial, 1928, was operative. The court by reason of this presumption was empowered to adjudicate the extent to which the burden of inquiring into the mental condition of accused was imposed upon it (CM 193543, Kazmaier, Dig. Op. JAG, 1912-40, sec. 395 (36), p. 227). The apparent determination by the court that further inquiry was not necessary was justified. The court was also warranted in concluding from all the evidence that at the time of the commission of his offense

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Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
23 June 1945.

Board of Review

MTO 7095

UNITED STATES)

v.)

Private DAVID R. POWE)
(35 094 046), 3402d Quarter-)
master Truck Company, 27th)
Quartermaster Battalion.)

PENINSULAR BASE SECTION

) Trial by G.C.M., convened at
) Leghorn, Italy, 22 May 1945.
) Dishonorable discharge and
) confinement for life.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

HOLDING by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

(on leave) _____, Judge Advocate.

Gregory C. Sessions, Judge Advocate.

Henry C. Remick, Judge Advocate.

MTO 7095

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
23 June 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private David R. Powe (35 094 046), 3402d Quartermaster Truck Company, 27th Quartermaster Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved.

MTO 7095, 1st Ind.
23 June 1945 (Continued).

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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:

(MTO 7095).



ELLWOOD W. SARGENT
Colonel, J.A.G.D.
Acting Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 96, MTO, 16 Jul 1945)



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
3 July 1945.

Board of Review

MTO 7160

UNITED STATES)

v.)

Private OLIVER BAKER, JR.
(34 529 158), Company L,
370th Infantry Regiment.)

) 92D INFANTRY DIVISION

) Trial by G.C.M., convened at
) Rear Echelon, 92d Infantry
) Division, 28 April 1945.
) Dishonorable discharge and
) confinement for life.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 Oliver Baker, Jr. Company "L", 370th Infantry Regiment, did, at Viareggio, Italy, on or about 9 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Mario Lucchesi, a human being by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave 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, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg,

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

3. The evidence shows that about 2030 hours 9 March 1945, Mario Lucchesi (deceased), his wife, Ostilia Lucchesi, and his mother, Adele Romiti, were at their home at 84 Via Virgilio, Viareggio, Italy. Lucchesi and his wife were in bed and his mother was outside the house looking for her small son. A colored soldier approached the mother and pointed a rifle (or pistol) at her. She asked the soldier why he was pointing the weapon at her and he replied "'Via, via, go away'". (R. 5,10,11) The soldier continued to point the weapon at her and she became frightened and called Lucchesi, who came out to her. He tried unsuccessfully to reason with the soldier. With the weapon in his hand the soldier forced Lucchesi and his mother to walk to a section of the town "where no one was living". Lucchesi told the soldier "'Paesano it is not good to go in that area where no one is living'" whereupon the soldier struck him on the head with his helmet. The mother pleaded with the soldier not to force them to enter that area because it was mined, whereupon the soldier shot her in the left shoulder. She then ran toward her home calling for help and the soldier followed her. (R. 6, 7,10,11) Lucchesi's wife was standing outside the house when his mother arrived. The two women entered the house through the back door. The soldier forced his way through the front door and they left the house. Shortly thereafter a shot was heard. (R. 7,8,11)

Lucchesi's wife ran back to the house and found her husband lying on the small steps leading to the door. The soldier was standing over him with his weapon in his hands. She begged him not to kill her husband and he seized her arm and tried to drag her away but she freed herself and returned to her husband's side. The soldier then fired another shot and she ran and hid in the grass. After searching unsuccessfully for her the soldier returned to the house. (R. 8,11-14) She then heard Lucchesi say "'No Paesano, do not murder me'" and about five minutes later another shot was heard. The wife ran down the street in an attempt to find her cousin and the mother also went for assistance. When the mother returned Lucchesi was dead. (R. 8,9,12,13)

Lucchesi's wife did not know the type of weapon the soldier had but the mother thought it was a rifle (R. 5,12).

About 2140 hours 9 March, Captain Robert E. Lee, Medical Corps, 317th Medical Battalion, went to 84 Via Virgilio, Viareggio, Italy, and examined the body of Lucchesi. He testified that Lucchesi was dead and that "There was a gunshot wound that entered the forehead in midline and emerged at the base of the skull. There was another gunshot wound that went through the abdomen ***". Witness expressed the opinion that the immediate cause of death was the head wound and that the size of the weapon causing the injuries was "something less than a rifle". (R. 38)

About 2215 hours 9 March accused was apprehended by two military policemen approximately 150 yards from Lucchesi's home. He stated that "he had been to a house drinking, got lost from his outfit, and didn't know

where it was" and asked to be carried to a doctor. It was the opinion of the military policeman who apprehended accused that he had been drinking but was not drunk. Accused was able to get into a "jeep" without assistance. The military policemen found a "foreign make" pistol in accused's right rear pocket. Accused and the pistol were turned over to Lieutenant Ralph W. Rhodes. (R. 17-19,25,37) Later that night at the 317th Medical Clearing Station accused was staggering and talked incoherently. Lieutenant Rhodes testified that in his opinion accused was "quite drunk" but was not so drunk that he did not know what he was doing. When told he was speaking to an officer accused replied "Yes sir, I know it". (R. 21-23) Accused also stated to Lieutenant Rhodes "You are a Lieutenant and I am a Private" (R. 35). About 2300 hours while he was under guard outside of the clearing station accused stated that "he had shot a Paesano". Accused was at that time "sort of boisterous and talking a lot". He walked normally, was not staggering and was able to get into a "jeep" without assistance. It was the opinion of one witness that accused was then in "the sobering-up stage" and "knew the nature of his talk and his acts". (R. 34-36)

The following morning Lieutenant Rhodes informed accused of his rights under the 24th Article of War and asked him if he desired to make a statement. Accused denied any knowledge of the crime and also denied having seen Lieutenant Rhodes the preceding night. About 1530 hours that day Lieutenant Rhodes read Article of War 24 to accused and again informed him of his rights under this Article of War. He made the following voluntary statement which was introduced in evidence without objection:

"About 1400 hours myself and two more guys who I don't know by name we went to a whore house and a little boy was selling 'grappa.' We got a bottle so after we got that bottle we decided to take a walk and come down town. After we get in town we went to a man's house. We set down with him and his family and we ate some of his wife's birthday cake, and we bought some vino. We bought quite a bit, over two gallons of the stuff. We just set up and talked and set there quite a while and talked so I decided I'd go back into the camp. I started back into the camp. I got lost and I seen a man and I goes up to where he was at and I wanted to buy me another bottle to take back into camp with me. He told me where I might could get a bottle at. I goes on out to the house and I sees a man was in his front yard right in the door. I asked him about getting some vino. He told me he would give me a drink. I takes a drink and I tries to buy a bottle from him. I didn't have a bottle. He wanted me to put it in a bottle, so I tried to get him to let me have one and he wouldn't do it so I started on out of the yard cause he told me to go. He called me and I told he wasn't no buono, no good. He started walking in behind me. I didn't go in the house. I glanced around and I think he had something in his hand. I turns around and shoots him. I seen he

has one of those old axes or something in his hand. After I shot him I was going back to my camp and report it. I was picked up by the MP's. I was brought here to Military Police Headquarters" (R. 19,20; Ex. A).

Accused stated further that on the night of the homicide he "fired with" the weapon that was taken from him on that night by the military policemen (R. 21).

The murder of Lucchesi was the only homicide committed by a soldier which was reported to the military police in Viareggio on 9 March (R. 19,21).

The pistol taken from accused, and the three expended nine millimeter cartridge cases which were found at the scene of the homicide, were introduced in evidence without objection (R. 17-20,25).

The pistol and the three cartridge cases were forwarded for ballistics examination to the Criminal Investigations Division, Mediterranean Theater of Operations, United States Army (R. 19,21,24). Agent Charles M. Stewart, Criminal Investigations Division, a ballistics expert, fired three test cartridges from the pistol taken from accused. From a microscopic comparison of the cartridge cases found at the scene of the homicide and the test cartridge cases, he testified that in his opinion the evidence cartridges and the test cartridges were fired from the same weapon. (R. 23-26)

Accused testified that on the 8th or 9th of March he was transferred from the 365th Infantry to the 370th Infantry rest area. For nine or ten days preceding the transfer he had been on the front lines where he had received heavy artillery fire and when he went to the rest area he was nervous and "didn't feel so good". (R. 27) Accused remembered leaving the rest area on 9 March and going with some other soldiers to a house of prostitution where they

"met a kid and got some grappa. We left him there and goes to an Italian man's house and did quite a bit of drinking and had some of his wife's birthday cake. We stayed there until pretty late before I left" (R. 28).

Accused testified he also remembered starting back to camp but the next thing he remembered was waking up the next morning in the stockade. He did not remember shooting anyone, seeing Lieutenant Rhodes, or anything else that happened the preceding night. (R. 28-30,32)

Accused testified further that on the morning of 10 March he was taken to the office of Lieutenant Rhodes for the purpose of making a statement but that he did not make a statement at that time because he "didn't know any statement to make". He was then placed in a cell with other soldiers who told him it would be better for him if he made a statement. The military policemen had previously told him that he had shot someone and that they had his pistol, so he and the other soldiers "mapped up a statement together *** called the MP and the MP took me back to the office". (R. 28-30)

After being warned of his rights under Article of War 24 he made a voluntary statement (R. 20,27,29; Ex. A). He testified that that portion of the statement wherein he related that he had shot a man because the man was following him with an axe in his hand was not true (R. 20,32; Ex. A). About 25 days after he made the first statement he made another voluntary statement which was substantially the same as his first one. Accused testified that he made the statements because he "thought if I made out this statement it would be for my best, and then come in court and say I didn't know anything", and he also "thought if someone got after me with something and I defended myself, it would be self-defense". (R. 31-33) Accused testified further that "to a certain extent" he would not deny that he shot Lucchesi because he (accused) was so drunk on the night of the homicide that he did not remember whether he shot him or not (R. 31). Accused testified he owned a pistol similar to the one introduced in evidence, and that the military police took his pistol from him when they apprehended him the night of 9 March. He had carried the pistol for some time and was keeping it for a souvenir. He did not remember how many rounds of ammunition were in the weapon when he left the rest area on 9 March. (R. 25,30,32)

4. It thus appears from prosecution's evidence, corroborated by the pre-trial statement and testimony of accused, that at the place and time alleged accused killed Mario Lucchesi, the person named in the Specification, by shooting him with a pistol. Shortly preceding the homicide accused appeared at the home of Lucchesi and, armed with a pistol or rifle, forced him and his mother to walk to a place where accused struck him on the head with a helmet and shot his mother in the shoulder. Lucchesi's mother ran back to her home followed by accused. Shortly thereafter another shot was heard and Lucchesi was seen lying on the steps with his hand over his stomach. Accused was observed standing over Lucchesi with a weapon in his hand. Lucchesi's wife heard her husband pleading with accused not to murder him and then heard a shot. When the mother returned a few minutes later Lucchesi was dead. A medical officer who examined the body the night of the homicide, found a gunshot wound in the head and another in the abdomen. He expressed the opinion that the wound in the head was the immediate cause of death and that the size of the weapon employed was "something less than a rifle".

Although none of the witnesses who testified saw accused fire the fatal shot, it was clearly established that immediately after a shot was heard Lucchesi was seen lying on the ground and a soldier was observed standing over him with a weapon in his hand. Lucchesi was heard pleading with the soldier to spare his life and immediately thereafter another shot was heard. Shortly afterwards accused was apprehended approximately 150 yards from the scene of the homicide with a pistol in his right rear pocket. Later that night accused stated that he had shot a "paesano". The following day after being duly informed of his rights under the 24th Article of War, accused stated that the preceding night he had shot a man with the pistol which was taken from him by the military policemen. It was established by a ballistics expert that spent cartridge cases found at the scene of the homicide were fired from the pistol taken from accused when he was apprehended. No other

homicides by a soldier were reported to the military police at Viareggio on the night of 9 March. These facts, together with other circumstances in proof, establish accused as the assailant of Lucchesi. The fact that one witness thought the weapon used by accused was a rifle is immaterial. It was clearly established that the weapon from which accused fired the fatal shot was a pistol as alleged.

There is evidence that shortly prior to the commission of the homicide accused had been drinking. Accused testified that he was so drunk on the night of the homicide that he could not deny that he shot Lucchesi because all he remembered was leaving his camp, going to a house and drinking, and then waking up the next morning in the stockade. One witness testified that after accused was apprehended he was staggering, talked incoherently and was "quite drunk". Two other witnesses who observed accused about the same time testified that he had been drinking but that he walked normally and was able to get into a "jeep" without assistance. All three of the witnesses were of the opinion that accused was not so drunk that he did not know the nature of his acts. Accused's own testimony is the only evidence in the record that he was drunk at the actual time of the commission of the offense. The issue of intoxication was one of fact for determination by the court, which was clearly warranted in resolving the issue of drunkenness against accused (MCM, 1928, par. 126a; MTO 6869, Gregory).

Accused testified in effect that the pre-trial statement, which was admitted in evidence without objection, was based upon what he had been told by military policemen and that he made the statement because the soldiers in the cell with him advised him that it would be better for him if he made a statement. As a further motive for making the statement he testified he thought that it would be to his advantage to make one and then to come into court and to deny knowing anything. The admission of accused on the night of the homicide that he had shot a man and the fact that spent cartridge cases fired from the pistol taken from accused that night were found at the scene of the homicide tend to corroborate the major portion of the pre-trial statement. The pre-trial statement of accused was admitted in evidence without objection. There was no error in its admission.

Accused in the pre-trial statement asserted that he shot a man because the man had an axe and was following him. At the trial, however, accused testified specifically that this part of his statement was not true and was made solely for the purpose of establishing a plea of self-defense. No evidence of self-defense was offered at the trial and the circumstances in evidence definitely establish accused as the aggressor and preclude any theory of self-defense.

There is ample competent evidence warranting the court in concluding that accused willfully and deliberately shot Lucchesi with a pistol while the latter was lying on the steps begging accused not to murder him. Malice aforethought may be inferred from accused's deliberate, wanton, cold-blooded use of a deadly weapon in a deadly manner. The homicide was without legal provocation, justification or excuse. Accused was properly found guilty of murder as charged (MCM, 1928, par. 148a).

5. The charge sheet shows that accused is 25 years of age and was inducted 8 February 1943. He had no prior service.

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

Walter R. Jones, Judge Advocate.

Clevo L. Curious, Judge Advocate.

(on leave), Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army
25 July 1945

Board of Review

MTO 7141

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|---------------------------------|---|----------------------------------|
| U N I T E D S T A T E S |) | 92D INFANTRY DIVISION |
| |) | |
| v. |) | Trial by G.C.M., convened at |
| |) | Rear Echelon, 92d Infantry |
| Privates First Class SAM J. |) | Division, 25 May 1945. |
| ADAMS (34 841 272), and JOHNNIE |) | As to each accused: Dishonorable |
| R. HILL (34 301 397), both of |) | discharge, suspended, and con- |
| Company E, 370th Infantry |) | finement for 20 years. |
| Regiment. |) | MTOUSA Disciplinary Training |
| |) | Center. |

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

1. The record of trial in the case of the soldiers named above, having been examined in the Branch Office of The Judge Advocate General, MTOUSA, and there found legally insufficient to support the findings and sentences, has been examined by the Board of Review and held to be legally sufficient to support the findings and sentences.

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

ADAMS

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Sam J. Adams, Company "E", 370th Infantry, did, at Strettoia, Italy, on or about 6 April 1945, misbehave himself before the enemy, by failing to return to his unit which was then engaged with the enemy, after having been ordered to do so by Captain Raymond A. Zobel.

HILL

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Johnnie R. Hill, Company "E", 370th Infantry, did, at Strettoia, Italy, on or about 6 April 1945, misbehave himself before the enemy, by failing to return to his unit which was then engaged with the enemy, after having been ordered to do so by Captain Raymond A. Zobel.

Each accused 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 either accused. Each accused 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. As to each accused the reviewing authority approved the sentence, reduced the period of confinement to 20 years, ordered execution of the sentence as thus modified but suspended execution of the dishonorable discharge until the soldier's release from confinement, and designated the MTOUSA Disciplinary Training Center as the place of confinement. The proceedings were published in General Court-Martial Orders No. 190 (Hill) and 191 (Adams), Headquarters 92d Infantry Division, 12 June 1945.

3. The evidence shows that on the morning of 6 April 1945 the first platoon of Company E, 370th Infantry Regiment, of which both accused were members, was located in a defensive position on Hill Y in the vicinity of Forte dei Marmi, Italy. Accused were present with their platoon. The enemy was located on Hill Z about 600 yards away. The platoon received enemy fire from artillery, mortars and small arms and was alerted to move out for a further attack against the enemy. Both accused were informed by their platoon sergeant that the platoon would endeavor to move through the 1st Battalion and continue the attack. The platoon moved out from Hill Y after 1700 hours. About 1700 hours on that date both accused were found to be absent from their platoon. They did not have permission to be absent. (R. 6-8)

Technical Sergeant Robert E. Bazemore, Headquarters Company, Battalion Sergeant Major, 2d Battalion, 370th Infantry, testified that about 1830 hours on 6 April accused were brought to the battalion command post by military police. Bazemore asked accused what they were doing there. They replied that they had been to the aid station and, upon leaving, had been picked up by the military police and "brought to battalion". (R. 8,9) Bazemore testified as follows:

"Q And what did you tell them?

A I told them I had to send them back to their company.

Q And then what did they say to you?

A One of them said 'Sergeant I cannot go back on the Hill'.

Q Can you tell me which one of those individuals that you just touched told you that?

A No, sir.

Q Did the other individual say anything?

A No, sir; he did not say anything.

Q Did you say anything further to them?

A No, sir; after they told me that they could not go back up on the hill I called the adjutant" (R. 9),

"Q Did you order these men back to their Company?

A Yes, sir.

Q Will you repeat for the court and the record just what order you gave these men?

A I just told them that I had to send them back up to their company, sir.

Q No, I do not mean that, I mean tell me in your own words just what you told the men?

A I told them that they would have to go back to their company, sir.

Q How did you tell them - ?

A I told them to go back to their company, sir."

"Q What were the orders, as near as you can remember, that you gave to these men?

A I told them that I would have to send them back to their company, sir.

Q What did they say to you then?

A One of them said that he could not go back up on the hill.

Q Did the men understand your order?

A Yes, sir.

Q How do you know?

A Because I asked them.

Q You asked them what?

A I asked them they understand that they had to go back upon the hill.

Q And what did they say?

A They said that they could not go back.

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Q And that is what they said?

A Yes, sir." (R. 11)

Bazemore testified further that he then called Captain Raymond A. Zobel, the adjutant, who came and asked each accused what he was doing there. Bazemore testified further that Captain Zobel told accused that he "would have to send them back to their company". One accused (witness did not recall which one) stated to Captain Zobel that "he would have to go to the guard house because he could not go back upon the hill". The other accused remained silent. Captain Zobel then asked both accused if they knew that leaving their company and not going back was a court-martial offense and that "they could be court-martialed for refusing to go back". Accused then "said that they understood". Captain Zobel thereupon placed both accused in arrest and immediately sent them to the stockade. (R. 9,10,12)

On cross-examination the battalion sergeant major testified in part as follows:

"Q Was there any time lapse between the time that the accused made their statements to the Captain and the time that he told you to place them under guard and send them to the stockade?

A No, sir.

Q Were the men given a chance to change their minds before being sent to the stockade?

A Not after that, sir.

Q Were the men confined?

A Yes, sir" (R. 12).

Each accused elected to remain silent and no evidence was introduced by the defense (R. 13).

4. Two questions are presented for consideration: (1) Did Captain Zobel order each accused to return to his unit, as alleged? (2) Did each accused fail to return to his unit after having been ordered to do so by Captain Zobel, as alleged?

(1) Although accused are not charged with willfully disobeying the order of a superior officer in violation of Article of War 64, the following statement in the Manual for Courts-Martial with reference to the word "order" as used in that Article, appears to be pertinent considering the allegations in the instant case:

"The form of an order is immaterial, as is the method by which it is transmitted to the accused, but the communication must amount to an order and the accused must know that it is from his superior officer" (par. 134b, p. 149) (Underscoring supplied).

Although the statement by Captain Zobel that he "would have to send them back to their company" was not couched in the usual language of a direct order, the circumstances in evidence clearly show not only that this statement was intended by the officer to be a direct order but also that it was so understood by each accused. Both accused were found to be unauthorizedly absent from their platoon about 1700 hours, at which time the unit was about to move out in an attack. Both had been informed of the impending attack. Both were apprehended at the aid station and brought to the battalion command post. Bazemore testified in part that he told accused "to go back to their company" and that they replied "they could not go back". When Captain Zobel arrived he told accused he "would have to send them back to their company". He then asked accused if they knew that leaving their company and not going back was a court-martial offense and "that they could be court-martialed for refusing to go back". Accused then "said they understood". (Underscoring supplied).

In the opinion of the Board of Review the last quoted statement made by each accused to Captain Zobel, considered in light of the course of conduct previously pursued by each, clearly indicated that each accused fully understood that he was refusing to obey an actual order to return to his unit, and amounted to a declaration that he would persist in that refusal.

(2) The only other question presented is whether the act of Captain Zobel in placing accused in confinement prevented them from complying with the order to return to their unit. The question must be answered in the negative. Accused were not confined until each had definitely stated that he understood he "could be court-martialed for refusing to go back". Following this admission neither made any statement or movement indicating an intention to return. Further, their entire previous conduct indicated that they had no intention to return to their unit. It is well recognized that when an accused is ordered to perform some act which will necessarily involve a lapse of time, such as to report at a designated place at a specific time, or within a certain period, he can not be legally convicted of failing to obey the order, even though he declares his intention not to obey it at the time it is given, unless sufficient time for compliance is allowed. In the instant case, however, when Captain Zobel ordered each accused to return to his unit, accused were then and there under a duty to start immediately to join their organization. It would approach absurdity to maintain, under the circumstances of this case, that after accused stated they understood they could be court-martialed for refusing to go back, Captain Zobel should have allowed any definite period of time to elapse before accused were placed in confinement. When accused failed to take any action whatsoever toward effecting their return after receipt of the order, they thereby failed to return as ordered.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentences.

Edward W. Bergin Judge Advocate.

(sick) _____, Judge Advocate.

Henry C. Reuick, Judge Advocate.

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1st Ind.

Branch Office, JAG, MTOUSA, Board of Review, 25 July 1945.

To: The Assistant Judge Advocate General, MTOUSA.

For his information.



ELLWOOD W. SARGENT

Colonel, J.A.G.D.

Chairman, Board of Review

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
5 July 1945.

Board of Review

MTO 7189

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| U N I T E D S T A T E S |) | 91ST INFANTRY DIVISION |
| |) | |
| v. |) | Trial by G.C.M., convened at |
| |) | Cormons, Italy, 13 June 1945. |
| Private FREDERICK F. GREY |) | Dishonorable discharge and |
| (35 263 223), Antitank Company, |) | confinement for life. |
| 362d Infantry. |) | U. S. Penitentiary, Lewisburg, |
| |) | Pennsylvania. |

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 Frederick F. Grey, Anti-Tank, Company, 362d Infantry, did, in the vicinity of Palmanova, Italy, on or about 20 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Evelina Nardini.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 20 May 1945, Mrs. Evelina Nardini lived in the old fortifications of Palmanova, Italy, about one-half mile from that city, with her husband, her six-year old son Angelo Nardini, and four stepchildren including fifteen-year old Cesare (R. 6,7,11,12,24,25,33). Evelina first saw accused, a member of Antitank Company, 362d Infantry, about 1600 or 1700 hours, 20 May. She was in her home and accused was outside with her husband. (R. 6,12,35) Accused asked her to come to the window to give him a bag with which to buy groceries (R. 12). Evelina stepped back from the window. She testified that he wanted her to give him her hand so that he could come upstairs. She did not desire accused to come upstairs and did not assist him because she saw him winking his eye and making signs toward the bed. She also observed that accused was unable to maintain his equilibrium, was "weaving to and fro", and was "very drunk". (R. 12,13,20,21,26) Her husband apparently departed leaving Evelina alone in the house (R. 13,23). Accused then mounted a ladder, through a hole in the second floor, into Evelina's home (R. 13,25,26). The only other means of entrance was a dark, narrow stone staircase (R. 7). Accused was "very drunk", his eyes were affected and he was unsteady. He asked for wine and eggs, but although she had wine Evelina gave him none because accused made signs and winked at her. (R. 19-21,25) He again made signs toward the bed, took hold of Evelina's clothes and jerked her toward the bed (R. 13,20,26). Accused then emptied a bottle of oil and refilled the bottle with wine. Evelina jumped to the first floor through the hole by which accused had gained entrance, injuring her side and "flank". (R. 7,13,20,23,25,27) She was "very scared" and "understood that he was more than drunk" (R. 13,20,21,27). Crying out "Cesare" and "Angelo" she ran toward her son and Cesare who were about 50 meters away. Her injury impeded her running. (R. 13) Accused followed and overtook her. He walked and ran with her, and continually tried to pull her back. (R. 13,21,24,27-29) It was then approximately 1730 or 1800 hours (R. 24). He told her in Italian that "he was an American, very strong, 25 years old" (R. 21). The children called to her "What do you want?", but as accused was doing nothing at the time she told them nothing was happening but to watch her (R. 28). Accused pulled her ears and earrings saying that the latter were iron and he wanted to give her gold (R. 13). His pants were open. He put his hands on his penis and said something Evelina could not understand. Evelina pushed him away when he grabbed her arms, and endeavored to calm him. He then grabbed her again by the back, with one hand over her mouth, and threw her to the ground. She tried to shout but was not able to do so. She escaped and started to run. Angelo called to Evelina, "'come up here'". Accused caught her by the leg and again threw her to the ground. (R. 14,15,18,24,29) He held her by the throat, and with his his chest on hers, "with his right hand he worked up underneath". Evelina had been in her menstrual period for two days. (R. 14,22,28,29,33,35) Angelo and Cesare approached and Cesare caught accused by the leg. Accused kicked Cesare, slapped Angelo, caught him by the neck and threw him down, whereupon the two boys ran "back yelling for help". (R. 12-14,29,30,34) Accused hit Evelina on the leg, scratched her and struck her on the face with a rock (R. 16,22). Evelina resisted and struck him but he tore off her underwear, rolled up her skirt and put it over her mouth. Evelina testified variously that accused then "put it up into me",

"accomodated himself on top of me", "He came into me. He 'fucked me", "He came into my nature". She also testified that accused's penis was "more or less hard", "I felt it. It went in a little bit, but not entirely into the uterus". She felt as if she fainted but did not entirely lose consciousness. She did not consent to his actions and did not know whether or not he had an emission. (R. 14-16,18,24,35; Ex. A) Evelina further testified that he inserted his penis in her vagina, "but not very deep because we were continually wrestling" (R. 54,55). Evelina then liberated herself and accused ran away (R. 15,16,29,34). Evelina and her son then ran to the nearest house several hundred yards away (R. 7,16,23,24,30,34). They were admitted to the house by Mrs. Pia Durli, a woman Evelina had never seen before. Pia observed that Evelina was hysterical, crying and "trembling all over". She had her underwear in her hands, her hair was "mussed", her face was scratched and she was bleeding from her mouth and nose. Pia gave her water and coffee. Evelina told Pia that she had been attacked by an American soldier and recounted in broken words what had happened, exhibiting her undergarments and the injury to her leg. Evelina told Pia that the soldier "did not complete the act". Evelina testified that she told Pia she had been attacked by an American soldier who tried to do her some harm, but "held back" and did not tell Pia everything because "she did not want to get into a scandal". Blood was flowing down Evelina's leg. She told Pia of her menstruation, that she was afraid "to go back" and needed hospitalization. (R. 18-20,31,32) Evelina desired to be taken to the home of Joseph Tessarolo, a friend of her husband's (R. 16). Seeing that Evelina was not improving and was about to faint, Pia assisted her, as she was unable to walk, to Tessarolo's home. Tessarolo took Evelina to a civilian hospital in a wagon, Pia following on a bicycle. (R. 16,17,32,33) Pia testified that she requested a physician to disinfect Evelina but Evelina told the doctor, "'Internally it is not necessary because I know that the act was not completed'" (R. 33). Evelina also testified that she told some officers at the hospital that she told Pia that she did not know whether or not she had intercourse with the soldier because "I did not have the courage to say it. For me it is a great deal of shame" (R. 19). About 1400 hours on 21 May, a medical officer witnessed a pelvic examination of Evelina by a civilian doctor. The left side of her face was scratched and she had a contusion on her left thigh. There was no evidence of recent traumatism to the genitalia. (R. 8-11)

The investigation officer testified that he saw accused four times (R. 35). The day after the alleged offense he explained Article of War 24 to accused. Accused denied any knowledge of having had improper relations with Evelina. (R. 36,41) He traced the route he had taken the day of the assault, and stated that an old woman gave him wine and eggs. Thereafter three excited Italians met him on the road and turned him over to two sergeants. At that time he did not know what was the matter. (R. 38) Upon being told that Evelina's assailant was missing an eye tooth accused admitted that he was missing an eye tooth. Two days later the investigating officer took accused and four other enlisted men to the vicinity of Evelina's home where her 15-year old son identified accused. Accused did not recognize the boy or the locality. (R. 37) Two days thereafter accused was again returned to the same vicinity and on this occasion Evelina identified him as her assailant. Accused denied having seen her before. Thereafter when seen in

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the stockade accused denied knowing anything of the matter. Once again accused was taken to Evelina's home and on this occasion he remembered Evelina and recognized her son. In a subsequent conversation with the investigating officer accused changed his story and admitted that he had tried to have intercourse with Evelina, but stated he was so drunk "he didn't know exactly whether he did or did not". Accused denied ever having been inside Evelina's home. (R. 37-39) Accused cross-examined Evelina in the presence of the investigating officer, asking her if she left her home with him willingly, to which she said "'no'". He also asked her if she lay down on the ground willingly with him and she responded "no, she fought him off". (R. 41)

Accused testified that on the evening of 20 May 1945:

"I got a pass with Private Holbrooks and Brewer to the town of Palmanova where we went to get some cognac. On the way back we met three girls who invited us into their house for dinner. After dinner the girls left and we finished drinking the cognac. We went out and got two bottles of grappa and went back to that place. On the way back we met Sergeants Brown and Thornton up the road a piece. I went up the road a little ways and went into a lady's house and she gave me two eggs. She fried the two eggs for me and I ate them and thanked her for them and went onto the road on the way back. So this woman was by the house and she grinned at me and I walked up to her and spoke to her and she started to walk with me down the path. We stopped and she asked me what I was and I told her I was an American soldier. I put my hand on her cheek and put my arm around her. Then she laid down and rolled over and I laid down and rolled over, and I got up and went back and I met Sergeant Blakeslee who took me to the British who had me locked up until the lieutenant came after me" (R. 43).

He further testified that he had been in the army over three years, had never before been in trouble and did not have intercourse with Evelina because he was too drunk (R. 43). Accused and his two companions bought and drank two quarts of cognac and two quarts of grappa in town the afternoon of 20 May (R. 47,50). Accused walked back toward camp on the road by the fortifications. He saw Cesare standing on a bank but did not see Angelo. He saw Evelina standing by a fence near a house about 50 feet from the road. Evelina "grinned" at him, accused left the road, approached her and said, "'Grindato'", which means that "you want to have intercourse with the woman". Evelina walked toward him and they went down a lane together. They did not go to the house, but stopped on the lane where Evelina asked accused if he was English or American. They then went down a path by a bank and accused put his arm around Evelina and laid her on the ground. Evelina rolled over and accused rolled over. He did not know whether or not she removed her pants, or whether her dress was pulled up. The buttons

on accused's trousers were unbuttoned but he did not remember if his penis was exposed. He testified he intended to have intercourse with Evelina. Accused then arose and walked to the main road. (R. 43-47,49) The incident occurred at 1600 or 1730 hours (R. 50). Accused testified further that both of them were willing to indulge in intercourse, that he tried but did not have intercourse with Evelina because he was too drunk (R. 43,46,49). He did not kick Cesare and did not scratch or choke Evelina (R. 46,47). When Cesare identified accused at the investigating officer's request, accused did not remember him, and did not admit knowing Evelina because he was "scared and nervous" (R. 47,48). He denied telling anyone that Evelina had intercourse with him willingly, denied having raped her, having thrown her to the ground or having kicked, choked, scratched or struck her (R. 48,49). When asked if the incidents were "pretty hazy" in his mind, accused testified "When I am drinking I get so drunk" (R. 50). Accused also testified that he did not have a "gun" (R. 51).

Technical Sergeant William D. Woodall, a member of accused's organization, testified for the defense that accused came to the Antitank Company in June 1944. Witness had been with the organization since that time. Accused had been with witness' platoon "all through combat", and had missed no combat time to witness' knowledge. Accused had been a good soldier for witness, and had not been in any trouble. (R. 51)

Joseph Tessarolo testified in rebuttal for the prosecution that he had known Evelina for three and a half to four years and had known her husband for about six years. He testified further that Evelina's general reputation for truth, veracity, and chastity in the community in which she lived was good, that she was a "very serious woman", "Serious and honest". (R. 53,54)

4. It thus appears from the evidence that at the place and time alleged accused had unlawful carnal knowledge of Evelina Nardini, the woman named in the Specification, by force and without her consent. Accused entered Evelina's home through a hole by means of a ladder and by gestures and taking hold of her clothes, indicated a desire to have sexual intercourse with her. She made her escape by jumping through the hole and injured herself in the jump, which injury retarded her in running. Accused followed and overtook her. Despite her resistance, attempts to dissuade him from his evident purpose and her cries for help, he attacked her and forcibly threw her to the ground. Holding his hand over her mouth, accused endeavored to have intercourse with her and physically repulsed Evelina's young son and stepson when they sought to intervene, whereupon the boys ran for help. Evelina escaped again, but accused caught her, again threw her to the ground, and struck and scratched her. He tore off her underwear, rolled up her skirt and placed it over her mouth, and inserted his penis partially into her vagina, despite the fact that she had been in her menstrual period for two days. Evelina continued to struggle and again made her escape. Joining her young son, she made her way with him to the nearest house, to which she was admitted by Pia Durli.

Evelina told Pia that she had been attacked by a 25-year old American soldier who attempted to harm her, but that "he did not complete the act".

Evelina was hysterical and disheveled, and was carrying her underwear in her hands. Her face and mouth were bleeding and blood from her menstrual flow was visible on her legs. Evelina's statements to Pia fell short of asserting affirmatively that she had been subjected to a completed, forceful, involuntary act of sexual intercourse. She justified her limited story by her assignment as reasons therefor the presence of her child and her fear of a scandal when talking to Pia, and the shame involved when talking to officers at the hospital. Her statement that she had been attacked, however, was in itself a prompt complaint, under the circumstances, that the attack upon her was sexual in nature, and supported the inference that there had been penetration. Her statement that the act had not been completed corroborated her testimony that penetration was partial and the inference that accused did not have an emission, but did not tend to show that there was no penetration at all. The complaint likewise supported the inference that the partially completed coitus was without her consent. Though not made in accused's presence the complaint came shortly after the assault and, under the circumstances, at the first place and opportunity available to Evelina. Proof of the complaint was admissible in corroboration of Evelina's testimony relative to the corpus delicti of the offense and as part of the res gestae (MCM, 1928, par. 115b; CM 218643, Bright, 12 B.R. 103,112; CM 228891, Bull. JAG, January 1943, sec. 395 (22); Wharton's Crim. Ev., Vol. 1, 11th Ed., sec. 520, pp. 823-829). Pia's testimony as to the disheveled and damaged condition of Evelina's clothing and person, as well as her state of excitement and hysteria, shortly after the assault, was also admissible in establishment of the corpus delicti and in further corroboration of Evelina's testimony of her lack of consent (52 C.J., "Rape", secs. 97,98, pp. 1072,1073).

Testimony was volunteered at the trial by Pia, without objection, to the effect that at the hospital Evelina told the attending physician that internal disinfection of her body was unnecessary as the act had not been completed. If admissible, that statement tended only to corroborate Evelina's testimony at the trial that penetration was partial and her testimony establishing the inference that accused did not have an emission. An emission is not an essential element of the offense charged (MCM, 1928, par. 148b). The initial complaint had already been made, and the statement at the hospital cannot be construed as part thereof. Since it bore upon a matter which is not of essential importance, the admission of the testimony was not prejudicial to the substantial rights of accused. It was in fact favorable to accused.

The testimony and pre-trial statements of accused substantiated Evelina's testimony to the extent that there was an encounter of sexual nature between them. The testimony of accused and Evelina was in accord on the point that accused was drunk at the time of the assault. Drunkenness is not a defense to the offense of rape (MCM, 1928, pars. 126b,148b; 52 C.J., "Rape", sec. 51, p. 1038; 22 C.J.S., "Criminal Law", sec. 66, pp. 130,131). So far as accused's condition of intoxication may have related to his impotence, and therefore his physical inability to commit so much of the physical act of intercourse as is necessary to constitute rape, his assertion

of his drunkenness ran principally to lapse of memory of the events which allegedly occurred. His testimony does suggest, however, that he was too drunk to perform the sexual act. Evelina's testimony that his penis was "more or less hard", and that it penetrated her, though not completely, posed an issue of fact which the court was justified in resolving against accused (52 C.J., "Rape", sec. 51, p. 1038; sec. 102, p. 1075).

Accused's denial in his testimony and pre-trial statements that an act of intercourse occurred, although both parties were willing, and his testimony that Evelina voluntarily lay on the ground and "rolled over", was in direct conflict with her testimony that accused penetrated her person sexually by force and without her consent. The issue of consent thus being presented, the rebuttal testimony of Joseph Tessarolo to establish Evelina's reputation for chastity was material and admissible on that question and as to the probability of her story (Wharton's Crim. Law, Vol. 1, 12th Ed., sec. 732, p. 993). Evelina's testimony that there was a penetration, though not a complete one, was positive, affirmative and repeated. Any penetration, however slight, is sufficient carnal knowledge. There was ample basis for the court to conclude that penetration did occur. Her testimony as to the physical injuries she received were amply corroborated by the medical testimony and that of Pia and Cesare. The latter's testimony as an eyewitness of part of accused's attack upon her support the inferences that there was a penetration by force, without her consent and despite her resistance, protests and cries for help. From all the circumstances in evidence, the court was warranted in concluding that accused had carnal knowledge of Evelina by force and without her consent (MCM, 1928, par. 148b). The Board of Review is of the opinion that the evidence supports the findings of guilty of rape.

5. The record shows that after testimony by prosecution witnesses, the court recessed and on its own motion convened at the locus of the assault. The personnel of the court, the personnel of the prosecution and defense, the accused, the reporter and the prosecutrix were present. The prosecutrix was interrogated by the prosecution and members of the court, and repeated the incidents connected with the assault, pointing out where they occurred. There was no material variance between the testimony of prosecutrix in the court room and at the "view". There was no objection by the defense to such questioning, and defense counsel did not request the right of cross-examination. The practice of "viewing the premises" by a military court is authorized procedure (AW 31). However, the examination of witnesses at the scene is improper and a highly dangerous practice not approved or commended. In the instant case, however, there was sufficient previous competent testimony to support the finding of guilty without that elicited at the "view". Under the circumstances of this case, examination of the prosecutrix at the "view", although a procedural error, did not injuriously affect the substantial rights of the accused (AW 31,37; Bull. JAG, August 1944, sec. 395 (1)).

6. The charge sheet shows that accused is 26 years of age and was inducted 23 January 1942. He had no 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

Walter R. [unclear], Judge Advocate.
Cleopatra Sessions, Judge Advocate.
(on leave), Judge Advocate.

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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 Privates Glenn W. Drain and Lloyd D. Farnell (the deceased), members of the 91st Quartermaster Company, were together during the evening of 2 June 1945, and that about 2215 or 2220 hours Drain left Farnell outside the door of a house at 63 Via Gorizia, near Cormons, Italy (R. 6-8).

About 2100 hours 2 June accused, a member of Company K, 363d Infantry Regiment, and a Private Zupp, also known as "Napoli", went to a "house of tolerance" at 63 Via Gorizia, Cormons. They had previously arranged to take Antonietta Schiesaro, one of the prostitutes in the house, to a dance. (R. 8, 17-19, 31, 32) When they arrived at the house "Napoli" became engaged in a fight with some soldiers who were downstairs. Accused went upstairs in Antonietta's room, and thereafter left the house with Antonietta and "Napoli" to go to the dance. After they had gone a short distance some cries were heard coming from the house and they returned to see what was happening. "Napoli" again became engaged in an altercation with the soldiers who were downstairs and accused, who had a pistol in his hand, ran upstairs. (R. 19, 20, 28, 34) In the hallway upstairs were several soldiers, one of whom (Farnell - the deceased) had been in the room of Libera Beucci, another prostitute, about ten minutes before. Accused ordered all the soldiers to leave and threatened them with his pistol, whereupon all left except Farnell who ran into the room of Maria Cucher, another prostitute, locked the door, grasped Maria closely and held her in or near a closet. (R. 20, 21, 29, 32-35, 43; Ex. A) Accused demanded that the door to Maria's room be opened and when this was not done, he knocked down the door and entered the room. Maria and Farnell, who was holding her, moved near the end of the bed and stood there motionless. Accused fired his pistol and wounded Farnell who had his arm around Maria. (R. 21, 26, 29-31, 43, 44) Maria was not positive but believed that Farnell made no effort to prevent accused from shooting him, and that he did not advance toward accused (R. 43, 44). She felt "some heat" from accused's weapon and ran out of the room screaming (R. 29). Antonietta, who had followed accused upstairs, saw him fire one shot and ran into her own room which was about three or four meters from Maria's room (R. 20-22, 29). She then heard a second shot after which accused and "Napoli" entered her room. She left the house reluctantly for the dance after accused pointed a pistol in her back. In the opinion of Antonietta and Libera accused was drunk. Both girls saw Farnell lying on the floor in Maria's room, where he was "moaning from his pains". He was bleeding and vomiting. Maria was with him and was crying "He is killed. He is wounded". Maria remained with the wounded soldier until he was taken away by another soldier. (R. 22-26, 28-30, 32, 34; Ex. A)

About 2230 hours 2 June, a surgical technician went to 63 Via Gorizia where he found Farnell lying on his back on the floor in an upstairs room. Farnell was delirious, had no radial pulse, and had "blood on his back and a hole - a penetrating hole" which was "To the right of the spinal column above the small of the back". (R. 11-13) The technician administered first aid and transported Farnell to the 316th Medical Battalion clearing station where he was examined by a medical officer. The officer testified that Farnell

had a wound in the back and one on the left forearm just below the elbow, and expressed the opinion that the wounds were caused by small arms fire. Farnell received plasma treatment both at the clearing station and while en route shortly thereafter to the 56th Evacuation Hospital. (R. 7,9-13)

Another medical officer testified that Farnell arrived at the 56th Evacuation Hospital about 0100 hours 3 June, and was operated upon immediately. During the operation "a bullet was removed from the inner abdominal wall of the front of the abdomen". Farnell died about 0530 hours, 3 June, while on the operating table. The cause of death was "the massive hemorrhage in the abdomen from the laceration or severing of the large vessel in the abdomen, the inferior vena cava". (R. 14-16) Witness was of the opinion that "The severe laceration of the vena cava was caused by a small arms bullet which had entered the abdomen from the patient's back", and that the bullet causing "a perforating wound" on the left forearm just below Farnell's elbow, entered "somewhere to the left of the rear" of Farnell (R. 16,17).

During the pre-trial investigation, Antonietta identified accused from a line-up composed of accused and five other prisoners from the stockade, "as the one who was in their house" at the time of the shooting (R. 35,36).

On 10 June the investigating officer explained to accused his rights under the 24th Article of War. No promise of leniency or reward was offered. Accused was informed that he need not make a statement and that any statement he made would be used against him at his trial. He then voluntarily made the following statement, which was introduced in evidence without objection:

"We started from Camp to Cormons Saturday afternoon June 2, 1945 between three and four o'clock. Then we went through the compound on up town. And Zupp stopped in at a barber shop for a shave, and I went on up to a girls house that I know here in Cormons, and told him I would be back in about fifteen minutes. And when I came back, we left the barber shop and went back to the compound and eat chow, eat supper at the Quarter Master mess hall. Then we left there and went straight to the whore house. Then he talked to one of the whores down there about something, and then we went on around the house and got in line. And then he said, lets go get drunk, we we went to the Quartermaster bar in the compound, and I had the boy that I bought the pistol from buy me two dollars worth of tickets and I gave them to Zupp, and he went in and ordered us some drinks. And I asked a guy what he would take for an Italian pistol he had, and he said he did'nt want to get rid of it. So the other guy that was with him said he had one that he would sell me for twenty dollars, we went to his room and he showed me the pistol, and I bought it, and I think that he gave me six shells. And we left his room and went back to the bar and we joined Zupp. He had us some drinks ordered so we sat there and drank for about between and hour and an hour and

a half. And then we went to the stockade to see some of the boys that were from our Company. We left there and went back to the whore house. Am not sure, but I think we went right into the whore house and ran all the boys out that were in there, and then went back outside and Zupp started a fight with the boys that were in the back of the house, and I had the pistol in my hand and told all the boys to leave. Then I went around front and someone came up in a peep and I told them to turn around and get the hell out of there. And went back around back and went into the whore house and I asked the old man if their was anybody upstairs, and he said yes. So I went on upstairs, and Zupp was having a fight with the boys up there. I think I stepped over against the wall and told a few boys that were upstairs to leave and this one guy did'nt want to leave, so him and Zupp was having a fight and he fought him all the way downstairs. And when he came back upstairs we went into his girls room, and he pushed her down on the bed and was trying to fuck her. And I think I went out of the room and gave the pistol to him and he went downstairs and did something, and then came back upstairs. And while he was gone I went into the fat girls room and tried to screw her, but she would'nt let me. She was getting ready to go to the dance, or somewhere, and I went out of the room into the hall and met Zupp and he gave me the gun back, and I went into another room where their was a boy with a whore, and told him to leave. So he came out of a clothes cabinet with the whore, and started walking towards me and said he was going to take the gun away from me, and I told him to stop and get out or I would shoot. But he kept coming towards me so I shot him once, and he still kept coming towards me so I think I shot him again, then he fell on the floor, then Zupp came running in the room and started kicking him in the face, and in the body, and I think he hit him a couple of times with his fist. Then he went and got his girl by the arm and brought her out in the hall, and then he asked me for the pistol, and he went back downstairs and when he came back up he did'nt have the pistol, he said someone had taken it away from him, and then he grabbed his girl by the arm and started downstairs with her, and said come on lets go to the dance. So we all three started down the road and went over the railroad tracks, and got on another road and went to the Medic's dance, and they would'nt let us in, so we went into the show building and the MP's ran us out of there. And he went back to the Medic that was on guard at the door and started arguing with him. I left him there and went back to the compound to a crap game and shot a few dice, and then went to the gate and stood there and watched them stop Zupp in the middle of the road with the whore. And they searched him for a gun but they did'nt find any. So I

think I stood at the gate for awhile and then went back to the crap game, and after I lost all my money but two dollars and a half, I went back to the gate and stayed their for awhile and then headed for camp" (R. 37,38; Ex. A).

Technical Sergeant Raymond E. Love, accused's platoon sergeant, testified for the defense that accused was a rifleman and, in witness' opinion, had an excellent combat record (R. 40). Staff Sergeant Harley R. Boucher testified for the defense that he was accused's squad leader, that accused was a very good soldier and had been wounded in combat.

Accused elected to make the following unsworn statement:

"One thing about the sworn statement I made there. When I shot the boy in the room, the boy and the girl was together. He came towards me with his hand in his pocket and the girl had hold of his arm. He said he was going to take my gun away from me and kill me with it. He still didn't have any gun and the girl still had hold of his arm. I don't know whether he ever took his hand out of his pocket or whether he had anything in his pocket. He was still coming straight towards me. I got scared and told him to go away or I would kill him, and he kept coming so I shot" (R. 42).

4. It thus appears from the evidence, including accused's pre-trial statement and unsworn statement in court, that at the time and place alleged accused killed Private (First Class) Lloyd D. Farnell, the person named in the Specification, by shooting him with a pistol. Shortly before the homicide accused went with a friend to a house of prostitution for the purpose of taking one of the prostitutes to a dance. Accused's companion engaged in altercations with other soldiers in the house and accused, with a pistol in his hand, ordered the soldiers who were upstairs in the house to leave. All the soldiers left except Farnell who ran into a room with one of the prostitutes and locked the door. Accused knocked down the door and entered the room. Farnell, who had been standing in or near a closet with his arms around the girl, moved to a position near the bed. As Farnell stood there with his arm still around the girl, accused shot him with his pistol. Farnell was taken to a hospital where he died early the following morning. He received two wounds, one in the back and one below the left elbow. A medical officer was of the opinion that a hemorrhage in the abdomen resulting from the wound in the back was the cause of death.

Although none of the witnesses testified that Farnell was the person shot by accused, it was established by the evidence that about 2215 hours on 2 June he was at 63 Via Gorizia, a house of prostitution, where accused on that night shot a soldier and left him lying in an upstairs room. About 2230 hours that same night Farnell was found wounded, lying in an upstairs room in that house, and was taken to a hospital where he died a few hours later. These facts, together with the other circumstances in evidence, warrant the conclusion that Farnell was the soldier shot by accused.

In his pre-trial statement and unsworn statement at the trial accused asserted, in effect, that he shot Farnell because, after being ordered out of the house by accused, the victim walked toward accused and asserted he was going to take accused's weapon from him and kill him. Accused admitted, however, that Farnell did not have a weapon in his hands and that he did not know whether he had anything in his pocket. The evidence shows that accused forcibly entered a locked room where Farnell was and fired two shots from his pistol. One of the bullets entered Farnell's back and the other struck the rear of his left forearm. When he was shot Farnell was tightly clasping a girl and medical evidence established that the point of entry of each wound was from the rear. There is no testimony that Farnell was armed. Moreover, the testimony of the eyewitness does not substantiate accused's assertion that Farnell was advancing toward him or threatening him. Circumstances in proof show that accused was not in any danger whatever from deceased and that accused was in fact the aggressor throughout. The purported conduct of his victim as stated by accused, does not establish legal justification or excuse for the employment of a dangerous weapon in assaulting deceased. The court was warranted in concluding that accused did not shoot deceased in self-defense (MCM, 1928, par. 148a).

There is ample competent evidence warranting the court in concluding that accused willfully and deliberately shot Farnell with a pistol as alleged. Malice may be inferred from accused's deliberate, wanton, cold-blooded use of a deadly weapon in a deadly manner and his callous indifference to the life of his victim. The circumstances exclude any theory of legal justification or excuse and the evidence is devoid of any circumstances of extenuation or mitigation (NATO 2880, Watson). Accused was properly found guilty of murder as charged.

There is evidence that shortly before the homicide and immediately thereafter accused was drunk. But there is no evidence in the record that he was so drunk at the actual time of the commission of the offense that he could not entertain the specific intent requisite for the offense of murder. It is significant that the defense offered no evidence that accused was intoxicated, and although he asserted in his pre-trial statement that he had been drinking he did not claim that he was drunk. The issue of intoxication was one of fact for determination by the court, which it was warranted in resolving against accused (MCM, 1928, par. 126a; MTO 6869, Gregory).

5. The charge sheet shows that accused is 20 years of age and was inducted 9 December 1943. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence to death or imprisonment for life is mandatory upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil

nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Edward K. Berg Judge Advocate.
Thomas R. Brown , Judge Advocate.
Henry C. Reusch , Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army
2 August 1945

Board of Review

MTO 7275

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

v.)

Private First Class DAVID
SANDERSON (34 741 434),
Company B, 365th Infantry.)

) 92D INFANTRY DIVISION

) Trial by G.C.M., convened at
) A-T Company Command Post, 365th
) Infantry, 31 May 1945.
) Dishonorable discharge, suspended,
) and confinement for five years.
) MTOUSA Disciplinary Training
) Center.

OPINION by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

Original examination by Wilson, Judge Advocate.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class David Sanderson, Company "B", 365th Infantry, did, near Fornaci, Italy, on or about 6 February 1945, desert the service of the United States by absenting himself without proper leave from his platoon with intent to avoid hazardous duty, to wit: Infantry combat duty against the enemy.

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He pleaded not guilty to the Charge and Specification. He was found not guilty of the Charge and Specification, but "'GUILTY' of Violation of the 96th Article of War, with the Specification: 'In that Private First Class David Sanderson, Company "B", 365th Infantry, having received a lawful order from Captain Clyde A. Worthen to move out with his Company, the said Captain Worthen being in the execution of his office, did, at Fornaci, Italy, on or about 6 February 1945, fail to obey the same'". No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, ordered it executed but suspended execution of the dishonorable discharge until the soldier's release from confinement, and designated the MTOUSA Disciplinary Training Center as the place of confinement. The proceedings were published in general court-martial orders No. 220, Headquarters 92d Infantry Division, 25 June 1945.

3. The evidence shows that on 6 February 1945, Company B, 365th Infantry, of which accused was a member, was in the vicinity of Fornaci, Italy (R. 6,7,10,15). The company was preparing to move forward at night to relieve Company I, 365th Infantry, which had taken ground in the vicinity of Lomma di Sotto and which was under enemy fire (R. 6,10). Accused's company commander, Captain Clyde A. Worthen, explained the mission to his platoon leaders and platoon sergeants and they in turn explained it to their squads. The company commander personally "checked" on accused and told him that he "would go" and told accused's platoon leader, platoon sergeant and squad leader to "check on him to be sure that he went". (R. 6,10,20) Accused's acting platoon sergeant ordered accused to "roll up". Accused asked what "he was to do" and went to see his platoon leader who told accused "he had to move out with the platoon, and he would try to get transportation, but if he couldn't get it, he would have to move out with the platoon" (R. 10,11,20). The reason the platoon commander mentioned transportation was because accused's ailments prevented him from keeping up with his platoon and in previous instances when transportation was not available to move the platoon, accused's acting platoon sergeant had been ordered to stay back and bring him up (R. 11).

Accused did not "move out" with his platoon and was not given permission to absent himself from the platoon at that time. When accused's company commander last saw accused on 6 February he was sitting on the ground with his equipment. (R. 6,11,17,18,20,21) Accused's company commander said to his platoon leader "Alright, leave him there and let's move out" and that he would prefer charges against accused (R. 20). Accused was not with his platoon between 6 February 1945 and 12 February 1945, about which latter date he was returned to the company command post under armed guard (R. 6,11,18).

On or about 6 February 1945 accused appeared at his company supply room, which was in the rear and not under enemy fire, with his combat equipment. Upon being asked by the supply sergeant why he was there, he said he could not keep up with the company. The supply sergeant told him he had "better go up to the Company". (R. 7-9) The supply sergeant then said,

"No, I will send you to the mulehead and you report to Sergeant Jackson, who is in charge there; after you get there, contact the First Sergeant and see if he will permit you to stay there and send the rations up to the CP, and, if not, you will have to go up to the Company, but I can't give you permission to stay at the mule-head(')" (R. 7).

Accused was limping and in the opinion of the supply sergeant he "couldn't get around very well" (R. 9). Accused had been limping since before his unit left Fort Huachuca (R. 9). Accused went to the mulehead which was within range of enemy fire (R. 8,9). Subsequent to the cessation of hostilities in Italy accused had made all company formations (R. 18,21).

Accused's former company commander testified for the defense that he had known accused for about two years, did not consider him capable of serving in the Army because of mental and physical limitations, and on several occasions had recommended that he be "Section-eighted" but no action was taken (R. 12). Witness testified further that when his company was alerted for overseas movement accused was transferred from his company under a "weeding out" process because of "physical and mental limitations". Accused was slow to understand an order but always obedient when he understood, and it had not been necessary to take any disciplinary action against him. Accused did not mix with other soldiers and was a misfit. (R. 12,13)

Accused testified:

"At the time that we stopped to take a break up there before moving up toward Barga - that day before I went to the doctor, and that night we moved out and I told the Company Commander that my feet were frozen and I couldn't do any walking on them at all. I got all my clothes and equipment and came out and told my Platoon Lieutenant that I couldn't make it, and he told me to go back in the house. I also told him that my leg was hurting" (R. 15,16).

Accused testified further that he told the doctor at the aid station that his leg was hurting him and that his feet were frozen and the doctor gave him some pills and told him to return to the company (R. 16).

4. The only question in this case requiring consideration here is as to the legal effect of the findings. Accused was charged with desertion in violation of Article of War 58 by

"absenting himself without proper leave from his platoon with intent to avoid hazardous duty, to wit: Infantry combat duty against the enemy".

The court found accused:

"Of the Specification and the Charge: 'NOT GUILTY', but 'GUILTY' of Violation of the 96th Article of War, with the Specification: 'In that Private First Class David Sanderson, Company "B", 365th Infantry, having received a lawful order from Captain Clyde A. Worthen to move out with his Company, the said Captain Worthen being in the execution of his office, did, at Fornaci, Italy, on or about 6 February 1945, fail to obey the same'".

A court-martial is authorized in its findings to except one or more words or figures from the specification and, where necessary, to substitute others provided, among other limitations, that such action

"does not change the nature or identity of any offense charged in the specification" (MCM, 1928, par. 78c; MTO 7029, Morrow).

The court not only found accused not guilty of desertion, the offense with which he was charged, but found him guilty of failure to obey a lawful order of a superior officer in violation of Article of War 96, an offense with which he was not charged. A court-martial may legally find an accused guilty of an offense different from that with which he is charged only when the offense of which he is found guilty is lesser than and necessarily included in the offense charged (MCM, 1928, par. 78c; Bull. JAG, February 1943, sec. 416 (13)). An offense is lesser than and included in another offense when in proving the original offense the elements of the second offense are necessarily proved. To prove the offense alleged in this case it was necessary to establish (a) that accused absented himself without leave; (b) that he intended, at the time of absenting himself or at some time during his absence, to avoid hazardous duty as alleged; (c) that his absence was of a duration and was terminated as alleged; and (d) that the desertion was committed under the circumstances alleged (MCM, 1928, par. 130a). It is obvious, therefore, that in proving the offense alleged it was not necessary to establish that accused received an order from Captain Worthen to move out with his company and that he failed to obey such order. It follows, therefore, that the offense of which accused was found guilty was separate and distinct from and not included in the offense with which he was charged. Such a finding constitutes fatal error.

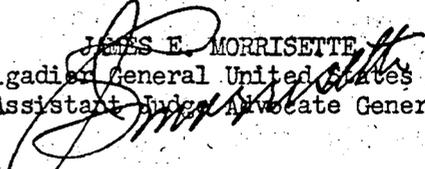
5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Edward K. [Signature] Judge Advocate.
[Signature] Judge Advocate.
Henry C. [Signature] Judge Advocate.

MTO 7275 1st Ind.
Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
2 August 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. There is transmitted herewith for your action under the fifth subparagraph of Article of War 50 $\frac{1}{2}$ the record of trial by general court-martial in the case of Private First Class David Sanderson, 34 741 434, Company B, 365th Infantry, together with the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. I concur in the opinion of the Board of Review and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the findings of guilty and the sentence be restored. There is inclosed herewith a form of action designed to carry this recommendation into effect should it meet with your approval.


JAMES E. MORRISETTE
Brigadier General United States Army
Assistant Judge Advocate General

(Findings and sentence vacated. GCMO 111, MTO, 12 Aug 1945)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

AGO 512, U. S. Army
30 August 1945

Board of Review

MTO 7339

UNITED STATES

v.

Private SYLVESTER L. THORNE
(32 747 683), Company L,
133d Infantry.

) 34TH INFANTRY DIVISION

) Trial by G.C.M., convened at
) APO 34, U. S. Army, 3 July 1945.
) Dishonorable discharge, suspended,
) and confinement for five years.
) MTOUSA Disciplinary Training
) Center.

OPINION by the BOARD OF REVIEW

Sargent, Irion, Sessions and Remick, Judge Advocates.

Original examination by Frieze, Judge Advocate.

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private Sylvester L. Thorne, Company "L", 133rd Infantry, while attached to the 509th Replacement Company, 108th Replacement Battalion, did, without proper leave, absent himself from the 509th Replacement Company, 108th Replacement Battalion, near Quarrata, Italy, from about 4 February 1945 to about 10 February 1945.

Specification 2: In that Private Sylvester L. Thorne, Company "L", 133rd Infantry, while attached to the 509th Replacement Company, 108th Replacement Battalion, did, without proper leave, absent himself from the 509th Replacement Company, 108th Replacement Battalion, near Quarrata, Italy, from about 16 February 1945 to about 20 May 1945.

He pleaded not guilty to and was found guilty of the Charge and Specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave 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 ten years. The reviewing authority approved the sentence but reduced the period of confinement to five years, ordered the sentence executed as thus modified but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the MTOUSA Disciplinary Training Center as the place of confinement. The proceedings were published in general court-martial orders No. 619, Headquarters 34th Infantry Division, 9 July 1945.

3. The evidence was as follows: It was stipulated by the prosecution, defense and accused that during the period 4 February 1945 through 20 May 1945, the 509th Replacement Company, 108th Replacement Battalion, was situated near Quarrata, Italy (R. 4). It was further stipulated that the extract copies of the morning report entries of the official morning report records of that organization, for the dates 4 February 1945, 11 February 1945 and 16 February 1945, insofar as they pertained to accused,

"may be received into the evidence and read into the record, to be given the same force, weight and affect as would have the original entries if they were received in the evidence".

The entries were as follows:

"4 February 1945 Thorne, Sylvester L. 32747683 Pvt Co L. 133rd Inf, 34th Div.
Above EM reld fr atchd for R&Q only to atchd for dy & adm fr units indicated, status AWOL 1400 hours.

11 February 1945 Thorne, Sylvester L. 32747683 Pvt Co L. 133rd Inf, 34th Div.
Above *EM reld fr atchd for dy & adm fr units indicated, status AWOL to atchd for R&Q only 1030 hours.

16 February 1945 Thorne, Sylvester L. 32747683 Pvt (Co L. 133rd Inf, 34th Div)
Above *EM reld fr atchd for R&Q only to atchd for dy & adm fr units indicated, status AWOL 0900 hours." (R. 4,5)

It was also stipulated that accused was returned to the 509th Replacement Company, 108th Replacement Battalion, 20 May 1945 (R. 5).

No witnesses were called by the prosecution, no evidence was presented by the defense, and accused elected to remain silent (R. 6).

After the stipulations as to the morning report entries and accused's return to military control were offered in evidence by the prosecution, the court reserved its ruling thereon and requested the trial judge advocate to obtain the Staff Judge Advocate's opinion as to whether "the form WDAGO from which the details of the stipulation was obtained" constituted an official morning report, and whether it would be necessary to take depositions even should the court determine to admit the "proffered stipulation" in evidence (R. 5). The court adjourned and upon reconvening the following day (4 July 1945), the prosecution announced that a letter of "instructions" had been received by the trial judge advocate from the Acting Staff Judge Advocate. The defense stating that there was no objection thereto, the prosecution read the letter to the court (R. 5,6). It was as follows:

"HEADQUARTERS, 34TH INFANTRY DIVISION
OFFICE OF THE STAFF JUDGE ADVOCATE
A.P.O. 34, U. S. ARMY

HCK/wcs
3 July 1945

SUBJECT: Questions Propounded by General Courts-Martial,
U.S. vs Sylvester L. Thorne.

TO: Trial Judge Advocate.

1. The court presently sitting requested you to obtain the opinion of the Division Staff Judge Advocate on 2 points namely:

(1) Does the WD AGO Form from which the details of the stipulation was obtained, constitute an official morning report within the purview of paragraph 30, page 143 of the Manual for Courts-Martial as amended?

(2) The second point raised was, in view of the absence of witnesses in this case notwithstanding that it may be determined the preferred stipulation be admitted in evidence that depositions be taken from pertinent witnesses to determine the facts and circumstances surrounding the absence of the accused, the dates alleged in the respective specifications of the Charge.

2. I will answer the first point raised. The WD AGO Form referred to is a duly authenticated true copy of the original morning report and is prima facie

sufficient to authenticate that paper as a copy of the original record, in accordance with paragraph 116 a, the Manual for Courts-Martial, page 119.

3. The absence of witnesses or depositions is not fatal to a case where there is sufficient evidence before the court to reach a decision. Defense Counsel has had long experience as counsel in this Division and it is presumed that he has given professional counsel to the accused. The court must be aware of the fact that it is not always possible to obtain witnesses from great distances from organizations widely scattered; and while it is always a good thing to have the personal testimony of witnesses in court, they must not overlook the laws of evidence with regards to authenticated documents which are also evidentiary.

/s/ Harry C. Kait
/t/ HARRY C. KAIT,
Major, J.A.G.D.,
Actg. Staff J.A.

The law member then ruled, subject to objection, that the "offered stipulation" would not be received in evidence. There was an objection to this ruling and the court, by majority vote in closed session, overruled the ruling by the law member and the stipulation was admitted in evidence. The prosecution and defense then rested and made oral arguments to the court. (R. 6)

The court closed and upon re-opening the President announced that

"The court in closed secret session requests directions from the convening authority on whether or (not) there is sufficient evidence or whether or not there should be depositions taken. This request for instructions is based in part upon the fact that the accused having pleaded not guilty, stipulation with regard to the extract morning report amount to a confession and the convening authority is referred to paragraph 126b, page 136, Manual for Courts-Martial (1928), which has been considered by the court. The court will be adjourned." (R. 7)

The court then adjourned at 1000 hours, 4 July (R. 7). The court reconvened the same day at 1130 hours. The prosecution announced that "instructions" had been obtained from the convening authority in that the Chief of Staff had been consulted, and had written "a memo direct to the president of the court." After the President read the communication and passed it to the law member, the former directed the trial judge advocate to read it to the court. The communication then read to the court was as follows:

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Hq. 34th Inf. Div., Office of the Chief of Staff, APO 34,
U. S. Army. 4 July 1945.

MEMO: TO: President of the Court.

It is apparent that the extract copy of a morning report has been accepted by the accused and his counsel and its contents are not questioned.

This can be accepted as an admission that witnesses can be made available who will testify to the facts contained in such extract.

The court is required by their oath to administer justice and cannot become involved in technicalities.

The court should proceed with the case.

/s/ John D. Forsythe,
JOHN D. FORSYTHE,
Colonel, G.S.C.
Chief of Staff."
(R. 8)

The court then closed, found accused guilty of the Charge and Specifications thereunder, and adjourned at 1145 hours (R. 9).

4. The evidence, consisting entirely of stipulations, shows that accused was absent without leave for the periods alleged, and under circumstances other than those herein discussed such evidence would be legally sufficient to support the findings and sentence. The question requiring consideration is whether the reading of the Acting Staff Judge Advocate's letter and the Chief of Staff's communication to the court before it made its findings, injuriously affected the substantial rights of accused within the meaning of Article of War 37.

Paragraph 126b of the Manual for Courts-Martial, 1928, page 136, provides as follows:

"b. Stipulations.--As to facts.--The parties may make a written or oral stipulation of the existence or nonexistence of any fact. A stipulation need not be accepted by the court, and should not be accepted where any doubt exists as to the accused's understanding of what is involved. A stipulation which practically amounts to a confession where the accused has pleaded not guilty and such plea still stands; and a stipulation of a fact which if true would operate as a complete defense to an offense charged should not ordinarily be accepted by the court. In a capital case and in other important cases a stipulation should be closely scrutinized

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before acceptance. The court is not bound by a stipulation even if received. For instance, its own inquiry may convince the court that the stipulated fact was not true. The court may permit a stipulation to be withdrawn. If so withdrawn, it is not effective for any purpose.

"As to testimony and documentary evidence.—The parties may stipulate that if a certain person were present in court as a witness, he would give certain testimony under oath. See 52c in this connection (stipulation which warrants denial of continuance). Such a stipulation does not admit the truth of such testimony, nor does it add anything to the weight of the testimony. Such stipulated testimony may be attacked or contradicted or explained in the same way as though the witness had actually so testified in person. The principles as to acceptance and withdrawal of stipulations as to facts apply here; but the court may be more liberal in accepting stipulations as to testimony.

"Subject to the same observations as to stipulations as to testimony, stipulations may be made as to the contents of a document." (Underscoring supplied).

The following cases are pertinent to the issue involved:

216707, Hester, XI B.R. 145 (Dig. Op. JAG, 1912-40, Sup. I, sec. 395 (55)). During the trial of an officer for absence without leave and drunkenness, a circular letter announcing a mandatory policy of dishonorable discharge in cases of enlisted men referred to general courts-martial, was distributed to the members of the court after they had deliberated without result for one hour and twenty minutes the day before. Within 30 minutes thereafter accused was found guilty and sentenced to dismissal. It was held that this procedure constituted an error injuriously affecting the substantial rights of accused and vitiated both the findings and the sentence. In this case the Board of Review in its opinion stated that:

"It is the function and duty of the court-martial alone to pass upon questions arising during the trial ***, to arrive at findings on the guilt or innocence of the accused based upon the evidence of record, and upon conviction to impose a legal, appropriate and adequate sentence. No higher authority, or for that matter no authority whatever, should be consulted by, or should directly or indirectly interfere with or influence the action of the court in its closed sessions. This principle is fundamental and its violation strikes at the very root of justice and opens the door for undue influence." (Underscoring supplied).

(156620, Dig. Op. JAG, 1912-40, sec. 395 (39)). During the trial of this case upon completion of the evidence and final argument, the court was

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closed and, upon reopening without having made any findings, adjourned for the stated purpose of "consulting higher authority on certain questions". The record failed to disclose the nature of these questions, but the only question involved was whether or not accused was guilty of the offense charged or of a lesser included offense. Upon reconvening the court, without disclosing what advice it had received or from whom, immediately proceeded to find the accused guilty. It was held that a court-martial is not permitted, in closed session, to consult any outside authority and that under the circumstances the error was fatal to the conviction.

(125676, Dig. Op. JAG, 1912-40, sec. 395 (53)). During the trial of this case, while the accused was challenging several members of the court, a short address was given to the court by the division judge advocate which was not made a matter of record. It was held that inasmuch as the record was silent as to the subject of the "short address" it was an unavoidable inference from the record that the address was in connection with either the law or the facts in the case and that the proceeding was so contrary to the orderly administration of military justice that it constituted prejudicial error.

(272457 (1945), Bull. JAG, March 1945, p. 88). During the trial of this case four unsigned depositions were offered in evidence and the convening authority by official communication directed that the depositions be admitted in evidence. It was held that to permit the reviewing authority to rule on the admissibility of evidence during the course of the trial would authorize the usurpation of the powers vested in the court by Congress, and that his unauthorized interference with the functions of the court in itself constituted prejudicial error.

The court was not bound to accept the stipulations offered in evidence by the prosecution (MCM, 1928, par. 126b, supra). It is evident that when it sought advice from the Staff Judge Advocate, the court entertained some doubt not only as to whether it should accept the stipulation regarding the morning report entries but also whether the evidence, even though the stipulation be admitted, was legally sufficient to establish accused's guilt of the offenses alleged. The letter from the Staff Judge Advocate stated in practical effect that the stipulated entries were derived from a duly authenticated true copy of the original morning report, that such evidence was legally sufficient to establish the unauthorized absences of accused, and that it would not be necessary to call witnesses or to take depositions. This letter undoubtedly influenced the court in its deliberations on both the question as to whether the stipulation should be accepted and on the final question of accused's guilt.

It is also apparent that when it sought advice from the convening authority, the court had some doubt as to whether the evidence then before it was sufficient to establish accused's guilt of the offenses alleged. The court asked "whether or (not) there is sufficient evidence or whether or not there should be depositions taken" (Underscoring supplied). By its use of the word "sufficient" the court clearly meant "legally sufficient" to sustain findings of guilty. The reply of the Chief of Staff plainly indicated

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that in his opinion the evidence was legally sufficient to establish accused's guilt of the offenses alleged and he so informed the court. He stated in substance that accused and his counsel had accepted and not questioned the contents of an extract copy of the morning report, that such action could be accepted by the court as an "admission" by accused that witnesses would testify in accordance with the facts contained in the extract copy, that the court should administer justice and not "become involved in technicalities", and that it "should proceed with the case". The statement that the court should not become involved in technicalities and should proceed with the case, clearly shows that it was the further opinion of the Chief of Staff that depositions or additional evidence was not required. Obviously, if the procurement of depositions was deemed necessary, the court could not proceed with the case until such depositions were made available to the court. That this communication influenced the court in its findings is inescapably indicated by the fact that the court, which one and one-half hours before had questioned the sufficiency of the evidence when seeking advice from the convening authority, immediately closed after the communication was read to it without requiring or receiving additional evidence, and found accused guilty of the offenses alleged. Only 15 minutes elapsed between the reconvening and final adjournment. During this short period the court considered the "memo" from the Chief of Staff, closed for consideration of the findings, reopened to receive evidence of one previous conviction, heard read the personal data pertaining to accused, closed for consideration of the sentence, and reopened and announced the sentence.

It was the duty of the court to decide both the interlocutory question as to admission in evidence of the stipulations and the final question of accused's guilt, of its own volition and upon its independent judgment without advice or assistance from any outside authority. Under the circumstances of this case and in view of the foregoing authorities, it is the opinion of the Board of Review that the consulting of other authority by the court and the reading to it of the Acting Staff Judge Advocate's letter and the Chief of Staff's communication, constituted fatal error.

The fact that the stipulated evidence may have been legally sufficient to sustain the findings of guilty does not modify the damaging effect of the error committed in this case. To hold otherwise would be to hold that the principles enunciated in the Hester and other cases (supra) would be applicable only in those cases where the legal evidence was not, as a matter of law, sufficient to sustain findings of guilty. If in any case the evidence is legally insufficient to sustain findings of guilty, there would be no reason for determining whether the findings in that case were influenced by outside authority. It is noted that in case 272457 (1945), Bulletin of The Judge Advocate General of the Army, March 1945, page 88 (supra), it was held that the unauthorized interference with the functions of the court in itself constituted prejudicial error.

5. In view of the foregoing, it is unnecessary for the Board of Review to express an opinion on any question suggested under Article of War 31 and

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paragraph 5ld, Manual for Courts-Martial, 1928, as to the finality of the ruling of the law member on the non-admissibility of the stipulation (R. 6).

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

Edward K. Hayes, Judge Advocate.
William B. Gray, Judge Advocate.
Cyrus C. Sessions, Judge Advocate.
Henry C. Reuick, Judge Advocate.

MFO 7339

1st Ind.

Branch Office of the Judge Advocate General, Mediterranean Theater of Operations, U. S. Army, APO 512, U. S. Army, 30 August 1945.

To: Commanding General, Mediterranean Theater of Operations, U. S. Army, APO 512, U. S. Army.

1. There is transmitted herewith for your action under the fifth subparagraph of Article of War 50 $\frac{1}{2}$ the record of trial by general court-martial in the case of Private Sylvester L. Thorne, 32 747 683, Company L, 133d Infantry, together with the opinion of the Board of Review in this Branch Office that the record of trial is legally insufficient to support the findings of guilty and the sentence.

2. Extract copies of morning reports of accused's organization were offered in evidence, under a stipulation by the prosecution, the defense and accused, that they "may be received into the evidence and read into the record, to be given the same force, weight and affect as would have the original entries if they were received in the evidence". It was likewise stipulated that accused was returned to his organization 20 May 1945, as alleged in the second specification. It abundantly appears that the stipulations were voluntarily entered into by accused and his counsel with full knowledge of their meaning and effect. No other evidence was introduced by the prosecution or by the defense and accused elected to remain silent.

3. Under these circumstances the unauthorized absences of accused and his guilt as alleged in the Charge and Specifications were fully established by competent and undisputed evidence. The court should have proceeded without further inquiries to its findings and sentence.

Instead, however, apparently at the suggestion of the law member,

it requested the judge advocate to obtain the Division Staff Judge Advocate's opinion concerning unnecessary features of the stipulation and the proper procedure. Thereafter the prosecution, after the defense had stated there was no objection, read the Division Acting Staff Judge Advocate's reply to the court's inquiry. There is no contention that the reply contained misleading information or coercive instructions. In spite of this advice the law member persisted in rejecting the stipulation but he was overruled by a majority of the court in closed session. After argument the court was closed and again requested advice, this time from the reviewing authority "on whether or (not) there is sufficient evidence or whether or not there should be depositions taken". The reply of the chief of staff to the reviewing authority is quoted in the Board's opinion. It was read by the trial judge advocate without objection, before or after the reading, by the defense.

4. It is conceded by the Board of Review that the stipulated testimony was competent and legally sufficient to sustain the findings of the court. It is not contended that there was any sufficient reason why the court under all of the circumstances should have rejected the stipulated testimony. I think it is perfectly clear that it should have been received, and as I understand the Board's opinion it is simply to the effect that it is improper and per se prejudicial error of procedure for a court to ask and for a reviewing authority to give advice to the court on the competency, admissibility or legal sufficiency of evidence.

In arriving at this conclusion the Board of Review relies upon the authorities cited in the opinion. In only one of the cases cited (CM 216 707, Hester) is the opinion of the Board of Review available in this office, but the others are sufficiently digested to make their meaning and scope clear. Reluctantly, because, although I am willing to concur generally in the conclusions reached in these cases, I think their language is unnecessarily broad, I am compelled to agree that they support to a very great extent the opinion of the Board of Review in this case.

5. In arriving at this conclusion I have not overlooked the opinion in the case of Second Lieutenant Albert A. Davis (CM 253 209), the strength of which is impaired by the subsequent opinion in the case of Second Lieutenant Vincent J. Mankowski (CM 260 479), in which the opinions in the Hester and Hoffman cases are referred to with approval.

6. The charge frequently appearing in the public press and sometimes heard on the floors of Congress that members of courts-martial are too often subjected to coercion by reviewing authorities constitutes perhaps the most serious challenge to existing court-martial procedure, a procedure which, in my opinion, is necessary and essential, without substantial change or modification, to the maintenance of discipline in the Army. Next to leadership the power of punishment is the most efficient and is an equally essential means of maintaining discipline. The present system will endure

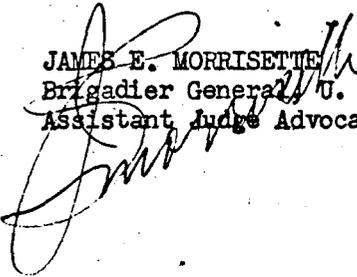
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so long as it deserves and retains the confidence of the American people, and no longer. Under such circumstances, even the appearance of coercion must be avoided. The Chief of Military Justice in this section and four members of the Board of Review, all highly intelligent and well trained lawyers and loyal officers, are convinced that this record of trial discloses coercion. In my opinion it is clear that no coercion was intended and, although the advice of the staff judge advocate and the chief of staff was unfortunately phrased, I think in substance both communications clearly stated the applicable law and rule of evidence. I cannot, however, deny that under all of the circumstances they do create a suspicion of coercion and undue interference with the deliberations and conclusions of the court. Records of trial should be free of every substantial appearance of coercion of the court by higher authority, and even though this guilty soldier will thereby escape punishment, I think it to the interest of orderly and proper administration of military justice that the procedure in this case be condemned.

Under these circumstances and for the reasons stated above, I recommend that, in accordance with the Board of Review's opinion, the findings of guilty and the sentence be vacated and that all rights, privileges and property of which the accused has been deprived by virtue of the findings of guilty and the sentence be restored. There is inclosed herewith a form of action designed to carry this recommendation into effect should it meet with your approval.

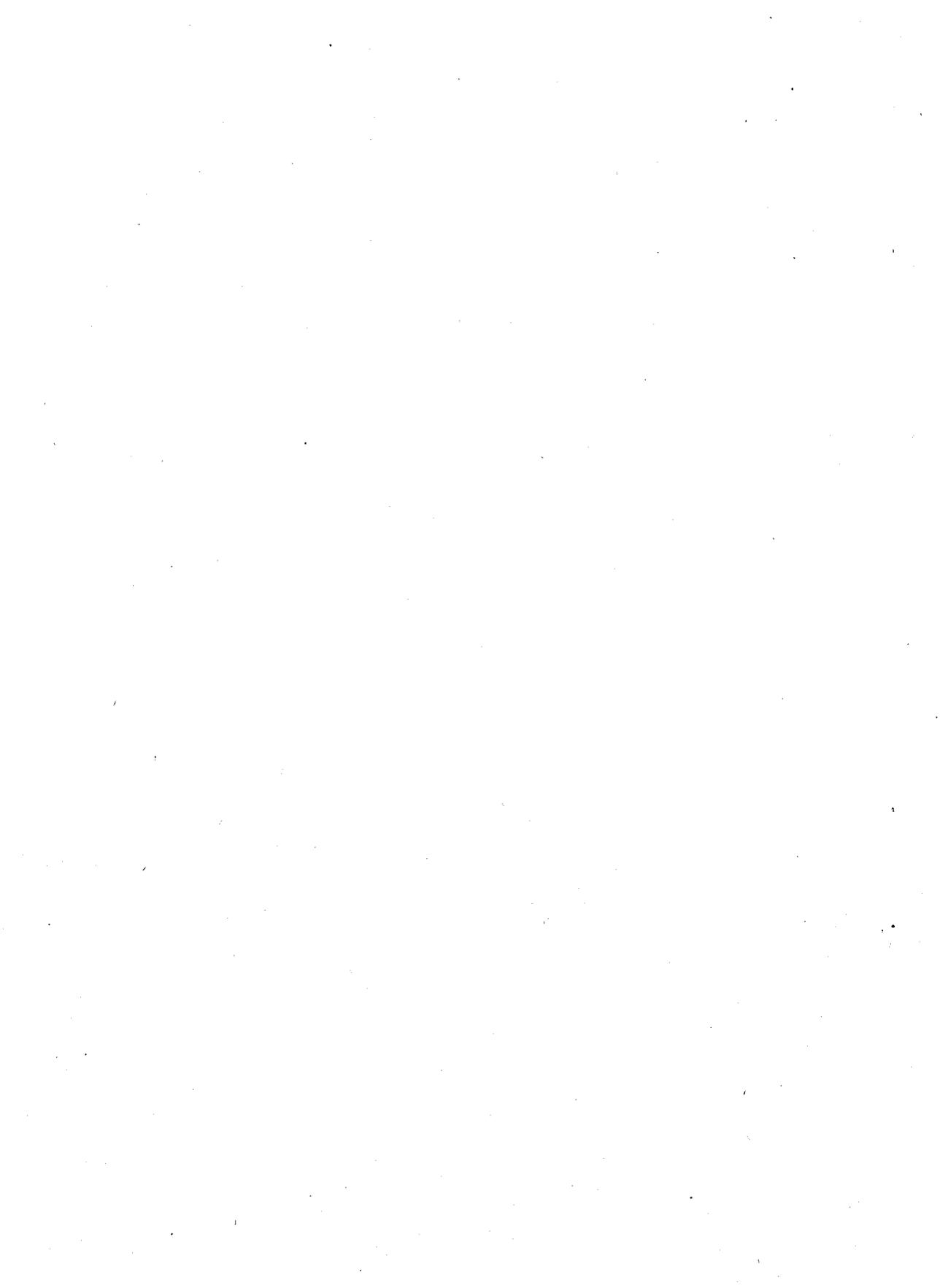

JAMES E. MORRISETTE
Brigadier General, U. S. Army
Assistant Judge Advocate General

2 Incls:

- Incl 1 - Form of action
- Incl 2 - Record of trial

(Findings and sentence vacated. GCMO 117, MTO, 7 Sep 1945)

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Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army
1 August 1945

Board of Review

MTO 7378

UNITED STATES)

v.)

Private THOMAS STEWART)
(35 268 059), Service Company,)
87th Mountain Infantry.)

10TH MOUNTAIN DIVISION

) Trial by G.C.M., convened at
) Cividale, Italy, 16 July 1945.
) Dishonorable discharge and
) confinement for life.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

REVIEW by the BOARD OF REVIEW

Sargent, Irion and Remick, 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 (then Private First Class)
THOMAS STEWART, Service Company, 87th Mountain Infantry
did, at or near Arabba, Italy, on or about 4 July 1945,
forcibly and feloniously, against her will, have carnal
knowledge of Rosa Dauru.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, 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 4 July (1945), Company I, 87th Mountain Infantry Regiment, was stationed at Passo Pordoi, Italy, for a week of mountain training (R. 6,21). About 1100 hours on that date Staff Sergeant Myril C. Young, Company I, met accused, a member of Service Company, 87th Mountain Infantry Regiment, on the mountain and drove down the valley with him, on the east side of the mountain, to a village villa (R. 6,10,11,21). They visited three bars, where Young drank wine and accused drank beer and after lunch, about 1300 or 1400 hours, they started back up the pass toward Young's company area. Accused, who was driving the jeep, was dressed in combat boots, "OD slacks, OD shirt" without necktie, and an "Eisenhower jacket", and was wearing a pair of black suede, wool-lined gloves which Young had loaned him. (R. 6-11; Ex. 1) They stopped at a bar for a glass of wine and again at a second bar, in the little village of Pieve di Livinallongo where Young had more wine and accused had a cup of coffee (R. 7). They left Pieve at about 1530 or 1600 hours and drove three to five miles up the road to a bar in the Albergo Bosco Verde, where they stayed 20 or 30 minutes (R. 7,11,13). From there they drove up the road toward the pass (R. 7). Accused stopped the jeep twice on the way to the company area, the first time being at a point about five miles from the inn. Young noticed some cattle along the road. (R. 7,8,10-13) Accused left the vehicle, walked back down the road a short distance and returned to the car in eight or ten minutes or less. He said something to Young which the latter did not understand, got in the jeep, drove up a "couple of switchbacks" and stopped again. (R. 8,10,12) At that point in the road there was no town, but there were many small shelters along the road for cattle or sheep in case of a storm, and one house, in which a cattle-herder lived with his daughter and little son (R. 12). Accused again dismounted and as he went across a ditch he told Young that if anyone passed by and asked any questions, accused had gone to relieve himself (R. 8;12).

Candido Dauru, a bricklayer, and his 12-year old daughter Rosa Dauru, of Rocca Pietore (Italy), which was about half an hour's walk from Pordoi, on 4 July were watching their cattle about 500 meters from their house and about 20 meters from the Pordoi autostrada (R. 13,14,18,20). Between 1600 and 1630 hours both Candido and Rosa saw two soldiers, whom Rosa identified as American, drive up the autostrada in a jeep and stop near them (R. 14,15,18,19). Candido saw them looking at him and glancing at his daughter and the cattle (R. 19). Rosa saw one soldier dismount from the vehicle, look at her, and re-enter the automobile (R. 15,18). Candido saw them start their car and proceed to "another zig zag portion of the road" about a kilometer away, where the motor was stopped (R. 19,20). Candido estimated that the distance from his house to where the jeep stopped the second time was between 400 and 500 meters (R. 20; Court's Ex. 1). Meanwhile he had sent his daughter Rosa back to the house to make him some coffee (R. 14,15,19).

Rosa testified that as she was preparing the fire for the coffee the door was opened and accused appeared (R. 15,17). He said something she did not understand and

"was putting his hand on the ground. He was putting his hand on his knee, then on the inside of his elbow and then on his

cheek. He was making those motions, and I didn't understand what he was trying to tell me. (Indicating Motions)" (R. 15).

He offered her cigarettes but she did not accept them. He then took her by the wrist and "pulled" her about half a kilometer away from the house to "a small bank, near a small brook, under some bushes", where there was a little grass. She tried to "holler" and call her father but accused put his hand over her mouth, preventing her from doing so, and continued to pull her. (R. 15-18) Then she testified, he

"took me and put me under the bushes, and was holding me by the wrists and pulled out his knife and wanted to cut me over here on my inside arm".

Rosa said to him "'You are going to kill me, you are going to kill me'", and when he saw that she was afraid he put his knife in his pocket. Accused laid her on the ground "eagle-ways", that is, spread out "like an eagle with his wings and legs". (R. 15,16) She tried to get up "but he was strong" and kept knocking her down. He then pulled up her dress and pulled down her bloomers. She tried to prevent him from removing her clothes and attempted to call her father. Accused tried to take his knife out again, unbuttoned his jacket and belt, unbuttoned his pants and pulled them down below his hips. Then, as she was "laying down eagle-ways", he knelt between her legs and

"laid himself on top of me and he was laying thus for about 10 minutes. I had a very bad pain and was trying to call my father, but he kept putting his hand on top of my mouth. My father wasn't able to hear me because he was about a kilometer's distance. He was on top of me for about 10 minutes. I had a very bad pain in between my legs. I was trying to get up and he kept pushing and knocking me down by hitting me on my shoulder and he was putting me in position all the time." (R. 16)

Rosa further testified that accused hurt her "by putting his secret inside of my secret", which "made my secret bleed". Then, after he arose, he "cleaned his secret off with my bloomers because his secret was full of blood". After he had buttoned his pants, buckled his belt and buttoned his jacket, he told her to remain there on the bank until he left, saying "'No no, li li' (there there)", which she understood. (R. 16,18) She was with accused about 20 or 25 minutes (R. 17). After he left she remained there about two minutes and then went directly to her father. She was crying and her face was pallid and frightened. She told her father everything that had happened. (R. 16,17) Candido testified that he saw his daughter at 1645 hours, after "she was molested". "She had a frightened look on her face and she was crying." He took her directly to Pordoi. (R. 19)

Rosa positively identified accused at the trial as her assailant and also as the man she saw with another soldier "in the annex of the Albergo Savoia at Pordoi that evening". She described him in detail as follows: he was

blond and had "sort of wavy hair"; he wore a pair of "OD" pants, a very short jacket with the 10th Mountain Division patch, and a pair of light, polished shoes; he had "a badge with a rifle and wreath under it" and under this two small medals, which she believed were green; he had a pair of gloves, almost black, in his right hip pocket; he had a small knife which she saw him put in his pocket. (R. 17,18)

Young, who had been left sitting in the jeep when accused dismounted the second time, testified that he (Young) walked around the vehicle several times, relieved himself, looked at the scenery and then got back in the car and "dozed off". When accused returned he woke Young up, started the jeep and remarked "'I got a piece of tail'", "'but it wasn't very good'". When Young asked him why, accused "said it was a little young or a little small or words to that effect". Young thought accused was "just bragging". They proceeded up the pass to the company area arriving there about 1630 or 1700 hours. (R. 8) Young admitted that he drank 12 or 15 glasses of wine that afternoon, that it was necessary to stop the vehicle once so that he could "throw up", that he was "half asleep" several times and did not "catch" what accused said to him, and that he did not remember everything that happened (R. 8-12). He saw Rosa Dauru when she came up on the mountain about 1730 hours 4 July. "Her father seemed rather excited and she appeared to be crying--had been crying". (R. 9)

Captain Alexander Jones, Jr., commanding Company I, 87th Mountain Infantry Regiment, arrived at Passo Pordoi shortly after 1700 hours 4 July (R. 21) and at the Albergo Savoia Annex found an Italian "yelling and shaking his stick and in general *** very much excited". The Italian's daughter, accused, Sergeant Young and several others were present. When questioned by Captain Jones the Italian said that "his daughter had been raped by a soldier down east of the pass". During the questioning accused interrupted several times and asked "'What's all this about?', 'Who does he accuse?', 'What is he saying?'" Captain Jones testified that

"at one point in my questioning, I noticed what appeared to be two drops of blood, fresh blood, on the floor between the legs of the girl, as she was standing there, and as soon as I saw that I immediately asked her who had done the act, who had raped her". (R. 22)

Accused was hatless, was in "OD's", wore a combat jacket with a 10th Mountain Division patch, wore combat boots with a light tan polish, and had a pair of gloves (which belonged to Young and which Captain Jones identified as Exhibit 1) in his right hip pocket (R. 22,23). Accused's trousers were removed and a grass stain found on the right knee (R. 23,24; Ex. 2). No examination was made of his private parts or thighs (R. 24). After Captain Jones warned accused that he had a right to remain silent and that if accused believed he was implicated "he had better remain silent than say something that would be prejudicial to his interests", Captain Jones

"questioned him as to his activities, where he had been prior to when I had first seen him, and he told me he

had gone down to Cantesea, a little town west of the pass, to get a tire repaired, and Sergeant Young had been with him the whole time. He told me that after repairing the tire by about 1300 he had started back to the pass and had had several drinks along the way at different bars, roadside bars" (R. 23).

Rosa's father having insisted that a civilian doctor examine her (R. 24), Doctor Giuseppe Kostner, official doctor of Livinallongo, was called for that purpose at about 1900 hours 4 July to the annex of the Albergo Savoia at Passo Pordoi (R. 25,26). Doctor Kostner testified that Rosa's

"general condition was good, but she was very agitated, and her heart was beating fast. She had a good presence of spirit, and in between her legs the blood was already coagulated and hard, and on opening the lips of her womb I was able to see blood, drops of blood coming out of her vagina, and also a laceration there. Her hymen had been penetrated. I wasn't able to look further into the vagina because I didn't have the proper instruments" (R. 26).

In Doctor Kostner's opinion something had entered "which lacerated her vagina and broke the hymen". He believed that she had not yet begun to menstruate and that the "light red blood" he found was not menstrual blood. He believed that "she did have some kind of (sexual) relations". The laceration he found was made "a few hours" before his examination. (R. 26)

Captain William H. Snead, Jr., Medical Corps, 391st Medical Collection Company, 54th Medical Battalion, about 2300 hours 4 July examined Rosa Dauru "for any evidence of intercourse or rape" (R. 26,27). He testified as follows:

"I found dried blood on the inside of each thigh, about 2 to 3 inches in diameter. Also found that her genitalia or her vagina and surrounding parts were slightly swollen and that she had a hymen that was a very very flimsy affair that had evidently been ruptured in the last say 10 to 12 hours—that would be an approximation. There were no other scratches of any kind on her body except two small scratches on the palm of her left hand about 3/4 of an inch long" (R. 27).

In his opinion Rosa's vagina, which was "irritated and swollen slightly" but not bleeding, had been penetrated by some object or objects within the preceding ten or 12 hours. Also in Captain Snead's opinion the stain on the fly on accused's trousers (Exhibit 2) was caused by blood, but he could not be definite without a laboratory examination. (R. 27)

Captain Stephen B. Preston, Service Company, 87th Mountain Infantry, testified for the defense that he had known accused, who was his jeep driver,

for about 11 months. Accused's "work was always excellent. Any job that he was given he did well", and at "no time since he has been in my command has he had any type of punishment or any kind of trouble at all". Witness considered accused "an excellent soldier". (R. 28)

Accused testified that on the afternoon of 4 July in the company of Sergeant Young he stopped at five different taverns in different towns and different parts of the country. Young drank "a lot" and accused drank three beers and three glasses of "vino". The last stop for drink was at about 1610 hours. On the way back to Pordoi Pass for "chow" two stops were made, both for the purpose of allowing Young to vomit. At the first stop Young vomited and relieved himself and accused saw no one at all around that area. At the second stop, which was "only a very short ways" up the zigzag road from the first stop, Young again was vomiting and relieved himself. Accused also dismounted from the jeep, walked across a ditch to a little creek ten to 15 yards from the road, relieved himself and took "a dump". He was not out of sight of the jeep, could see the road at all times, and was away "five minutes at the longest". He did not know if Young was sleeping when he returned to the jeep. As they started over the mountain accused said "Young, maybe that would have been a pretty good piece of tail, but it was too damned old"; referring to an elderly woman at the last bar whom Young had "propositioned". They arrived back at Pordoi Pass at 1630 hours and had a cup of coffee. (R. 29-33)

4. It thus appears from the evidence that near the place and at the time alleged in the Specification accused forcibly and without her consent had unlawful carnal knowledge of Rosa Dauru, the person named in the Specification, a child 12 years of age. Accused, with a companion, was returning through a mountain pass to the company area after having previously visited several bars and taverns in neighboring villages. As they came to a lonely and uninhabited part of the mountain road accused stopped the jeep he was driving, dismounted and looked at Rosa and her father who were tending their cattle. While Rosa left her father to go to her house, 400 to 500 meters away, accused drove the jeep about a kilometer up the road and stopped on a zigzag turn. He again dismounted, left instructions with his companion to account for his whereabouts if questioned, and set out across the ditch. When he entered Rosa's house he made some motions which she did not understand, and offered her cigarettes. When she did not accept these he took her by the wrist and pulled her about half a kilometer from the house to a grassy spot under some bushes. When she tried to call her father he put his hand over her mouth and drew out his knife. He then laid her spread-eagled upon the ground, pulled down her bloomers, pulled off his trousers, knelt between her legs, lay on top of her and penetrated her sexually. Rosa testified that accused hurt her by putting his "secret" inside her "secret", making it bleed. He remained on top of her about 10 minutes, then arose, cautioned her to stay there on the bank, and left. When he returned to the jeep he told his companion that he had had "a piece of tail" but that "it wasn't very good" because it was "a little young or a little small".

Rosa did not expressly testify that she resisted accused to the extent of her ability or that her resistance was overcome by force or prevented by

fear. She did testify, however, that she tried to call her father and was prevented from doing so by accused's placing his hand over her mouth, that he dragged her from the house by her wrists, that she was afraid he would kill her when he took out his knife, that accused kept knocking her to the ground when she struggled to get up, and that he hurt her when he penetrated her body. These facts, together with other acts of violence visited upon the 12-year old victim by accused, justify the inference that she did not in fact consent, and that any lack of resistance was attributable to her fear of great bodily injury or death induced by the violent manner in which accused laid his hands upon her, and threatened her with the dangerous weapon with which he was armed. It is rape though a female may yield through fear (MTO 6956, Gordon).

Rosa's testimony was clear and convincing that her accompaniment of accused to the grassy spot where the assault occurred was in fact under duress. Her version of the occurrence was probable, not uncertain, not contradictory, and straightforward. The medical testimony warrants the inference that she was a virgin prior to the assault. The injuries to her sexual organs showed forcible penetration of a pre-existent hymen, and support the inference that the penetration which necessarily caused them was of a sexual nature. The medical testimony thus corroborates Rosa's testimony as to the fact of penetration. Rosa's identification of accused as her assailant was unequivocal and uncontroverted and was strengthened by accused's excited, agitated interruptions when she and her father appeared before the officer to whom they had complained. These and other circumstances in evidence justified the court in rejecting the improbable and unconvincing testimony of accused and in concluding that accused overcame Rosa's resistance and had sexual intercourse with her by force and without her consent. It is immaterial that she was but 12 years of age for rape may be committed upon a female of any age (MCM, 1928, par. 148b). The Board of Review is of the opinion that the findings of guilty of rape are supported by the evidence.

5. The record shows that after an explanation as to his rights by the president of the court, accused elected to remain silent. Oral arguments were thereafter made by the defense and the prosecution, and the court was closed and "voted in the manner prescribed in Articles of War 31 and 43". It thereupon opened, received evidence of no previous convictions and the data from the charge sheet and closed for voting upon the sentence. While the court was thus closed it was informed that accused desired to make a sworn statement. It thereupon opened, vacated its findings and allowed accused to take the stand under oath. (R. 28,29) This procedure, while unusual, is authorized (Dig. Op. JAG, 1912-40, sec. 395 (37), CM 166782 (1925)), and being at the express request of accused he could not have been prejudiced in any manner thereby.

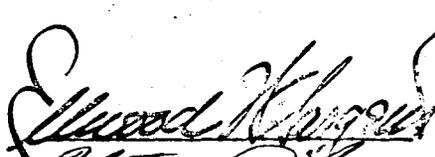
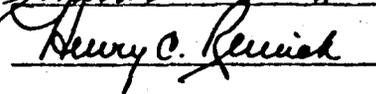
6. It is alleged in the Specification that the offense was committed "at or near Arabba, Italy". The evidence shows that it occurred at Rocca Pietore, where Rosa and her father lived, about eight miles from Pieve di Livinallongo. An examination of an official Italian compilation of the localities, towns, cities, communes and provinces of Italy discloses that Arabba and Pieve di Livinallongo are both in the commune of Livinallongo and that all three localities are in the province of Belluno. There is no

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suggestion in the record that accused was misled or surprised by this variance in proof, and the locus not being of the essence of the offense charged, and the jurisdiction of the court not depending upon the geographical location of the situs, the variance was immaterial (MTO 6166, Camacho).

7. The charge sheet shows that accused is 26 years of age and was inducted 21 February 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

 Judge Advocate.
 , Judge Advocate.
 , Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army
7 August 1945

Board of Review

MTO 7423

UNITED STATES)

v.)

Private LLOYD E. MIMMITT
(38 311 672), Company B,
910th Air Bast Security
Battalion.)

FIFTEENTH AIR FORCE

Trial by G.C.M., convened at
APO 520, U. S. Army, 9 June 1945.
Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

REVIEW by the BOARD OF REVIEW

Sargent, Irion and Remick, 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 Lloyd E. Mimmitt, Company B, 910th Air Base Security Battalion, did, at Army Air Base, Vincenzo, Italy, on or about 16 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Stonewall Jones, a human being, by shooting 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 shot to death with musketry, all members of the court present concurring in the sentence. 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, Mediterranean Theater of Operations, confirmed the sentence, but commuted it to dishonorable discharge, forfeiture of

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

3. The evidence for the prosecution shows that on 16 May 1945 accused's organization, Company B, 910th Air Base Security Battalion, was stationed at Vicenzo Number 11 (Italy), (R. 5). On that date Sergeant Stonewall Jones (the deceased) was sergeant of the guard, third relief, and accused was a sentry on that relief (R. 6). The guards of the third relief were scheduled to be posted about 0240 hours 16 May (R. 11). About 0215 hours Jones awakened accused's first sergeant, Edmund J. Harris, who was sleeping in the orderly room, and conversed with him. Jones then left to post the guard. (R. 5,6,9) About 0235 hours Harris was awakened by accused (R. 7,9). Harris testified as follows:

"He (accused) said, 'Sergeant Harris, you see Sergeant Jones has gone off and left me. He's trying to get me in bad with the man.' I said, 'Mimmitt, Sergeant Jones came in here and told me you were late for guard.' I asked Private Mimmitt if Sergeant Jones had called him. He said, 'Yes, I was preparing for guard.' Then he said, 'I ought to get him. I ought to get Sergeant Jones.' I told Private Mimmitt that it's nonsense to get himself into trouble. I said, 'The war's over, and you will be going home soon, I hope.'" (R. 7).

After accused left the orderly room carrying his .03 Springfield rifle, Harris heard "something like the noise of someone loading a rifle" (R. 7), as though "the bolt was pulled back" (R. 9). Later Harris heard "the truck coming in from posting the relief, and the men were laughing and talking". He then heard a loud explosion. (R. 7,8)

About 0215 hours Sergeant Jones, the deceased, awakened the driver of the truck who thereafter drove the guards of the third relief to their posts where they were posted by Jones. The guards of the second relief and Jones were then returned in the truck to the area where they arrived about 0230 hours. The vehicle was not equipped with a cab or a top. Jones sat in the front seat on the right side. (R. 9,13,14,23,26-28) When the truck arrived in the vicinity of the orderly room in the area (Ex. 1) accused, who was standing on the left side of the road holding his .03 Springfield rifle at port arms, shouted "Stop that damned truck!". He then walked swiftly around the front of the vehicle toward the right side where Jones was seated and, as he did so, accused manipulated the bolt of his rifle. (R. 14,15,17,18,23-25,28,29, 32) Still holding his rifle at port arms he asked Jones "What are you trying to do? Get me messed up with the man?" (R. 15,18,24,28,29). Accused then said "Now, you think you're smart. I'll kill your black ass. You black son-of-a-bitch!" (R. 21,29). Jones did not reply and stood up (R. 15,24,29). When accused said "I ought to kill you anyway. Don't you believe I will kill you", Jones replied "Yes, I believe you would kill me!". Accused then stated "I ought to kill you anyway *** Get down off that truck before I shoot you

down". (R. 29) When Jones stepped off the truck accused said "I ought to kill you anyway. You black son-of-a-bitch", and pointed his rifle at him (R. 19,29,32). One witness testified that Jones then started toward the day room, that accused thrust the rifle toward the former's neck with a jabbing motion and said that he would blow out Jones' brains (R. 15,16,19,21).

At this time Jones reached out with one hand, seized accused's rifle (R. 15,16,18,19,29), and "moved the gun off of him" (Jones). Accused then "drew the gun back on him", told Jones not to "catch his gun" and said that if he did so he would kill him. When Jones pushed the weapon away a second time, accused "drew it back on him again" and repeated his threat. Jones pushed the rifle away a third time, apparently in an effort to prevent it from being pointed in his direction. Accused said "Turn loose my piece, Sergeant Jones". The rifle was then discharged. (R. 24,26,29,30,32-34) When the shot was fired Jones and accused were not standing squarely face to face but at somewhat of an angle (R. 30,31,33). Only one shot was fired (R. 24,26). Jones removed his hand from the weapon and slowly fell to the ground (R. 16,30). Accused said "The black son-of-a-bitch's not shot. He's putting on; but I will shoot him", and "You not dead yet *** I'll empty this whole rifle in you" (R. 16,17,21,25,26,30). Jones said "Oh Lord have mercy on me" (R. 25,26). Corporal Willie Hawkins of accused's organization then took the rifle from accused (R. 13,17,30) who then said "Give me that gun. The son-of-a-bitch is not shot; but I will shoot him". When someone remarked that Jones was "shot bad", accused replied that he "didn't give a damn". (R. 30)

When Sergeant Harris heard the shot he left the orderly room and found Jones lying on the ground with a wound under the left armpit. Jones' pulse was beating slightly. Accused was standing to the left of a group of men with his hands in his pockets, and when Harris asked if he realized what he had done, accused replied that Sergeant Jones was "no good". Accused did not appear to be particularly angry or excited but did seem slightly upset. (R. 7,8,10,11) Corporal Hawkins examined accused's Springfield rifle and removed one empty round from the chamber and four rounds of live ammunition from the magazine. He gave the rifle, but not the ammunition, to Sergeant Harris. (R. 8,9,11,12,22) The weapon was identified at the trial by Harris and was admitted in evidence (R. 11-13; Ex. 2).

Jones was given first aid treatment at the scene and was then taken to the 61st Station Hospital. Although he was alive when placed in the ambulance (R. 42), he was dead when examined at the hospital by Captain Gerald W. Husted, Medical Corps (R. 38). Captain Husted, who arrived at the hospital about 0330 hours, testified that in his opinion Jones had then been dead between 15 and 30 minutes (R. 41). He testified further that in his opinion the cause of death was a "gunshot wound of the thorax" (R. 38,39). The point of entry of the bullet was on the lower left part of the neck, to the immediate left of the spinal column, and the point of exit was about four inches below the armpit, approximately three or four inches on the left side (R. 38,39). There was also an abrasive type of wound on the inner side of the left arm just above the elbow. There were no powder burns. (R. 39) Captain Husted identified Jones by the latter's identification tags (R. 38,41). The soldier who accompanied Jones to the hospital testified that Captain Husted was the doctor who examined Jones at the hospital (R. 42).

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For the defense, Private Robert Brumfield of accused's organization testified that he (witness) was on the truck when it arrived in the company area with the members of the second relief of the guard. As accused came to the right side of the truck where Jones was sitting, accused manipulated the bolt of his rifle. He stood about ten feet away from the door of the truck and asked Jones "What are you trying to do, Sergeant Stonewall, get me messed up with the man?" Jones did not reply, left the truck and walked straight toward accused whose rifle was pointed at Jones. When Jones seized the rifle with one hand accused said "You black son-of-a-bitch, turn my rifle loose". Witness jumped from the truck and went around toward the side of the vehicle, but before he arrived there the weapon had been discharged. Jones, whose hands dropped to his sides, then fell to the ground. Accused told Jones that he was not shot and that he (accused) ought to empty his rifle in him. Accused began to back up, and Hawkins took his rifle. (R. 43-46)

Private Robert J. Richardson of accused's organization testified for the defense that when he returned to the area with the second relief on the truck, witness left the vehicle and started toward his tent. After he proceeded 15 or 20 yards his attention was attracted by loud talking. He turned and saw Jones and accused facing each other and about two feet apart. Accused's back was toward witness. The rifle was discharged and witness saw accused back away with the rifle at port arms. Hawkins then took the weapon from accused. (R. 53-55)

Accused testified that he had been in the military service 32 months, 15 days and had been overseas 28 months (R. 47). Jones, who was sergeant of his relief, came to accused's tent on the evening in question. Jones later reappeared at the tent and said "Let's go". Accused, who "was getting up", began to dress but before he finished the truck drove away. Accused denied that he told Harris in the orderly room that he (accused) ought "to get" Jones. (R. 49) As he left the orderly room he manipulated the bolt of his rifle and threw a round in the chamber. Asked why he did so he testified that he did not know, that he was "just careless, I guess". He did not put on the safety at the time, and there were then four rounds in the magazine and one in the chamber. (R. 47,48,50,51) It was not customary to put a round in the chamber while waiting for the guard truck (R. 50). He denied saying "Stop that damned truck" when the vehicle arrived. Carrying his rifle at port arms he walked around the front of the truck to where Jones was seated and did not manipulate the bolt of the rifle at this time. He asked Jones "what he was trying to do get me in trouble or something with the man". (R. 47,50, 51) He did not "recall saying anything else" (R. 47). Accused's rifle was pointed directly at Jones when the latter stood up in the truck. Jones did not reply but left the vehicle and walked toward accused. Jones seized the rifle with his right hand, struck the weapon hard and pushed it to the left. Accused, who did not know Jones was going to seize the weapon, "didn't have any real grip on it". Accused's finger "wasn't exactly on the trigger" but Jones' action jerked the rifle and threw accused off balance. Accused's hand was jarred, his finger hit the trigger and the weapon was accidentally discharged. (R. 48,49,51-53) Jones was about two and a half feet from accused at the time (R. 48).

Accused testified further that he (accused) "was a little upset and angry; but not angry enough to hurt anyone", and that he did not intend to shoot Jones (R. 49,50,52). He voluntarily surrendered his rifle to Hawkins, and denied saying "The black son-of-a-bitch isn't dead. I ought to empty my gun in him". He also denied telling Harris that Jones deserved it and that the latter was no good. Asked why the witnesses for the prosecution "would testify about these things" accused testified:

"I can't see no reason why they should say those things. I may have said some curse words, due to a little angriiness; but I didn't say all those things." (R. 52)

4. It thus appears from the evidence that at the time and place alleged accused killed Sergeant Stonewall Jones, the person named in the Specification, by shooting him in the thorax with a rifle. It is indicated by the evidence that before the homicide accused was late for guard duty and that Jones complained to the first sergeant of the company. Accused was admittedly angry because he thought Jones was trying to get him in trouble, and told the first sergeant that he (accused) "ought to get" Jones. Accused then left the orderly room and shortly thereafter manipulated the bolt of his rifle and threw a bullet in the chamber. When the truck carrying Jones and the members of the second relief returned to the area, accused ordered the vehicle stopped, approached Jones and asked him if he was trying to get accused in trouble. Accused cursed Jones, said that he ought to kill him, ordered him to leave the truck and then threatened to kill him if he did not do so. As Jones left the vehicle accused again cursed him, repeated that he ought to kill him and pointed his rifle at him. Jones seized the rifle with one hand and twice moved the weapon to one side. On each occasion accused pointed the rifle again at Jones and threatened to kill him if he seized the weapon. When Jones pushed the weapon away a third time accused ordered him to relinquish the rifle, which was then discharged. One shot was fired. After Jones fell to the ground accused threatened to "empty this whole rifle" in him. After a soldier took the rifle from accused the latter requested that the weapon be returned to him, stated that Jones was not shot but that accused would shoot him. When someone remarked that Jones was seriously wounded accused replied that he "didn't give a damn".

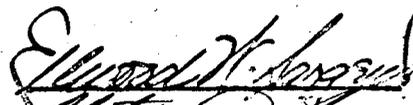
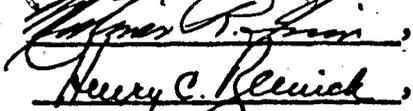
Accused's defense was that the shooting was accidental. He testified in substance that Jones seized the rifle, struck it hard and pushed it to the left. This action caused accused, who was not holding the weapon with a tight grip, to be thrown off balance. His hand was jarred, and his finger which "wasn't exactly on the trigger", hit the trigger, thus causing the weapon to be accidentally discharged. He denied saying that he ought "to get" or to shoot Jones, or stating that the latter was "no good". He admitted, however, being angry and that he might "have said some curse words". He further admitted that he put a round into the chamber of his rifle before Jones' arrival, that he did not put on the safety, and that he pointed the rifle at Jones when the latter stood up in the truck. There was no evidence that Jones had a weapon in his possession when he was shot or that he threatened accused in any manner. The evidence showed that he merely attempted, without any display of undue violence, to prevent the rifle from being pointed in his direction by thrice pushing it aside. Accused's testimony was, in general,

in sharp conflict with and uncorroborated by, that of the several witnesses for the prosecution. His credibility, as well as the weight to be given his testimony, was within the discretion of the court which, acting within its prerogative, rejected accused's version of the homicide and determined the issue adversely against him. In this it was warranted.

Rejecting accused's version, the homicide was without legal justification or excuse. Malice was inferable from accused's threat to Harris that he "ought to get" Jones, his subsequent loading of the rifle and leaving off the safety, his use of a deadly weapon, the willful, deliberate, and wanton manner in which it was fired, and the repeated opprobrious epithets and threats to shoot with which he addressed his victim both before and after the shooting. His violent conduct, in the absence of any circumstances whatsoever which would in the slightest degree excuse or justify the shooting, fully warranted the court in finding accused guilty of murder as charged (MTO 6868, Williams).

5. The charge sheet shows that accused is 23 years of age and was inducted 24 September 1942. He had no prior service.

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

 Judge Advocate.
 , Judge Advocate.
 , Judge Advocate.

RESTRICTED

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Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army
7 August 1945

Board of Review

MTO 7423

UNITED STATES

v.

Private LLOYD E. MIMMITT
(38 311 672), Company B,
910th Air Base Security
Battalion.

FIFTEENTH AIR FORCE

Trial by G.C.M., convened at
APO 520, U. S. Army, 9 June 1945.
Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Edward K. Sargent, Judge Advocate.
Estimor P. Irion, Judge Advocate.
Henry C. Remick, Judge Advocate.

MTO 7423

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
7 August 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private Lloyd E. Mimmitt (38 311 672), Company B, 910th 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 sentence, which holding is hereby approved. Under the

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MTO 7423, 1st Ind.
7 August 1945 (Continued).

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:

(MTO 7423).

JAMES E. MORRISSETTE,
Brigadier General, United States Army
Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 113, MTO, 12 Aug 1945)

RESTRICTED

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
21 August 1945.

Board of Review

MTO 7442

UNITED STATES)

FIFTH ARMY)

v.)

) Trial by G.C.M., convened at
) APO 464, U. S. Army, 5 July 1945.
) Dishonorable discharge and
) confinement for life.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

Private EZEKIEL SMITH
(34 251 550), 3256th Quarter-
master Service Company.

REVIEW by the BOARD OF REVIEW

Sargent, Irion, Sessions and Remick, Judge Advocates.

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

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

Specification: In that Private Ezekiel Smith, 3256th Quartermaster Service Company, did, at Montecatini, Italy, on or about 30 May 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation, kill one Private John M. Lewis, a human being, by shooting him with a carbine.

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

Specification: In that Private Ezekiel Smith, 3256th Quartermaster Service Company, did, at Montecatini, Italy, on or about 30 May 1945, with intent to do him bodily harm, commit an assault upon Private George T. Neal, by shooting him in the arm with a dangerous weapon, to wit, a carbine.

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

Evidence was introduced of one previous conviction by summary court-martial for willful disobedience of an order of a noncommissioned officer 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 the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on or about 30 May 1945, 3256th Quartermaster Service Company, of which accused was a member, was stationed in Montecatini, Italy (R. 9,10,24,33,41). After supper shortly before 1900 hours on that date, preparatory to moving to a staging area, the members of the company assembled with their arms and equipment for roll call in the street before the building at Number 4, Via Michelangelo, Montecatini, wherein were located the company orderly room and billets (R. 6,10,25,26,28,29,33,38,41; Ex. A). As their names were called the men were to leave the formation but not the area (R. 26). Private George T. Neal, who had been a member of accused's company for four days, fell out of the formation when his name was called. Leaving his rifle outside, he entered the building and stood near a doorway between a hall and the orderly room with his back to the street. (R. 26-29) Numerous other members of the company had left the formation and were scattered in the street, hallway and other parts of the building. Six or seven of them were in the hallway. (R. 28,29,37,38,44) Accused and Private John M. Lewis (the deceased), also a member of accused's organization, were in the street arguing over ownership of a musette bag (R. 26,31,32,41,44; Ex. D). They entered the building and continued the argument in the hallway at the entrance to the orderly room (R. 26,27,41,44; Ex. A). One of them pushed the other through the door to the street, and one of them said, "That's no way to treat an American soldier". A man was seen to stumble out of the door. (R. 41,45) Prior to the argument Lewis had placed a rusty "GI" knife in his musette bag when upstairs in the building, and had said "I believe I will take my old knife and kill me a son of a bitch". During the altercation he was heard to say "what he could do about his knife". Accused did not appear to be drunk and Lewis was not drunk although he had been drinking. (R. 44-46) Accused then left the building, and Lewis took a position facing Neal and the street by the door to the orderly room (R. 27, 28; Ex. A). Someone called to Neal "Watch out, this fellow is going to shoot you". Neal glanced over his shoulder and saw accused, whom he recognized and identified at the trial, approach the entrance to the building with a "rifle" pointed at the hallway. It was not dark but "light" at the time, and Neal did not see a "gun" in Lewis' possession. (R. 27-32; Ex. A) As Neal moved toward the inside of the door accused, from a position in the street about fifteen feet away from and opposite the entrance to the hallway, fired a shot at the door into the hallway while holding his "gun" at a low port position (R. 27,29-31,34,39-41,80-86; Ex. A). Neal was wounded in the upper left arm, and fell unconscious into the orderly room. He saw and heard only one shot fired. (R. 27,29-32,80)

When accused fired the formation scattered. McCune, one of the soldiers, started toward accused, and when McCune was about six feet from him, accused fired a second shot at the door into the hallway. Accused's weapon had a cover over the muzzle, and McCune saw fire come out of the barrel. McCune then took hold of the "gun" and he and accused fell to the ground as someone said, "Ezekiel Smith, don't go crazy". McCune disarmed accused, turned the weapon over to the company commander, and said to accused, "Look, it ain't no use of this going on". Accused responded, "I will get someone's gun and shoot you". (R. 34,35,37,39,40,42; Ex. A) The company commander unloaded accused's rifle. Accused handed five cartridges to a soldier and said, "Here's five shells. Hit me". The soldier threw the shells against a wall. (R. 38,39,42,43) The company, including accused, then marched to a railroad station where trucks were parked and entrucked for a staging area (R. 35,36,40,43,85).

About 1845 hours on 30 May 1945, military policemen arrived at Number 4, Via Michelangelo, Montecatini, Italy, and found two men who had been shot. Neal was living and had a first aid bandage around his upper left arm, but the other soldier, "supposed to be dead", was lying on the floor with his eyes open and a gunshot wound in the area of the heart. The two soldiers were taken to the 94th Evacuation Hospital and put into receiving tents. (R. 5-9; Ex. A) On 30 May 1945, Private John M. Lewis, 3256th Quartermaster Service Company, was admitted to that hospital, the records of which showed that he was dead upon arrival, with an admission diagnosis of "GSW, Pen. Precardial area" (R. 19-21; Ex. C). The military police searched the areas of Number 4, Via Michelangelo, and the railroad station for the weapon employed in the shooting and later obtained accused's unloaded carbine from an officer of accused's company at the railroad station. Accused's carbine had a muzzle cover "all shot off the top". The weapon smelled as if it had been fired. It was admitted in evidence at the trial without objection. (R. 8-16,48,78,83; Ex. B) Accused was arrested by the military police later that night in a staging area at Pisa (Italy) (R. 16-18,78,79).

A medical officer performed an autopsy on the body of Private John M. Lewis on 31 May 1945. He testified that death was caused by a gunshot wound of the heart, the point of entry being in the left anterior chest. The heart was cut, shattered and one of the chambers was blown away. The bullet was removed from the lower right side of the back and was admitted in evidence at the trial without objection. (R. 22-24,48,49; Ex. E)

At the trial the court excluded from the evidence a pretrial statement signed by accused on 1 June 1945 on the ground that it had not been voluntarily made, and ruled that it not be read as an admission (R. 49-51, 55-63,86-88; Ex. F). Agents Berlin H. Crites and Ralph B. Herbert, Criminal Investigations Division, testified that verbal statements precedent to the signing of the written statement were made by accused after explanation of his rights under Article of War 24, and after accused was told that he did not have to make a statement and that if he did it might be used for or against him. No promises, threats or physical violence were made or employed. (R. 49,50,56,59,60,63,86) Crites then testified as to verbal statements made by accused on or about 1 June 1945. Accused stated that he had been in the company four or five days and was in his

billet in his company area in Montecatini (Italy) on 30 May 1945 at about 1845 hours, prepared to assemble with his company for movement to a staging area. Members of the company were in the hallway when accused came downstairs and some of them were arguing. A soldier pushed accused backwards out the door. Someone held that soldier, and then released him, whereupon the soldier started to come out of the door with his hands in his pockets. The soldier was six feet, one or two inches tall, weighed about one hundred eighty-five pounds and had light brown skin. Accused lowered his carbine and fired once, whereupon a member of the company seized the carbine and twisted it out of accused's hand. The company commander then called the company to attention, marched it around the corner to trucks, and the company went to a staging area near Pisa (Italy). Accused was arrested at Pisa about 0500 hours on 31 May 1945. (R. 63-65)

Accused testified that he and seven other soldiers had been with 3256th Quartermaster Service Company approximately two weeks (R. 66). He had been issued ammunition for guard duty three days, and his carbine five days, previous to 30 May 1945 (R. 66,68). Accused was billeted on the second floor of Number 4, Via Michelangelo (R. 65,66; Ex. A). On 29 May 1945, accused turned in part of his equipment at the direction of an inspecting officer (R. 67,73). About 1800 hours on 30 May, the whistle blew and the members of the company began to assemble in the street with their equipment (R. 65,66,70,72). Accused brought down into the street, where all of the company's equipment was placed, his musette bag, field bag, haversack, roll, carbine, helmet and gas mask (R. 66,68,71,72-75). A muzzle cap or canvas bag was over his carbine (R. 68). After placing his carbine and equipment in the street, accused went to the supply room at the rear of the building to draw a shelter half and mattress cover, which he did not obtain (R. 65,68,72,73,74; Ex. A). Three or four minutes later, while in the supply room, accused heard two shots fired in the front of the building. He got out of the way of some soldiers who were running through the house. (R. 65,66,68,76) Accused returned to the orderly room at the front of the building and saw someone receiving first aid treatment in the door (R. 76,77,90). He left the orderly room, could not find his carbine and joined the formation of the company, having with him at the time only his gas mask. After the roll had been partially called, the company commander terminated the roll call, and on his order the company moved to trucks on another street. (R. 66,67,72,74,76) Accused recovered and took with him all of his equipment except his carbine, which he inquired for but could not find. He learned that the company commander had his weapon when the latter informed him of this fact. He placed his equipment on the truck in which he rode to the staging area, and went to bed upon arrival. (R. 68,69,71-73,75) Accused testified that he did not know Lewis, and had never gone out, gambled or fought with him. He did not know Neal or McCune. He denied having a scuffle with McCune, and testified that the witnesses whose testimony placed him in front of the building at the time of the shooting, and engaging in a struggle with McCune, were mistaken and lying. (R. 69,70,72,75,89,90). He did not have an argument nor was he pushed in the hallway (R. 68). He admitted throwing five rounds of ammunition against a wall, and testified that five more rounds of ammunition were taken from him

by agents of the Criminal Investigation Division, but no more than that number (R. 69,77,89). Most of the men, including accused, had been drinking on 30 May 1945 (R. 67,68). Accused denied that he fired a shot on the evening in question (R. 89). He also denied telling a Criminal Investigation Division agent that he fired a carbine on the night of 30 May 1945 (R. 90).

4. It thus appears from the evidence that at the place and time alleged accused killed Private John M. Lewis, the person named in the Specification, Charge I, by shooting him with a carbine. It further appears from the evidence that at the place and time alleged accused wounded Private George T. Neal, the person named in the Specification, Charge II, by shooting him in the arm with a carbine.

The evidence shows that preceding the fatal assault upon Lewis and the assault upon Neal, accused's organization assembled for roll call in the street before the building which contained its orderly room and billets, preparatory to entrucking to a staging area. The members of the company had placed their arms and equipment in the street. During the roll call, while numerous members of the company were in the street and building, but not in formation, accused and Lewis engaged in an altercation in the street and the hallway of the building over a musette bag. During the course thereof Lewis referred to what he (Lewis) could do about his knife which he had previously placed in his musette bag, and one of them pushed the other out of the door. Lewis remained in the hallway as accused left the scene and returned with his carbine, which was equipped with a muzzle cover. From the street accused fired one shot into the hallway, in which were present six or seven of the members of his company, including Neal, who was standing near Lewis. Neal was wounded in the upper left arm. Accused then fired a second shot into the hallway, and was immediately disarmed by another soldier, whom accused threatened to shoot. Shortly thereafter military police arrived at the scene, found Neal and another soldier, wounded respectively in the upper left arm and chest, and dispatched them to the 94th Evacuation Hospital. Lewis was dead upon his arrival at the 94th Evacuation Hospital on that day, his death having been caused by a gunshot wound of the heart. Military police obtained accused's carbine, with the muzzle cover shot away, from one of accused's officers at the entrucking point.

Accused's pretrial statements suggest that he fired his carbine in self-defense when a soldier who had pushed him came toward him with his hand in his pocket. This version of the transaction does not make available to accused the principles of self-defense, as it does not appear that his life was endangered even had a soldier, whom accused did not identify as either Lewis or Neal, approached him in such a fashion, nor does it establish that he was legally justified in resorting to the use of a dangerous weapon (MCM, 1928, par. 148a). Accused did not reiterate this version of the homicide in his testimony at the trial, but placed himself on the opposite side of the building, away from the locus of the assaults, at the time the shots were fired. He also denied having an altercation with Lewis, or having fired his carbine. Although accused had been a member of his organization for only a short time, the evidence identifying him as the assailant was

affirmative and unequivocal. Accused's contentions were questions of fact for determination by the court which decided such questions against him.

The evidence clearly shows that accused and Lewis had engaged in an altercation over a musette bag, upon conclusion of which accused left the building and Lewis remained in a hallway with a number of other soldiers. When accused re-approached the building with his carbine he deliberately fired two shots into the crowded hall. Deceased was found by military police shortly thereafter in a room adjoining the hallway with a gunshot wound in his chest. Lewis was dead upon arrival at a hospital, his death being attributed to a gunshot wound of the heart. From these circumstances it is fairly inferable that accused intended to fire both shots at Lewis. Neal, who was wounded by one of the two shots, testified that he heard only one shot, that which wounded him, and that he then became unconscious. Therefrom is drawable the inference that the first shot fired by accused wounded Neal. No witness testified that he saw deceased wounded by either of the shots. As there is no suggestion that any other shots were fired or that Lewis' injury could have accrued through any agency other than a shot fired by accused, the court was warranted in concluding that the second shot fired by accused killed Lewis (NATO 696, Pokorney). The weapon employed by accused was referred to variously by the witnesses at the trial as a "gun", "rifle" and carbine. From all the evidence the court was warranted in concluding that it was a carbine as alleged.

The court was justified in believing that the shooting of deceased was a conscious, deliberate and intentional act. Moreover, the deliberate and indiscriminate firing of a carbine into a crowded hallway involved the probability of death of or grievous bodily harm to one or more of the occupants, knowledge of which is conclusively charged to accused. Therefrom, as well as from the callous and deliberate manner in which accused employed the deadly weapon with which he was armed, may be drawn the inference that accused acted with malice aforethought. There was no evidence that deceased threatened accused with a weapon or that he was armed at the time of the homicide. The homicide was without legal provocation, justification or excuse. Accused was properly found guilty of murder as charged (MCM, 1928, par. 148a; NATO 1556, Boudreaux; NATO 1631, Lucky; Bull. JAG, May 1945, sec. 450).

Although accused may have intended to fire both shots at Lewis, the wounding of an innocent bystander, Neal, does not exculpate accused from criminal responsibility therefor. The requisite intent to do bodily harm with a dangerous weapon to Neal is imputable to accused from the probable consequences of his deliberate and intentional act, although the bullet may have been intended for deceased (MCM, 1928, par. 148a, p. 163, par. 149m, p. 180; Dig. Op. JAG, 1912-40, sec. 451 (10); Bull. JAG, July 1944, sec. 451 (9); MTO 6166, Camacho; MTO 5428, Coleman).

5. The charge sheet shows that accused is 30 years of age. He enlisted 21 February 1942 and had no prior service.

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

Edward W. Karp, Judge Advocate.
Thomas R. K..., Judge Advocate.
Orlando C. Sessions, Judge Advocate.
Henry C. Reisch, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army
3 September 1945

Board of Review

MTO 7535

UNITED STATES)

FIFTH ARMY)

v.)

Trial by G.C.M., convened at
Gardone Riviera, Italy,
1 August 1945.

Private JAMES L. GRAVES
(32 Oll 395), Company F,
92d Engineer Regiment.)

Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Sargent, Irion, Sessions and Remick, Judge Advocates.

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

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

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

Specification: In that Private James L. Graves, Company F, 92nd Engineer Regiment, did, at or near San Antonio a Trebbia, Italy, on or about 17 July 1945, forcibly and feloniously, against her will, have carnal knowledge of Eleonora Bozzano.

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

Specification: In that Private James L. Graves, Company F, 92nd Engineer Regiment, did, at or near San Antonio a Trebbia, Italy, on or about 17 July 1945, with intent to do him bodily harm, commit an assault upon Francesco Maccio, by striking him on the head with a dangerous instrument, to wit, a pistol.

(324)

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence was introduced of three previous convictions, one by special court-martial for absence without leave, disrespect toward his superior officer and for being drunk and disorderly in company orderly room in violation of Articles of War 61, 63 and 96, and two by summary courts-martial, one for absence without leave in violation of Article of War 61, and one for being outside his bivouac area without a pass 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 the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on 16 July 1945 Francesco Maccio of Mazzone, Italy, and his fiancée Eleanora Bozzano, age 21, of Genoa, Italy, were traveling from Milan to Genoa accompanied by a woman named Giuseppina Bruzzone. About 2230 hours they arrived at a "check point" at Piacenza near San Antonio a Trebbia where they searched for a soldier named Lane, who was a friend of Giuseppina. (R. 6,7,17,18,26) Accused, a member of 92d Engineer Regiment, and some other soldiers also joined the group and Lane eventually appeared. Accused was sober. Francesco searched unsuccessfully for rooms for the night and was partly assisted by accused who told them not to worry, that he would find a place for them at his camp. (R. 7,8, 13,18-20,27,34,58) Francesco and Eleanora told accused that they did not want to go to the camp. They went, however, with Giuseppina, Lane, accused and another soldier because Lane said that "these colored fellows were all right" and Giuseppina vouched for both Lane and accused. (R. 8,20,21) Eleanora told Francesco to stay close to her as she was afraid. Giuseppina told accused that Francesco was Eleanora's brother but Eleanora denied it. (R. 26,27) After the group reached a tent in the camp wherein some soldiers were sleeping, and had seated themselves, accused began to fix the beds and showed them where they could sleep in the tent. Francesco did not "think it good to sleep separated from my fiancée" and he and Eleanora said they would leave. Francesco told accused that Eleanora did not feel well, needed fresh air, and that it was better to sleep in the open field. (R. 8, 13,21,27) Accused and another soldier, both carrying blankets, accompanied Francesco and Eleanora to a spot in a field about 100-150 meters from the camp, and the other soldier then departed (R. 8,9,13,21). Lane was not present (R. 21). Accused spread the blankets on the ground and the three lay down, Eleanora being in the middle. Francesco told accused that the latter should sleep in his tent but accused refused to leave. Francesco said that it was impossible for two men and a woman to sleep together, and that it would be all right if there were two men and two women. When Francesco insisted that accused go to his tent the latter pulled out what appeared to be a Beretta pistol, operated the slide and put a bullet in the chamber. Francesco and Eleanora attempted to leave but accused ordered them not to go and pointed the weapon at them. (R. 9,10,21,22) Eleanora was shaking and very much feared that accused would injure her (R. 10,22). After the three lay down again two soldiers appeared and talked with accused. Eleanora asked the two

soldiers in Italian not to leave because she was afraid. After one of the soldiers asked Francesco to come with them and the latter refused, the two soldiers left. (R. 10,14,22) Eleanora did not leave with them because she trusted her fiance and was with him (R. 27). The three again lay on the blankets. Eleanora faced accused and kept as far away from him as possible in order to see "what he was doing". She did not converse with him and denied that he asked her for intercourse and that she replied "'Wait until my fiance is asleep'". (R. 14,23,27) Accused then lifted her skirt and touched her body. After she pulled his hands away he put them on the middle of her legs. With her elbow she nudged Francesco who pulled accused's hands from the girl's body. Francesco, who was angry, and Eleanora arose and accused then threatened them with his pistol. Francesco told accused that he (Francesco) "couldn't be present at that scene and it was better for me to be shot down there". Eleanora was shaking and asked her fiance "to do something for her to avoid what was going to happen". (R. 10,11,14-16,23) Francesco had no pistol in his possession (R. 13,15,27). Accused then turned his pistol in his hand, struck Francesco on the head with the handle and Francesco fell to the ground unconscious. When Eleanora attempted to go to him accused seized her hand, pushed her on the ground and told her to stay there. When her fiance later arose, Eleanora told him to run for help and he did so. As Francesco ran, he turned his head, saw accused "jumping over my girl", and heard some shouting. (R. 11,16,23,24)

Eleanora testified that after Francesco left, accused pulled her along with his left hand, holding the blankets under his right arm and the pistol in his right hand. Although she repeatedly asked him to take her to camp, he insisted that she remain with him. After they had proceeded about 50 meters toward the camp, he spread the blankets on the ground and told her to lie down. When she refused he pointed the pistol at her and she got down on the blankets, followed by accused. Although the camp was but 50-70 meters away from that spot, she did not call for help because she feared he "would use the pistol against me". Also, when they first left the camp accused had spoken to the guard and she knew that he and the guard, therefore, were friends. (R. 24,28-30) Accused put the pistol under the blanket near his head and said that he would not hurt her if she remained quiet (R. 24,28,29). Eleanora was "very much" afraid (R. 24). With his hands he was trying to force her to lie down and whenever she pulled his hands from her body he again "embraced" her. He lay on top of her and opened his trousers. She tried to cross her legs but he separated them with his hands and told her to keep her knees up. She kept her skirt down on her legs with her hands and continually told him to let her alone. Although she attempted to prevent him from removing her knickers he succeeded in doing so. His penis finally penetrated her vagina. She had her hands on her stomach and tried to keep him as far as possible from her body. He seized her hands and attempted to put them around his neck, and remained on top of her about ten minutes. The girl "applied all the strength" she had to prevent the act of intercourse although she feared his pistol. She did not consent, even reluctantly, to the act. She did not remember "the end" because she "felt unconscious". Later, she found that she was "all wet". (R. 24,25,29-31) After the act was completed accused brought her to his tent, and when she asked to be taken

to Giuseppina he told her that she was to stay with him that night and that she would go with Giuseppina in the morning. He left the tent to find her shoes which she had lost. She did not escape after he departed because accused had spoken to another soldier who was in the tent and who was right beside her, and she realized then that she "had lost her chance". Accused returned without her shoes and lay down on the cot on which she was lying. He put his pistol under the pillow and they remained there for an hour. (R. 25,26) Although he touched her legs he did not try to have intercourse with her in the tent (R. 30). She did not leave during that time for she was not certain accused was asleep as another soldier, during the hour, had asked for a cigarette and accused took one from her pocket and gave it to him. At the end of the hour she heard Francesco calling and, as accused was then asleep, she ran out to her fiance. She identified the skirt she wore that night and it was admitted in evidence. (R. 26; Ex. 1)

Eleanora further testified that she did not agree to have intercourse with accused and denied that she removed one leg from her knickers herself. When accused was about to go in search of her shoes, she told him for the first time that Francesco was her brother because she feared that accused would catch her fiance outside the camp and injure him. (R. 28) She did not see another soldier when she and accused were walking to the second field where the act of intercourse was accomplished, nor did she see another soldier while they were lying down in the second field. However, while they were lying in the second field she did see accused "rise up and take his pistol". (R. 30,31) It was not accused's finger which penetrated her person, and because she was "wet afterwards" she did not believe he used a contraceptive (R. 30).

When Francesco ran for help he fell into a ditch and broke his leg which was in a cast on the day of trial. With the aid of his hands he finally arrived at the main road and was taken in a truck to the headquarters of the 227th Provost Company (British) where he arrived at 0300 hours. (R. 11,12,31) Francesco was "very distressed" and a wound was observed on the top of his head (R. 32). Francesco and two British soldiers then went to the camp of the 92d Engineer Regiment about 0400 hours 17 July where Francesco called Eleanora. She ran to him and they embraced each other. She was hysterical, shaking from head to foot, and told her fiance that "he (accused) had done everything over her". They then accompanied some officers to accused's tent. (R. 12,13,32-35) First Lieutenant Frank D. Wills of accused's company went to the tent where accused was then sleeping, removed a Beretta pistol from under his pillow and awakened him. A clip containing bullets was found in the pistol but no bullet was in the chamber. (R. 34-36) The pistol was admitted in evidence (R. 59; Ex. 2).

It was stipulated by the prosecution, defense and accused that if Lieutenant Dobson, Royal Army Medical Corps, were present in court he would testify that he examined Eleanora at 0700 hours, 17 July, and that there were patches of what appeared to be semen on her skirt and knickers. There were no marks of violence on her wrists, arms and neck, and no bruising, scratches or stains on her thighs, lower abdomen and the region of the vulva.

Her hymen was not intact. No speculum was available and it was not possible to obtain a smear from the region of the cervix. Eleanora admitted that she previously had had intercourse with her fiance. She had not "washed herself" or urinated between the time of the incident and the examination. (R. 36,37) It was further stipulated that if the resident officer of the Ospedale Civile di Piacenza were present he would testify that he treated Francesco on 17 July for a "straight" wound on the head about five centimeters long, "regular edges, slightly contused, in as deep as the bone" (R. 37).

For the defense, Private Chauncey L. Boles of accused's organization testified that he accompanied Francesco, Eleanora, Giuseppina, Lane and accused from the road to the camp that evening, and that after some conversation in the tent which witness could not understand, he went with Eleanora, Francesco and accused to the field. Giuseppina and Lane did not go with the group but went toward a bridge. After remaining in the field a few minutes Boles, who was carrying a quilt, told accused that he "was going over and lay down and see what was coming up". He went about 20 feet away and lay down. (R. 38-40) About 15 minutes later he returned to the group and asked accused "what was up" and the latter replied "nothing as yet". Boles went back and lay down. He saw two soldiers approach the group but did not hear what was said. He fell asleep and about 20 minutes later was awakened by some "confusion" and saw some wrestling. He asked accused what the matter was and was told "'Nothing'". Boles saw "a pass" made and when he walked over to the group Francesco was lying on the ground as if he had been knocked out and accused had a pistol in his hand. Francesco said something, jumped up and ran away. Boles told accused that he was going to the tent to bed and accused replied that he also was going to bed. (R. 40-43,45) As they walked toward the tent Eleanora was hanging on to accused's right arm and Boles believed accused had his pistol in his hand but was not certain of this fact (R. 42). Witness testified that he, Eleanora and accused went directly to accused's tent without stopping en route and that they all arrived at the tent at the same time (R. 41-45). He also testified that as he walked along he was not watching accused and the girl, that he saw them at some later time but was not able to state how long the interval was, and that there was "Damn little" light that night (R. 44). In the tent accused and Eleanora sat on accused's bed. She was shaking, talked to accused in a "funny" voice, and would seize his arm. (R. 42,43,45) Boles went to his own tent, removed all his clothing except his shorts and returned to ask accused "what was up". Accused replied "'Nothing'". When Boles asked him for a cigarette the girl gave accused one. Accused gave it to Boles who took a puff, returned it to accused, and then went to his own tent for the night. (R. 43)

It was stipulated that if Private Rubin Gilbert, Company E, 92d Engineers, were present he would testify that when he was on guard about 0200 hours (17 July) someone called out from tent number 11 and asked Gilbert to awaken him at 0400 hours. At 0330 hours Gilbert went to that tent, asked if someone wanted to be awakened and a voice replied in the affirmative. Nothing unusual occurred thereafter until some officers and British military police arrived "a little while later". (R. 45,46) It was also stipulated that if Lieutenant John Bertoglio of accused's company were present he would testify that during the day of 16 July 1945 he conducted a "shake-down inspection" of tent number 11 in accused's company area and found no weapons at the time (R. 46).

Accused testified that after he met Francesco, Eleanora and Giuseppina, and had found Lane for them, Francesco unsuccessfully searched for rooms. Accused then offered to let them sleep in his tent and they agreed. During the conversation Eleanora told him her name was Maria and that Francesco was her brother. (R. 46-49) As the group, including Boles, went toward the camp accused held Eleanora's hand on the way. He said she could sleep with him and she agreed to do so. In the tent accused showed Lane the bed where he (Lane) and Giuseppina would sleep. He also showed Francesco his bed and told Eleanora that she could sleep with him (accused) and she agreed. (R. 49) After she and Francesco spoke together Eleanora told accused they preferred to go to the field and asked if he could go with them, whereupon he and Boles obtained blankets and accompanied them about 60 yards into the field. Lane and Giuseppina did not go with them. Accused told Boles to "go back out in the field and wait" and Boles withdrew about 15 yards. The three then lay on the blankets and Eleanora, who was between the two men, faced accused. (R. 50) Accused put his arms around the girl and began to fondle her and Francesco objected. She whispered "Wait until he goes to sleep". Accused, about 15 minutes later, began to fondle her again without her objection and Francesco pulled accused's hand away, began to talk loudly and rose to his feet holding a pistol in his hand. When accused advanced toward him Francesco pointed the pistol at him and said "sparare" which means "shoot". (R. 51,52) Accused continued to advance toward the man and was not afraid because he believed he could take the weapon from Francesco (R. 55,56). Accused seized Francesco's hand, raised and twisted his arm and when the weapon dropped the two men struggled for it. Accused got it first, struck Francesco and the latter fell. Shortly thereafter Francesco arose and ran away. Accused denied that he pointed the pistol at Francesco. Accused told the girl to go away, secured his blankets and walked off. Boles arrived and asked what was "going on". Eleanora seized accused's arm, said "Wait, wait", and asked accused to take her to Giuseppina. Accused refused and motioned that she should go away. She repeatedly told him that he was good and that her "brother" was bad. When accused stopped walking and asked her if she wanted to have intercourse, she agreed and he spread the blankets. He had the pistol in his hand but did not point it at her. (R. 52) She voluntarily lay down on the blanket with him and removed her drawers. Although he fondled her without her resistance and she held his penis, he did not succeed in having an erection and did not penetrate her person at all. After ten minutes he "gave up" and he and the girl went to his tent. She was not crying and lay down on his bed. He put the pistol under his pillow and then left to find her shoes and Giuseppina, at Eleanora's request. He could not find the shoes and on his return he asked the guard to come to tent number 11 and to awaken him at 0400 hours as accused thought that at that hour he could have intercourse with Eleanora and then take her back to the road. After accused returned to the tent and lay on the bed, Boles arrived and told him to "Take a walk". Accused told him to return later. In about 15 minutes Boles returned clad in his shorts and asked "What are you going to do?" Because the girl trembled accused told him that he "wouldn't have anything to do with her now as she seemed a bit shaky". Accused believed the girl was trembling because her brother ran away and she could not find Giuseppina. (R. 53,54,56) Boles was "hanging around" because he believed the girl was

a prostitute and he wanted intercourse with her (R. 57). When Boles asked for a cigarette Eleanora gave accused a package and he handed one to Boles. After Boles, the girl and accused smoked it, accused then turned his back, slept, and was awakened by the guard at 0330 hours. He did not have intercourse with Eleanora in the tent. (R. 54)

Accused further testified that the girl's dress could have been stained by his fingers which were wet because he fondled her. He insisted that he did not have intercourse with her or have an emission, and testified that he did not have a pistol when he first went into the field. With reference to Boles' testimony that he had accompanied the girl and accused from the field to the tent, accused testified that Boles was walking faster and did not notice that accused and Eleanora had stopped. (R. 54-56)

For the prosecution, in rebuttal, it was stipulated that if Lieutenant Colonel Philip Goldstein, Medical Corps, Chief of Laboratory, 37th General Hospital, were present, he would testify that examination of the girl's dress disclosed the presence of two whitish spots which showed "vaginal epithelium and also some spermatozoa" (R. 57-59).

4. There is thus direct and positive evidence that at the time and place alleged in the Specification, Charge I, accused had unlawful carnal knowledge of Eleanora Bozzano, the woman named in the Specification, by force and without her consent. It was also shown by the evidence that accused committed an assault with an intent to do bodily harm upon Francesco Maccio, the person named in the Specification of Charge II, by striking him on the head with a dangerous weapon, namely a pistol.

Accused accompanied Eleanora and Francesco to a field, lay down with them on some blankets and refused to leave upon Francesco's request. When Francesco insisted that accused leave them the latter pulled out a pistol, put a bullet in the chamber and threatened them with the weapon. The girl, who feared accused would injure her, asked two soldiers who then appeared not to leave them but they departed after Francesco refused their request to come with them. Thereafter, accused fondled the girl against her will and when her fiance objected and pulled his hands from her body, accused struck him on the head with the pistol, knocking him unconscious. After Francesco ran for aid accused, still holding his pistol, pulled the girl away to another spot in the field and at pistol-point forced her to get down on the blankets. Although she feared accused would use his pistol she resisted with all her strength his attempts to accomplish the sexual act. He finally succeeded in removing her underclothing and in penetrating her person. The girl testified that she "felt unconscious" toward "the end".

The testimony of Eleanora as to the commission of the offense of rape was corroborated in part by the testimony of Francesco, by the fact of her hysterical, trembling condition when her fiance later arrived at the camp with the British police, and by her complaint at that time that accused "had done everything over her". Boles also testified that two soldiers had appeared in the field, that the girl was shaking and talked in a "funny" voice after her return to accused's tent, a fact admitted by accused. The medical evidence

disclosed that there were patches of what appeared to be semen on the victim's skirt or dress, and underclothing. The lack of medical equipment prevented the taking of a smear from the region of her cervix.

The testimony of Francesco as to the vicious assault upon him was corroborated by the testimony of Eleanora and Boles, and by the medical evidence.

Accused testified that although the girl was willing to indulge in the sexual act and never resisted his advances, he was unable to have an erection and did not penetrate her person or have an emission. The question of penetration and of the consent of the victim was one of fact for the determination of the court and upon all the facts and circumstances disclosed, the court was fully warranted in finding accused guilty of rape as charged.

Accused denied that he had a pistol when he first entered the field, testified instead that it was Francesco who had the weapon, and that accused disarmed and struck him because the Italian pointed the pistol at accused and threatened to shoot him when accused fondled his fiancée. Again, the truth of accused's contentions was a question of fact for the court's determination and its resolving of this issue against accused was fully supported by the evidence. Accused was properly found guilty of an assault with intent to do bodily harm with a dangerous weapon in violation of Article of War 93.

5. The charge sheet shows that accused is 29 years of age and was inducted 10 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

Edward K. Hargrave, Judge Advocate.
Walter C. Adams, Judge Advocate.
James C. Lewis, Judge Advocate.
Henry C. Keenish, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army
5 September 1945

Board of Review

MTO 7547

UNITED STATES)

v.)

Private FRANK JORDAN)
(18 023 253), 484th)
Aviation Squadron.)

FIFTEENTH AIR FORCE)

Trial by G.C.M., convened at)
Bologna, Italy, 14 August 1945.)
Dishonorable discharge and)
confinement for life.)
U. S. Penitentiary, Lewisburg,)
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 Frank (NMI) Jordan, 484th Aviation Squadron, then a member of Company "A", 909th Air Base Security Battalion, did, at Bologna, Italy, on or about 5 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Risi Nella.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special courts-martial, one for absence without leave and for failure to obey a lawful order of a commissioned officer, in violation of Articles of War 61 and 96 respectively, and one for carelessly discharging a service rifle in his tent 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

copy for A.G.O.

23 OCT 1945

for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on 5 May 1945 accused, now a member of the 426th Signal Construction Battalion, was a member of the 909th Air Base Security Battalion, stationed at an airfield about six kilometers from Bologna (Italy) (R. 38,46). He and Private First Class Richard Anderson were part of a small detachment of soldiers, of which Corporal Willie Evans was in charge, guarding a four-motor airplane that had crashed (R. 42,46,59). About one kilometer from the airfield, at Calderara Di Reno, part of the city of Bologna, lived Risi Nella, her 35-year old married sister Risi Vellina, her parents, and Chiarrini Giovanni, a 56-year old refugee from Bologna (R. 6,14,15,24,31,33,42). Nella, who was not a virgin, having had intercourse on many occasions more than a year previously with her fiancé, an Italian soldier, was 25 years old, one meter and 45 centimeters tall, and weighed 55 or 56 kilos (R. 13-15).

About 1630 or 1700 hours, 5 May 1945, Nella was in the kitchen of her home, and in the outside hallway were her sister Vellina, her 11-year old niece Rubini Adelfa, and another little girl (R. 6,7,25,36). Accused, a colored soldier, approached and asked Vellina for wine, and upon being told that she had none, entered the kitchen where Nella was, followed by the two little girls (R. 7,10,25,26,28,36,37). Accused was dressed in an olive-green uniform and wore a cap (R. 11,28). As this was the first time Nella had ever seen a colored soldier, she "went backward", but accused said "'don't be afraid, I am American. I am not bad'". He asked for some wine and when Nella told him that she did not have any, he sat down in a chair. (R. 7,25,36) Then he seized Nella by her hand or wrist, placed her on his knees, told the two little girls to leave, and told Vellina, who was standing outside the window to "'get out of here'". As he said this he twice put his hand under his shirt. (R. 8,26,36) As Adelfa left to go to a near-by farmhouse, she heard Nella screaming (R. 36). As Vellina left and went 12 or 13 yards for help, she heard her sister "yelling" (R. 26).

Risi Nella testified that as she tried to escape and follow the little girls, accused grabbed her hand and knocked her to the floor. She tried to get up and defend herself and accused hit her on the eye with his closed fist, slapped her on the mouth and teeth, and hit her on the chest and right hip. (R. 8) As she struggled and yelled, unable to breathe, accused squeezed her throat, put his hand on her mouth, squeezed her legs, pulled her drawers down and removed them, and "got on top" of her (R. 8,9,16). She yelled and struggled and did everything she could to prevent accused from removing her drawers (R. 17). When he was on top of her, he unbuttoned his belt and trousers and inserted his private parts within hers (R. 9). She tried to get up but accused squeezed her legs together with his legs and kept her on the

floor (R. 16). She tried to move but accused struck her on the side. She finally lost consciousness after accused had penetrated her person (R. 9,18). The intercourse was against her will (R. 14).

Vellina, who had gone for help, returned and saw accused lying on his knees on top of her sister. All of Nella's clothes had been "pulled up", and accused's trousers were down and his shirt out. (R. 26,30) Accused rose on his knees and threw a chair at her (R. 26) and she went away shouting (R. 27). Chiarrini, who was in the fields about 200 yards from the house, had heard Nella yelling, and rushed to the window, where he saw her lying on the floor "with the negro on top of her". She was moaning and accused was squeezing her throat and hitting her. (R. 31,32) Her skirt was above her waist and he could see her private parts. Accused's pants were up and unbuttoned. (R. 32) Chiarrini told accused to "'come out'" but accused threatened him and put a chair through the bars of the window in order to drive him away (R. 9,32). Nella regained consciousness while Chiarrini was at the window and accused thereupon dragged her by her legs about 15 feet over the rough stone floor to the other side of the kitchen near a table (R. 9,17). Chiarrini came around and entered the door of the kitchen, where he saw accused on top of Nella, under a table. Nella did not move. (R. 32) Accused threw two chairs at Chiarrini, which did not hit him, and Chiarrini threw one chair at accused, striking him on the nose and causing it to bleed (R. 9,27,32). Nella, who was still on the floor, was told by Chiarrini to come out (R. 10,32). She "walked under the table" "like a cat", and when she reached the door her skirt, which had been torn by accused during her struggles, dropped down and fell to the floor (R. 10, 11,16,18,19; Ex. 1). She left the kitchen, holding her skirt, and went to a near-by house, "still yelling"; her drawers remained in the kitchen (R. 10,18, 19,27,29). Accused "stood a moment to think and then when he saw his nose was bleeding" he left the kitchen. He ran away through the fields, turning from time to time to throw rocks, and reached the road. (R. 27,33)

Nella returned to the kitchen and washed her legs which were dirty (R. 10). Her outer skirt had been torn on the right and at the back (R. 10,11,16,18; Ex. 1) but her under skirt, waist and drawers had not been damaged in any way (R. 11,18; Def. Exs. 1,2). Accused's cap, which was found on the floor, was inspected ten minutes later by "somebody from Headquarters, Villa Fornica", to whom Nella explained what had happened. The cap was burned by children in the evening (R. 12,13,22). Nella "felt very bad" and went to bed. Her back was sore and she had a swollen eye and pains in her abdomen (R. 13). She had bruises between the legs which remained 15 or 20 days (R. 16). Her parents returned to the house about 2000 hours and she told them what had occurred (R. 19,20).

About 1700 or 1730 hours accused returned to his tent and entered it hurriedly (R. 46,63). He was dressed in "OD uniform" and there was blood on his face, nose and clothes (R. 46,47,59,60,63). Anderson, who was in the tent, testified that he heard accused

"say something when he got in that he had been in a fight with some Italians and didn't say exactly where, out at some girl's house or something like that" (R. 46).

Evans, who was in the back of the tent, testified that he heard accused

"say to the boys in the tent he had been in a fight with an Italian who beat him up that way. That him and the girl was about to get in bed and about to get some and the Italian hit him in the nose with a brick" (R. 59).

Accused secured "a gun", began to clean it, and Evans took it away from him (R. 46,47,59,60). Between 1830 and 1930 hours accused took off his clothes, borrowed a fatigue suit from Anderson and left the camp area, saying that he (accused) was going to get his clothes that evening (R. 60-62).

Tarozzi Ersillia lived 100 yards from the Bologna airfield and about a kilometer from Risi Nella. About 1730 or 1800 hours 5 May 1945 accused brought his dark green woolen uniform, consisting of a shirt and a pair of pants, to Ersillia to be washed. There were blood spots or stains on the shirt and on the outside of the pants. When Ersillia asked him the reason for the blood he replied "I met Franka. I wanted to love her. Her father came and hit me with a rock in my nose". (R. 42-44)

Nella was unable to get out of bed on 6 May and no Red Cross ambulance was available that day, but on 7 May her brother took her by horse cart to the Santa Orsola Hospital, Bologna, 12 kilometers from her home (R. 12,13,20, 27). There she complained to Bertini Antonio, Maresciallo of Questura on duty, that she had been raped (R. 12,44,45). She was examined by a Doctor Tolomilli (R. 21). It was stipulated that Doctor Eros Tolomilli, a doctor in the internal medicine clinic of San Orsola Hospital, would testify that on 7 May 1945 he examined Risi Nella, who told him she had been forcibly raped on 5 May. His examination disclosed that her left eye was black, that she had a bruise about three inches in diameter on her right shoulder and a bruise about four inches in diameter on her left side below her ribs. There were no contusions, lacerations or evidence of violence of any kind in the region of Nella's vagina, but these would not necessarily be present, even if she had been raped, as she was not a virgin on 5 May. (R. 47) After 7 May Nella spent seven days in bed. Her back, which had blue marks on it, was sore, she was unable to eat or sleep, and she was "always yelling". About 14 May she went to the dispensary of a Doctor Macchiagodina, about one or one and one-half kilometers from her house, who had treated her previously. (R. 20) On 31 May Nella was admitted to the Obstetrical and Gynaecological Clinic of the Hospital of the University of Bologna, where she was examined by the Director of the Clinic, Professor Luigi Baccialli (R. 21). She told both Doctor Tolomilli and Professor Baccialli that she was not pregnant (R. 21,47), but when Professor Baccialli found her abdomen hard and thought she had a tumor she informed him that she had "missed menstruation" since 18 April.

On 22 July she was bleeding from her genitals and Professor Baccialli told her that "it was an abortion", from which she concluded that she had been pregnant. (R. 21,22)

Accused, who was the only negro in the court room, was identified at the trial by Risi Nella, Risi Vellina, Chiarrini Giovanni, Rubini Adelfa, and Tarozzi Ersillia (R. 6,10,24,25,28,31,33,37,42). Nella also testified that some time in June she saw accused "at the airfield with the military police", when five to seven colored soldiers, dressed alike, were lined up under the wing of an airplane. Italian men and women, from the other side of the plane, were taken to where the negroes were, first Tarozzi Ersillia, then Chiarrini, then her sister. Nella was apart from them and was in a car with the military police. Ersillia spoke to no one. Nella pointed with her hand at the person who had attacked her. (R. 11,23) Vellina testified that she saw accused in an airfield with other negro soldiers and pointed him out as being the man who had been at her house (R. 28). Chiarrini testified that he saw the negro about a month later when "we were called to point him out among eight or ten". All the other negroes in the line-up were dressed alike, in dark olive, without hats. (R. 33) Neither Nella, her sister, or her parents ever reported the matter to the American military police, or to the carabinieri, who were about five or six kilometers from the house (R. 19,20,30).

Luigi Baccialli, Director of the Obstetrical and Gynaecological Hospital of the University of Bologna, a specialist in gynaecology and obstetrics since 1914, testified for the defense that on 31 May 1945 he made a vaginal examination of Risi Nella at his clinic and found that she was three and one half or four months pregnant. She informed him that "she had the last menstruation between 18 and 22 April" but continually denied that she was pregnant. He saw no evidence on her body that indicated that she had been forcibly raped, but the marks or bruises could have disappeared between 5 and 31 May. Nella was released from the clinic after five days and returned on 24 July. Examination by microscope disclosed that her uterus was bleeding and smaller, as though she had been pregnant one month or one month and a half, and that she had had an abortion, the cause of which Doctor Baccialli was unable to determine. (R. 38-41)

Accused testified that on 5 May 1945 he and three other soldiers comprised a detail at the Bologna Airfield, which had been sent from the 909th Air Base Security Battalion at Manduria to guard an airplane. About 1300 hours he left the field and went to the house of a washwoman, not Tarozzi Ersillia, where he talked for a few minutes. (R. 48,49) Then he went about a hundred yards to a house where there were a middle-aged Italian weighing 130 or 140 pounds, and a 17- or 18-year old boy. He drank wine with the latter and engaged in an argument with the former "as to the Americans not getting enough wine and eggs". (R. 49,50,55,56) Although accused weighed 180 pounds, the Italian "happened to get in a lucky lick", and hit him on the nose, causing it to bleed on his jacket (R. 50,56). Then, acting "like any average American", accused ran off and rode in a government truck to a fork in the

road near his camp. He dismounted, went down to a bridge, and met a woman, not Risi Nella, and talked about 25 minutes. Then he went to the house of another woman, also not Risi Nella, 20 to 25 yards away, where he helped her chop some salt. (R. 50,56) He then returned to his company area at about 1600 hours (R. 51,57). He made no effort to change his clothing or hide the blood but talked with Evans and Anderson, "which is possibly what the average soldier would do", and, "like any good American soldier", cleaned his rifle. He never mentioned "Franka" to the soldiers but merely told them he had had a fight with an Italian. (R. 51,57) When he took his clothes next morning to the washwoman, Tarozzi Ersillia, he told her that he had had a fight with an Italian and did not say that he had been trying to make love to "Franka" or that some man had hit him in the nose with rocks (R. 51,52,57). He did not at any time on 5 May see or talk to Risi Nella, rape her or have intercourse with her, or go to her house. He saw her only once before the day of the trial, "in the line-up" (R. 51,54,55,57). He had not seen or talked to Chiarrini before the trial (R. 58).

There was about a "company and a half" of other negro troops stationed near Nella's house, but accused did not know the name of the organization. He remained on duty at Bologna about two and one-half weeks after 5 May, during which time he was not questioned nor placed under arrest. From Bologna he went to Falconara and thence to his unit at Manduria, where he was on duty every day until 19 June, when he was placed in confinement. (R. 52) He had not been questioned previously about anything he had done. From the guardhouse he was brought back by the Criminal Investigations Division to Bologna, where there was "a line-up" on two sides of an airplane. Accused was "second man, right hand side", and Italians were on the other side of the plane. (R. 53) All the soldiers were dressed the same except for caps. Accused wore a round fatigue cap with brim, and the others wore overseas caps (R. 54). The washwoman, whom accused had known a long time, was the first to come around to identify him; she pointed him out and then returned to the other side of the airplane where she stood talking (R. 53). Then another woman whom he knew, but who was not Risi Nella, pointed him out and returned to the other side. Thereupon Risi Nella, "the young lady that I am charged against", came and pointed towards him. (R. 54) He remained in the same position beside the plane and did not ask to be moved. He knew of no reason why Nella should have picked him out, but with regard to Chiarrini testified:

"Sir, an Italian is like an American. They will stick with each other. If one tells something that will help him, the other will do the same, which I believe the Italian did". (R. 58)

He denied that Chiarrini hit him on the nose with a chair to prevent him from attacking Nella (R. 58).

4. There is thus direct and positive evidence that at the place and time alleged in the Specification, accused forcibly and without her consent had unlawful carnal knowledge of Risi Nella, the woman named in the Specification. Accused approached Nella's home, asked her sister for wine and, upon being told she had none, entered the room where Nella was and again demanded wine. When Nella told him that she had no wine, he sat down in a chair,

seized her by the hand, placed her on his knees and ordered her sister and two little girls to leave the house. He knocked Nella to the floor and, as she tried to get up and defend herself, hit her on the eye, the mouth, the chest and the right hip. She screamed and struggled and, when accused squeezed her throat, became unable to breathe. Accused then removed her drawers, in spite of all she could do to prevent it, unbuttoned his trousers, placed himself on top of her and penetrated her person sexually. She tried to get up but accused struck her on the side and squeezed her legs together with his legs. The girl testified that the intercourse was against her will and that she became unconscious after accused inserted his male organ inside her. Shortly thereafter a neighbor entered the house and when accused attempted to drive him away with a chair, he hit accused on the nose, causing it to bleed. Accused thereupon left Nella's house and returned to his camp, where blood was noticed on his face and clothes. He remarked to a fellow-soldier that an Italian had hit him in the nose with a brick when he "and the girl was about to get in bed". He told a washwoman to whom he took his clothes that he had been hit in the nose by the father of "Franka" when he "wanted to love her".

It is abundantly clear from the evidence that Nella resisted accused to the fullest extent of her ability and that he overcame her resistance by force and had intercourse with her against her will. The testimony of Nella as to the commission of the offense of rape was corroborated by the testimony of her sister and by that of Chiarrini, the neighbor. The violence of the assault upon her was borne out by the medical evidence. The fact that Nella was not a virgin or was even possibly pregnant at the time the offense was committed is, of course, immaterial (Wharton's Crim. Law, Vol. I, sec. 737).

The identification of accused in court by the victim and three other civilian witnesses was positive and unequivocal, and was corroborated by their pre-trial identification which was not hearsay in character. Accused testified that he did not rape Nella or have intercourse with her on the date alleged and that he had not seen or talked to her at any time prior to a pre-trial identification "line-up". The truth of accused's contentions, as well as the question of penetration, unequivocally testified to by Nella, were questions of fact for the determination of the court and upon all the facts and circumstances disclosed, the court was fully warranted in finding accused guilty of rape as charged (MCM, 1928, par. 148b; MTO 7535, Graves).

5. Evidence was introduced by the prosecution that two days after the commission of the alleged offense Nella complained to medical and civil authorities that she had been raped. Nella was confined to her bed immediately after the assault and was unable to leave it or to obtain transportation for two days. Although not made in accused's presence the complaint occurred, under the circumstances disclosed, at the first place and opportunity available to Nella. It was, therefore, admissible in corroboration of her testimony relative to the corpus delicti of the offense (MTO 7189, Grey).

6. The charge sheet shows that accused is about 23 years of age. He enlisted 10 September 1940 and had no prior service.

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

William C. Brown, Judge Advocate.
Cipero C. DeSivina, Judge Advocate.
Henry C. Kennial, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army
5 September 1945

Board of Review

MFO 7564

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|--------------------------------|---|--------------------------------|
| UNITED STATES |) | FIFTEENTH AIR FORCE |
| |) | |
| v. |) | Trial by G.C.M., convened at |
| |) | APO 520, U. S. Army, 17 August |
| Private JAMES A. BULLOCK |) | 1945. |
| (34 074 535), Headquarters and |) | Dishonorable discharge and |
| Headquarters Detachment, 426th |) | confinement for life. |
| Signal Heavy Construction |) | U. S. Penitentiary, Lewisburg, |
| Battalion, formerly of 644th |) | Pennsylvania. |
| Military Police Company. |) | |

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charges and Specifications:
CHARGE I: Violation of the 92d Article of War.

Specification: In that Private James A. Bullock, Headquarters and Headquarters Detachment, 426th Signal Heavy Construction Battalion, formerly of 644th Military Police Company, did, at Torretta Army Air Field, Italy, on or about 17 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Maria Fucci, a human being, by shooting her with a pistol, resulting in her death at Cerignola Italy on or about 26 July 1945.

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

Specification: In that Private James A. Bullock, Headquarters

and Headquarters Detachment, 426th Signal Heavy Construction Battalion, formerly of 644th Military Police Company, did, at or near Torretta Army Airfield, Italy, on or about 17 July 1945, with intent to do her bodily harm, commit an assault upon Marta Del Vecchio, by shooting the said Marta Del Vecchio in the right leg with a dangerous weapon, to wit a pistol.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence was introduced of one previous conviction by special court-martial for willfully disobeying a lawful order of a noncommissioned officer in the execution of his office, 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 the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 17 July 1945 the 644th Military Police Company, of which accused was a member, was stationed at Torretta Air Base, approximately ten miles west of Cerignola (Italy) (R. 5,16,23,29,34,38). One of the duties of the 644th Military Police Company was to guard the 484th Bomb Group Area of the air base. At 1800 hours accused was posted at the 484th Area as a sentinel for a six-hour tour of duty. (R. 5,6,16,23) In addition to the general orders accused was instructed to keep all unauthorized persons out of the area and, if it was necessary to accomplish the purpose, to fire above the heads of intruders but not to shoot anyone (R. 5,7).

On 17 July Maria Fucci, Marta Del Vecchio (also known as "Lena"), and four Italian men went from Molfetta (Italy) to the Torretta Air Base. After arriving there about 1630 hours they entered the 484th Bomb Group Area. Marta was short, fat, had black hair and was about 19 years of age. Maria was thin, had blond hair and was between 25 and 30 years of age. They were both prostitutes and went to the 484th Area for the purpose of prostitution. (R. 5, 7-9,19,22,23,28,29) About 1830 hours accused told Private Robert Fulton, a sentinel on the post which adjoined that of accused, that some Italian girls were in the area and they should get them out before the sergeant of the guard arrived. With this in mind they located Maria and Marta and three or four Italian men in one of the buildings in the area. (R. 16,18,20) After talking to the girls for a few minutes accused and Maria went in one building, and Fulton took Marta in another building where he had intercourse with her. Fulton then returned to his post where 15 or 20 minutes later accused appeared and in response to a question by Fulton, stated that he had had intercourse with the girl. (R. 10,16,17,19) They decided to report the presence of the Italian girls to the sergeant of the guard when he arrived, and accused returned to his post (R. 18,21).

About 2100 hours Staff Sergeant Fred W. Brown asked accused if there were any women in the area. Accused replied in the affirmative and stated that they had gone off with some soldiers. Accused and Brown then began to search the area, and after about two and one-half hours found the girls near one of the

buildings in the area. Maria was standing outside by the door, Marta was sitting in the doorway. Several soldiers were standing around the building. (R. 24,27-30,35,39-41) As accused walked up to them he stated "You whores get out of here!". He struck Maria on the back of her head with his left hand while holding a pistol in his right hand. Maria ran into the building as accused turned and kicked Marta in the chest or stomach. Marta said "O.K., I'll go" and started to run. Accused fired his pistol two or three times at Marta and one shot hit her in the right leg. She screamed, fell to the ground and then got up and ran. Accused then turned again to Maria, kicked her and fired the pistol at her twice as she was running. She was hit by one of the shots and fell near a wall about ten yards from accused. (R. 24-31, 34-36,39) While he was shooting at Maria the pistol fell from accused's hand and he immediately picked it up. About that time accused was heard to ask a soldier for ammunition and to state that he thought he had shot her, referring to Maria, and that he "might as well finish her". Accused was told not to shoot any more and he then returned the pistol to his holster and left. (R. 31,33,39,41,42)

One witness testified that when accused struck Maria she started to run and he fired at her two or three times. He then turned to Marta, kicked her and fired at her as she also ran from the building. (R. 25,26) Several witnesses testified that accused did not threaten the girls and that when he fired the pistol he did not appear to be aiming; rather it appeared that he was firing toward the ground (R. 26,32,33,37). The soldiers who were standing around Maria and Marta scattered when the shooting started. However, some of them stopped Marta as she was running across the field and tied a handkerchief about the wound on her right leg. Accused walked up while they were fixing the bandage on Marta and appeared surprised when told that she had been shot. (R. 26,35,43,44,48)

About 0130 hours, 18 July, the commanding officer of the 644th Military Police Company and several soldiers found Maria with a bullet wound in her back, lying on the ground near the place where she fell when she was shot. Both of the girls were admitted to a civilian hospital at Cerignola (Italy) about 0200 hours. (R. 12,13,25,36,44-48; Ex. 1) Upon her arrival Maria was in a serious condition. A civilian surgeon testified that her wound was caused by a bullet which entered her back near the belt line, slightly to the left of the center of her spine, and which exited about four inches below the belt line on her left side near the area of the groin. She was operated upon immediately. Peritonitis developed from the wounds as a result of which Maria died on 26 July. (R. 12-14,48) He further testified that Marta's injury was caused by a bullet which penetrated the muscle of her right leg between the knee and the ankle (R. 13-15,48).

About 2330 hours Fulton was on his post when accused passed and said that "he thought he had shot one of the Italian girls" (R. 18,21,22). The only shots heard that night by Fulton were four or five which were fired about 2100 hours. Accused and Fulton were each armed with a pistol that night. (R. 22)

Approximately 20 July the 24th Article of War was read to accused and

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he made a statement which was reduced to writing. On 23 July at accused's request the statement was destroyed and the 24th Article of War was again read to accused. He then signed a second written statement reciting that he had been warned of his rights under the 24th Article of War and that the statement was given without threats, promises, duress or coercion. (R. 48-51; Ex. 2). The pre-trial statement, which was introduced in evidence without objection, is not herein set forth because it is substantially the same as accused's testimony at the trial, with the exception that in the pre-trial statement accused stated that he paid three dollars to the girl with whom he had intercourse; that about 2130 hours he fired his pistol in the air twice to scare away four or five Italian men who were in the area; and, that he and Sergeant Brown searched the area for the women (Ex. 2; R. 51).

For the defense, Private Odell Coleman, a member of accused's organization, testified that about 2330 hours on 17 July he was on duty as a sentry in the 484th Bomb Group Area and saw two Italian women and several soldiers at a building. He was about 20 to 30 yards away from the building when he heard some shots. It was a dark night and he did not see accused, neither did he see who was doing the shooting. He had been instructed to keep Italians out of the area and if necessary to fire over their heads. He had never been instructed to fire toward the ground. (R. 51-54) Private First Class Edward Hill testified for the defense that he was on "DS" with the 644th Military Police Company and his duty was that of a sentinel. He had been on guard in the 484th Bomb Group Area and had been instructed to keep the Italians out and to "fire in the air to scare them away". He was in the 484th Bomb Group Area on 17 July and saw accused "right after the shooting". He also saw Sergeant Brown but not until after the shooting occurred. (R. 55,56) Private First Class Ernest Morgan testified for the defense that he did not recall seeing Sergeant Brown or hearing his voice at the incident of the shooting on 17 July (R. 57). Sergeant Mitchell White testified for the defense that he was sergeant of the guard at the 484th Bomb Area on the night of 17 July and that accused was one of the guards posted that evening. Instructions had been given to the sentinels to "scare away" any civilians who were loitering around the area and "if you had to fire your piece, to fire up in the air". Some of the guards would fire in the ground though no instructions to that effect had been given. About 2100 hours on 17 July accused fired his pistol up in the air and "said that he was scaring some civilians away". Sergeant White testified further that the night was "pretty dark" but he did not remember whether or not the moon was shining. (R. 58,59)

Accused testified that he was a member of the 644th Military Police Company and his duty was that of a sentry. At 1800 hours on 17 July he was posted as a sentry at the 484th Bomb Group Area and about 1815 hours while he was walking with Private Robert Fulton, who was the sentry on the adjoining post, he saw two Italian girls, four Italian men and a soldier standing by a building in the area. He had seen one of the girls previously, knew her as "Lena" and had caught a social disease from her three months before. The other girl was blond, slender and older than "Lena". Accused and "Lena" went to a near-by building and engaged in sexual intercourse. About 15 minutes later they returned to the first building where accused asked Fulton if he had intercourse, to which Fulton replied in the affirmative. (R. 60,61,65) Accused and Fulton then obtained some water and washed themselves. About

2115 hours they decided to be sure that the girls would not remain on the post too long. They returned to the building where the girls were and remained there approximately 30 minutes, during which time soldiers were going in and out of the building. Accused returned to his post where, about 2215 hours, the sergeant of the guard, Sergeant Brown and three other soldiers drove up in a truck and asked if the girls had left the post. Accused informed them that the girls were in a building on Fulton's post. He then noticed that the girls had left Fulton's post with some soldiers and had gone to a building on his post. (R. 62) At approximately 2300 hours Sergeant Brown returned to accused's post and asked accused if the girls were near by. Accused took Brown to the building where the girls were. While walking toward the building accused gave his pistol to Brown, who fired it several times in the air and returned it to accused as they approached the building. (R. 62,63,65,68,70) Neither accused nor Brown threatened each other and accused had never had any trouble with Brown (R. 65,70). During the evening accused had not searched the area for the girls with Brown because he knew where the girls were (R. 62,63). Upon arriving at the building accused asked the "older" girl why she had not left his post and told her "to get the hell off my post". When she made no effort to leave he struck her. He then turned to "Lena" who was sitting in the doorway, kicked her in the stomach and told her to "get the hell out". "Lena" began to run and accused "began to fire just in the rear of Lena". He turned again to the "older" girl and was going to strike her but "The pistol began to fall" and "The piece went off as it fell from my hand". As he picked up his pistol he saw her getting up from the ground. He did not try to shoot the girls and did not aim at them. He was trying to get the girls off his post before he was relieved and thought the "O.D." might come to his post before he was relieved. (R. 62-64,69) After the shots were fired someone said "'Hold your fire, Jim. I think you shot one of those girls'". He saw a soldier tying a handkerchief around "Lena's" leg and was told that the other girl was hurt. He was surprised that the girl had been hit and did not say anything to the effect that he should finish killing her because he had already shot her. (R. 64,67)

Accused testified further that Fulton was mistaken about the girl with whom he (accused) had intercourse that night. Accused had intercourse only with "Lena" that evening and did not have intercourse with the other girl. (R. 65) In his first statement accused stated that he had fired in self-defense because one of the men had made a threatening gesture toward him with a stick. He testified he had been told to make such statement and that it was not true. He did not fire in self-defense but to "scare them off my post. I wanted them to get off my post". (R. 66,67) Accused fired at "Lena" first. He fired three or four shots toward the ground without aiming while she was ten to twelve yards away from him. He did not know whether or not he hit her. He then fired a single shot at the other girl. After he had finished firing he did not know how many rounds of ammunition remained in his pistol and he did not ask anybody for ammunition. At 2130 hours he had fired approximately a full clip of ammunition. (R. 68,69) Accused did not try to have intercourse with the "older" girl and did not shoot her because she had refused to have intercourse with him. At the time of the shooting the Italian men had disappeared. (R. 69) It was a dark night and accused's vision was poor (R. 69). He did not remember whether there was a moon that evening (R. 67).

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In rebuttal to accused's testimony Staff Sergeant Brown testified that he did not have accused's pistol in his possession, nor did he fire a pistol on 17 July (R. 70).

4. It thus appears from the evidence that at the place and time alleged accused shot Maria Fucci, the person named in the Specification, Charge I, with a pistol, and that she died nine days later as a direct result of the injury received. It further appears from the evidence that at the place and time alleged accused committed an assault with intent to do bodily harm upon Marta Del Vecchio, the person named in the Specification, Charge II, by shooting her in the leg with a dangerous weapon, namely, a pistol.

The evidence shows that on the night of 17 July 1945 accused was posted as a sentry guarding the 484th Bomb Group Area, Torretta Air Base (Italy). Shortly after being posted, about 1830 hours, accused and the sentry on the adjoining post found two prostitutes, Maria Fucci and Marta Del Vecchio, who were improperly in the area. Accused and the other sentry each took one of the prostitutes and had intercourse with her. Subsequently accused decided to remove the girls from the area because he was afraid the officer of the day would discover them. Accused searched for the girls and about 2330 hours found them in a building on his post. He told them to leave and without affording them an opportunity to comply with his order struck Maria, who was standing outside of the building by the door, on the head with his left hand. He was holding a pistol in his right hand. Maria ran into the building as accused turned and kicked Marta, who was sitting in the doorway. Marta said that she would leave and started to run. Accused fired his pistol two or three times at Marta and one shot struck her in the right leg. After firing at Marta accused forced Maria out of the building and fired at her twice. One of the shots struck her in the back as she was running from the building. Accused then asked a soldier for some ammunition and stated that he had shot Maria and that he "might as well finish her". Both girls were carried to a civilian hospital at Cerignola (Italy). Maria was in a serious condition when she entered the hospital and was operated upon immediately. Peritonitis developed from her wound, which was caused by a bullet which entered her back and injured her internally in the lower abdomen, as a result of which she died on 26 July while still in the hospital.

Accused contended that he did not intend to shoot the girls but that he fired the pistol to scare them. He testified further that the pistol was discharged accidentally when he started to strike Maria. There was testimony to the effect that accused was not aiming at the girls but was firing toward the ground. However, the evidence shows that both girls had expressed a willingness to leave the area as directed by accused and that while both were running away from him, he did in fact fire the pistol at them. He is presumed to have intended the natural and probable consequences of his actions (MCM, 1928, par. 112a). It is clear that when accused fired he was not in danger of losing his life or incurring serious bodily harm at the hands of anyone.

Malice aforethought is abundantly evident from accused's deliberate, wanton and cold-blooded use of a deadly weapon in a deadly manner. Callous

indifference to the life of the victim or vicious malice characterized the behavior of accused. The homicide was without legal provocation, justification or excuse. Accused was properly found guilty of murder as charged (MCM, 1928, par. 148a; MTO 6638, Jefferies).

The requisite intent to do bodily harm with a dangerous weapon to Marta Del Vecchio is inferable from the suddenness and violence of accused's assaults upon her, and from the use of a firearm in a deliberate and deadly manner (MCM, 1928, par. 149m; NATO 452, Reed).

5. The charge sheet shows that accused is 23 years of age, and that he was inducted 8 May 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence to death or imprisonment for life is mandatory upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

William R. Law, Judge Advocate.
James C. Sessions, Judge Advocate.
Henry C. Reuick, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army
22 September 1945

Board of Review

MTO 7577

UNITED STATES)

v.)

Privates ELMER SUSSEX)
(38 354 458), Company F, 371st)
Infantry Regiment, and CHARLIE)
ERVIN, JR. (34 042 926), Company)
I, 366th Infantry Regiment.)

92D INFANTRY DIVISION)

) Trial by G.C.M., convened at
) MTOUSA Disciplinary Training
) Center, 22 August 1945.
) SUSSEX: Dishonorable discharge
) and confinement for life.
) ERVIN: Death.
) SUSSEX: U. S. Penitentiary,
) Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

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

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

Specification: In that Private Charlie Ervin, Jr., Company E, 226th Engineer General Service Regiment (formerly Company I, 366th Infantry), and Private Elmer Sussex, Company F, 371st Infantry, acting jointly and in pursuance of a common intent, did, near Pietrasanta, Italy, on or about 31 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Pietro Testini by shooting him with a carbine.

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

Specification 1: In that Private Charlie Ervin, Jr., Company E, 226th Engineer General Service Regiment (formerly Company I, 366th Infantry), and Private Elmer Sussex, Company F, 371st Infantry, acting jointly, and in pursuance of a common

intent, did, near Pietrasanta, Italy, on or about 31 July 1945, with intent to do him bodily harm, commit an assault upon Giorgio Gamberini, by cutting him on the hand with a dangerous weapon to wit, a knife.

Specification 2: In that Private Charlie Ervin, Jr., Company E, 226th Engineer General Service Regiment (formerly Company I, 366th Infantry), and Private Elmer Sussex, Company F, 371st Infantry, acting jointly, and in pursuance of a common intent, did, near Pietrasanta, Italy, on or about 31 July 1945, with intent to do him bodily harm, commit an assault upon Giorgio Gamberini, by shooting him in the leg with a dangerous weapon to wit, a carbine.

Each accused pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced as to either accused. Accused Ervin was sentenced to be shot to death with musketry, all members of the court present concurring in the sentence. Accused Sussex was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence as to each accused, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement in the case of Sussex and forwarded the record of trial to the Commanding General, Mediterranean Theater of Operations, U. S. Army, for action under Article of War 48 as to Ervin and under Article of War 50¹/₂ as to Sussex. The record of trial was forwarded to the Branch Office of The Judge Advocate General with the Mediterranean Theater of Operations, U. S. Army from the Office of the Theater Judge Advocate, Mediterranean Theater of Operations, U. S. Army. The record of trial contains no action as to accused Ervin by the confirming authority, the Commanding General, Mediterranean Theater of Operations, U. S. Army.

3. As the record of trial contains no action by the confirming authority as to accused Ervin, the Board of Review expresses no opinion as to the legal sufficiency of the record of trial to support the sentence with reference to accused Ervin.

4. The evidence shows that during the night of 30 and 31 July 1945 an Italian civilian truck loaded with lemons and civilian passengers en route to Genoa (Italy) broke down on a highway in the outskirts of Pietrasanta (Italy) (R. 6,7,9,10,23). Giorgio Gamberini, one of the passengers, testified that the owner of the cargo decided to go to Genoa for assistance, whereupon the other seven occupants of the truck decided to pass the night at the scene. Some of them slept on the side of the road, and the remainder, including Giorgio and his brother-in-law, Pietro Testini (the deceased), slept on cases of lemons on the truck. (R. 7,10) Giorgio did not see any weapons in the possession of any of the civilians (R. 9). About 0400 or 0430 hours 31 July, one of the civilians awakened Giorgio and told him that some colored soldiers were bothering the driver. A colored soldier with "something white tied on his head" climbed partly up the side of the truck, his body being visible to Giorgio only from the waist up. Giorgio saw

only one soldier, who wore no insignia indicating that he was a military policeman. The soldier asked one of the occupants of the truck for his permit, and upon being shown the civilian's identity card said that it was "no good". Giorgio then pointed at the soldier's arm and said, "You are not from the MP's, military police". Thereupon the soldier asked Giorgio for his permit, and simultaneously drew a knife approximately 20 centimeters long, with which he jabbed at Giorgio as the latter drew his pocketbook from his hip pocket. (R. 7,10). The soldier talked as if he were very angry, and Giorgio thought that he was drunk "because other times at Pietrasanta we had trouble with drunk soldiers" (R. 10,11). Giorgio held his pocketbook in his left hand, as the soldier tried to take it from him and at the same time struck at Giorgio with his knife (R. 7,10). Giorgio retained hold of his pocketbook, and raised his right hand to protect himself from the knife, receiving a cut on the hand about eight centimeters long. The other people on the truck called for help and the soldier jumped down and disappeared, leaving Giorgio's pocketbook on the truck. Giorgio testified further that a few seconds later two shots were fired. A few seconds thereafter Pietro, who was on the truck to the right of and behind Giorgio, said "'Giorgio, I am wounded, I am wounded'". He also complained and said that he was dying. Giorgio observed that Pietro was holding himself "low down on his stomach". Giorgio then felt a "great heat" in his leg, saw it bleeding, and realized that he had been shot. Giorgio and Pietro were then transported to a civilian hospital in Pietrasanta (Italy). (R. 7-12) At the time of trial Giorgio was still not able to use one finger on his hand "very well" (R. 8), and he demonstrated to the court that he could bend his leg "to that extent-no more" (R. 10).

It was stipulated at the trial as follows:

"that Doctor Lucchesi Pietro, an Italian civilian, is a duly qualified licensed and practicing physician and is qualified as a medical expert witness, and that if he was present he would testify that Pietro Testini, an Italian male, and Giorgio Gambarini, an Italian male, were brought to the civilian hospital in Pietra Santa, Italy, of which hospital he is the director, at about 0400 hours, 31 July 1945; that Pietro Testini had been shot in the lower right side of his body and the bullet had cut one or more of the main blood vessels, causing an internal and external hemorrhage which caused his death at 0630 hours 31 July 1945, in the hospital at Pietrasanta, Italy.

"The second person, Giorgio Gambarini, was shot in the left leg and cut on the palm of his right hand. His condition was painful but not dangerous" (R. 24; Ex. C).

About 0700 hours 31 July 1945, the Chief of the Italian Carabinieri in Pietrasanta (Italy) went to the hospital in that town, where he saw Pietro's dead body with a wound in the stomach. He then proceeded to the scene of the homicide. A civilian at the scene handed him one live cartridge and two cartridge shells found near the truck, which he later delivered to a sergeant

of military police. The Carabinieri Chief did not know if the cartridge shells had been fired at the locus of the homicide. No other shells were found there. (R. 22-24)

About 2 August 1945, military policemen arrested accused, Private Charlie Ervin, Jr., a member of Company I, 366th Infantry Regiment, and Private Elmer Sussex, a member of Company F, 371st Infantry Regiment, while they were asleep in a school building in Pietrasanta (Italy) (R. 12,16,17,19). Found in the room with accused were two loaded U. S. carbines, .30 caliber, which weapons were also referred to at the trial as "rifles" (R. 12,14-16,18,19). Upon arrival at the military police station, each accused identified his own carbine by pointing it out and stating its serial number (R. 13,15,19).

On 3 August 1945 the military policemen who arrested accused delivered accuseds' carbines and the two evidence cartridge shells obtained from the Chief of Carabinieri of Pietrasanta, to a ballistics expert of the Criminal Investigations Division. (R. 15,18,19,23-25) The latter testified at the trial that he fired one test shot from each carbine and compared the cartridge cases with the evidence cases. The test cartridge case fired from accused Sussex's carbine compared with the cartridge cases delivered to him by the military policemen. He testified further that in his opinion the latter were fired from Sussex's carbine. (R. 25-27) The two evidence cartridge cases and Sussex's carbine were admitted in evidence for their probative value over objection by the defense that no evidence had been adduced that the weapon had been used or the cartridge cases fired at the scene of the crime (R. 26).

About 3 August 1945, accused were warned of their rights under Article of War 24 by military policemen, and were told that they did not have to make any statement. Without reward, threats or duress, accused Ervin and Sussex each separately thereupon made a pre-trial statement, signed by them respectively on 4 August and 5 August 1945. The statements were admitted in evidence without objection, each to be considered only against the accused making it. (R. 13-20; Exs. A,B) Sussex's statement reads in pertinent part as follows:

"On Monday, 30 July 1945, just before midnight I returned from Camaiore, Italy to Pietrasanta, Italy to the school in which I stayed. That is where I lived there two months. Tony (Charlie Ervin), asked me to walk out on route one with him. By me not thinking I gets ready so Tony (Charlie Ervin) gets my carbine and I picks up my Italian knife in a black case but I takes the knife alone. We goes out on route one. We first went north about a mile from Pietrasanta, Italy, and we sets down and rests about five or ten minutes then we gets up and turns and goes back south. When we gets near Pietrasanta, Italy, we sees an Italian truck. At all times Charlie Ervin carried my carbine and I carried my knife. When we gets near the truck it was between midnight and daybreak. Ervin speaks, "Lets go near the truck and see what they are loading". When

we gets near the truck I tied a white handkerchief on my head, then goes up to the truck and talks to the driver with my knife unseen. I had in mind of asking him for money which we went out for during the night of 30th of July 1945 to 31st of July 1945. First I asked him, "What was he loaded with?". He speaks loud to me, "Lemons". All the time Ervin is standing behind the truck with my carbine. Being I asked the driver for a pass then I gives it back to him. Ervin was dressed in OD pants, khaki shirt with no grade or insignia, wool knit cap and combat shoes. I had on OD trousers, a khaki shirt turned inside out, I had a white handkerchief folded and tied with one knot behind my head and GI shoes without tops. Several other civilians riding the rear of the truck some were sleeping and some wasn't. I walked around the truck maybe twice, then climbed up on the side of the truck next to the highway. First asking for a lemon. The old civilian man, who offered me a lemon. I did not take it. I asked him for a pass, looked at it and gave it back to him. A young civilian man who were laying in the far rear of the truck were talking a lot asking "Who were I, a Policeman or who?". I speak, "Why?" The first young man, the one behind the old man raised up with a box of lemons so I grabbed the mans foot who I were talking to. Then I grabbed my knife, at the time I grabbed my knife the young man that had the box threw it at me with all force. By me dodging the box I cut the young man I were talking to. When I jumped on the ground Ervin fired two shots. Ervin was on the ground in the rear of the truck. Then we both run towards the schoolhouse in Pietrasanta, Italy. The civilians were hollering for help on the truck. We went to the school building in Pietrasanta and went to bed" (Ex. A).

Thereafter, on 10 and 11 August 1945, after having been warned in each instance of his rights under Article of War 24, accused Sussex made two additional statements to the investigating officer, which were admitted in evidence without objection (R. 21; Ex. A-1). Those statements recite respectively as follows:

10 August:

- "1. I have re-read my statement dtd 5 Aug 45 and affirm that it is the truth and my signature is affixed at the bottom thereof. On the morning of the incident Pvt Ervin carried my carbine. He had it slung over his shoulder, butt up; however I don't remember which shoulder.
- "2. At the time of the incident, I was standing on the side of the truck. I did not intentionally stab the man on the truck. When the box of lemons was thrown at me, I accidentally stabbed the man in dodging the box. I heard two shots fired and saw Ervin run away so I followed.
- "3. I know Ervin fired the shots because he was the only person there with a weapon. Ervin told me after we returned to the

school building in Pietrasanta that he saw the civilian throw a lemon box at me and when he saw this he shot him. He said he knew he shot one of the people but didn't know how bad."

11 August:

"While I was on the side of the truck I did make several stabbing motions at the civilians with my knife, but I did not actually stab or cut anyone until the lemon box was thrown at me" (Ex. A-1).

Also on 11 August accused Ervin admitted to the investigating officer that he had signed his statement of 4 August. After receiving an explanation of his rights under Article of War 24 and being told that he did not have to make a statement, Ervin made a supplemental statement to the investigating officer on 11 August, which was admitted in evidence at the trial without objection (R. 21, Ex. B-1). These two statements of accused Ervin recite substantially the same facts as are stated in, and are not at variance in any material aspect with the pre-trial statements made by accused Sussex (R. 14,21; Exs. A,A-1,B,B-1). The only quotations necessary are the following from Ervin's statements of 4 August and 11 August respectively:

4 August:

"I call Elmer Sussex, 'Frank'. * * * When 'Frank' struck at the man the second time another Italian which was on the truck grabbed a box and threwed the box at 'Frank', it did not hit him. 'Frank' jumped off the truck on the ground and I shot the one who throwed the box. I shot twice. I heard the civilians holler and then we run" (Ex. B).

11 August:

"When another man on the truck threw a lemon box at Sussex, I shot at this man right away. I fired two (2) shots. Sussex was on the ground when I fired and we immediately took off" (Ex. B-1).

No evidence was introduced by the defense and both accused elected to remain silent (R. 27,28).

5. It thus appears from the evidence, including the pre-trial statements of accused, that at the approximate place and time alleged, Pietro Testini, the person named in the Specification, Charge I, was fatally wounded by a shot fired by accused Ervin during a joint attempt by both accused to rob deceased and his companions. It further appears that at the same time and place alleged Giorgio Gamberini, the person named in Specifications 1 and 2, Charge II, was cut on the hand with a knife by accused Sussex, and wounded in the leg by a shot fired by accused Ervin.

There is evidence that about 0400 hours on the date and near the place alleged in the Specifications, a colored soldier approached an Italian

civilian truck, loaded with lemons and civilian passengers, broken down on the highway. The soldier, identified further only by having "something white" tied around his head, climbed partly on the truck, began to examine the credentials of the people thereupon, and attempted to rob Giorgio Gamberini, the person named in the Specifications, Charge II, of his pocket-book. During the course thereof the soldier produced a knife, jabbed at Giorgio with the weapon and finally wounded him in the right hand. He then disappeared, and a few seconds later two shots were fired. Giorgio was wounded in the left leg and Pietro Testini, the deceased, who was also on the truck, was wounded in the stomach. The latter died a few hours later in a civilian hospital due to internal and external hemorrhages caused by a shot in the lower right side of his body, which cut one or more main blood vessels. There is further evidence that two empty cartridge cases found at the locus of the assault were fired from the carbine of accused Sussex.

Accused Sussex stated in substance in his three pre-trial statements that he and accused Ervin, respectively armed with a knife and Sussex's carbine, approached a truck on the highway at approximately the time and place alleged in the Specifications, for the purpose of robbery. Sussex tied a white handkerchief around his head, went to the truck with his knife concealed, and asked one of the occupants for his pass. Another civilian on the truck asked Sussex if he were a policeman. Sussex made "jabbing motions" at the civilians with his knife, and stabbed one of the civilians when a box of lemons was thrown at him. Sussex jumped to the ground and Ervin fired two shots. The pre-trial statements of accused Ervin agreed in all substantial details with those of Sussex. Ervin admitted firing two shots from Sussex's carbine at the civilian who threw the box of lemons at Sussex.

The principal issue presented by the evidence under the Specification, Charge I, pertains to the identity of accused. Participation of an accused in a homicide may be established by circumstantial evidence. This question, like any other question of fact, was for the determination of the court in the light of all the circumstances in evidence. From the ballistics proof that two empty cartridge cases found at the locus of the homicide were fired from Sussex's carbine may be drawn the inference that the shot which killed deceased was fired from that weapon. Although no witness of the shooting identified either accused at the trial, the evidence sufficiently established the corpus delicti, and was sufficiently corroborative of the pre-trial statements of accused in which was admitted a course of events, including the firing of two shots, identical with the circumstances proved. Identity of accused Sussex as the soldier who attempted to rob Giorgio, and of accused Ervin as the one who fired the two shots is thus established beyond doubt.

Although no such defense was made at the trial, a variant of the right of self-defense is suggested in the pre-trial statements of accused, in that Ervin assertedly fired the two shots when a lemon box was thrown at Sussex. It was not proved at the trial that such a box was thrown at Sussex. The right of defense of a third person exists only when self-defense is available to that person in justification of or excuse for a homicide. Since both

accused here were engaged in an admittedly common and pre-determined forceful and unlawful attempt to rob deceased's fellow-passengers, they occupied the role of aggressors and were the only persons at the scene armed. Neither was in any danger of losing his life or suffering grievous bodily harm. The firing of the two shots was therefore without legal provocation, justification or excuse. The version of the shooting as recited in the pre-trial statements of accused, even if true, establishes no less than that the shooting was deliberate and intentional, and entirely devoid of the elements of justification by reason of defense of another (MCM, 1928, par. 148a; Wharton's Crim. Ev., Vol. 1, 11th Ed., sec. 313; Wharton's Crim. Law, Vol. 1, 12th Ed., sec. 637; 40 C.J.S., "Homicide", sec. 282).

The evidence as a whole establishes that the homicidal assault was in furtherance of a preconcerted felonious design or intent by both accused to rob the occupants of the truck. The natural and probable consequence of that criminal undertaking involved the contingency of taking human life. Under these circumstances it is immaterial which of accused fired the fatal shot, as there is afforded substantial legal basis for imputing to accused Sussex the specific intent of whichever of accused fired the shot which caused deceased's death (NATO 2221, Harris, et al; MTO 6308, Goods, et al; MTO 6866, McMurray, et al; MTO 6867, Jackson). There is substantial evidence warranting the conclusion that Pietro Testini, the person named in the Specification, Charge I, was the Italian shot by accused Ervin, and that he died as a result of the injuries inflicted, though there is no expert testimony that the fatal gunshot wound was caused by a bullet from the carbine with which Ervin was armed (NATO 696, Pokorney; NATO 2295, Lavender, Bull. JAG, July 1944, sec. 450). Malice may be inferred from the use of a dangerous weapon in a deadly manner and from the deliberate and vicious manner in which the assault upon an unarmed victim was perpetrated. The court was warranted in finding accused Sussex guilty of murder as alleged (MCM, 1928, par. 148a).

As to the offense alleged in Specification 1, Charge II, there is direct evidence that a colored soldier with "something white" tied around his head cut Giorgio, the person named, on the right hand while attempting to rob him at the approximate time and place alleged. Accused Sussex's pre-trial statements identify him as the soldier who attempted to rob Giorgio, during which he cut the latter on the hand with a knife. Accused's pre-trial statements recite, in substance, that the cutting did not occur until a civilian occupant of the truck threw a box of lemons at accused. Accused did not state that Giorgio threw the box, nor was it established by other evidence at the trial that a box was thrown. These circumstances do not show any legal provocation, justification or excuse for the assault. The court was amply warranted in finding accused Sussex guilty of assault with intent to do bodily harm upon Giorgio by cutting him on the hand with a dangerous weapon, a knife, in violation of Article of War 93, as alleged (MCM, 1928, par. 149m).

As to the offense alleged in Specification 2, Charge II, there is direct evidence that Giorgio, the person named in the Specification, was wounded by a shot fired at the approximate time and place alleged. The circumstances proved, amply corroborative of the pre-trial statements of accused, support the inference that one of the two shots admittedly fired by Ervin wounded Giorgio. The firing of this shot was an act of force separate and distinct from that involved in the offense alleged in Specification 1, Charge II,

but in furtherance of the same joint and pre-determined criminal intent actively pursued by both accused. For the reasons stated above, regardless of which accused fired the shot, accused Sussex is legally responsible therefor as an accomplice. The court was justified in finding accused Sussex guilty of assault with intent to do bodily harm upon Giorgio by shooting him in the leg with a dangerous weapon, a carbine, in violation of Article of War 93, as alleged (MCM, 1928, par. 149m; 6 C.J.S., "Assault and Battery", sec. 19; see authorities above).

6. The charge sheet shows that accused Sussex is 23 years of age and was inducted 27 November 1942. He had no prior service.

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

William C. Quinn, Judge Advocate.
Clarence C. Quinn, Judge Advocate.
Henry C. Quinn, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army
26 September 1945.

Board of Review

MTO 7585

UNITED STATES)

v.)

Private JOHN E. H. AYERS)
(32 636 673), Company C,)
317th Engineer Combat Bat-)
talion.)

92D INFANTRY DIVISION

) Trial by G.C.M., convened at
) Rear Echelon, 92d Infantry
) Division, 5 July 1945.
) Dishonorable discharge and
) confinement for life.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 John E. H. Ayers, Company C, 317th Engineer Combat Battalion, did, at Nervi, Italy, on or about 28 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Caterina Pavia Santamaria a human being by shooting her 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 shot to death with musketry, all members of the court present concurring. 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, Mediterranean Theater of Operations, confirmed the sentence, but

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

3. The evidence for the prosecution shows that at about 0125 hours, 28 April 1945, Maria Pavia, a seamstress, was with her sister, Caterina Pavia Santamaria (the deceased) in their apartment on the second floor of a building in Nervi, Genova, Italy (R. 6,7,10). A knocking was heard on the door and, upon its being repeated, Maria went and asked who was there. She distinctly heard two voices, one of which replied in a foreign accent "'Apretta'", and "'Soldato Americano'". (R. 6,10) She asked what was wanted and the reply was "'Dormire', sleep". She told them to go away as there was no place to sleep in her home and when the knocking was continued she called her sister, who could speak English, to tell them to go away. Caterina went to the door, told them in English to go away as there was no place to sleep there, and also, if they wanted to speak to someone in the house, to return in the morning. The people at the door continued to knock and did not go away. The two women then began to call on the other tenants of the apartment for help, but no one came. They went to the back of the building and shouted for a fireman to bring them a ladder by which they might escape. During this time the people who were at the door said, in Italian, to open the door or they would fire. The women withdrew from the corridor where they were standing and went to the back window to call for help again. Returning, Maria managed to get into her room, but while Caterina was still in the corridor, about three or four meters from the door where the people were knocking, a shot was fired through the door and Maria "had a shock". Caterina called to her sister "'Maria, I am wounded'" and Maria looked for a light because it was dark. Caterina again said that she was wounded and Maria "seemed to hear as if someone pouring water on the pavement", which turned out to be "the sound of the blood that was pouring from the wound" of her sister. (R. 6,9) When the light was put on, Maria saw her sister falling on the bed and "pools of blood on the floor". Caterina had a hole in her forearm and "the part of the arm from the elbow to the top of the arm had completely disappeared". There was no flesh from the shoulder to the mid-arm. The shawl she was wearing over her left shoulder was "all blood-stained". Maria tried to help her sister "the best way possible" by wetting her lips with water and by tearing up sheets to stem the flow of blood. (R. 6,7)

During this time the people outside were still knocking at the door and trying to open it and Maria was screaming for help because she was "very afraid". Caterina did not utter a word but died within about 15 minutes. (R. 6,7,9) Later, Maria felt Caterina's pulse and noticed that it had stopped (R. 8). She also noticed that flesh from the arm of her sister was sticking on the door of the room (R. 9). Caterina's body remained on the bed and Maria buried her on "Monday morning" (R. 7,8). Maria testified that she "heard two shots, one immediately after the other, as if connected" (R. 8). She did not see the person who fired or the people who were knocking (R. 9). She distinctly heard two voices at the door. (R. 10).

At about 0130 hours, 28 April 1945, two firemen, Rumasio Agostino and his chief, Mario Navone, were in their firehouse at Nervi about ten or twelve meters from the Pavia home, when they heard their alarm ring and heard someone shout for help, saying that two colored soldiers were trying to break in the door and "take away some people" (R. 11,13,14). While they were dressing they heard a shot fired (R. 11,14). Mario went next door to the Pavia home, entered, looked up the stairway and saw two colored soldiers, one of whom was holding a rifle. Thereupon he sent Rumasio to a "block point" in Nervi for help. Rumasio returned with two American soldiers and they entered the Pavia home and went upstairs. (R. 11,13,14) Half way up the stairs a colored soldier (accused) came out of a door leading to a garden, "holding a rifle in his hands on guard". One of the soldiers with Rumasio spoke to "the armed soldier", who "put down his gun" and was taken away. Further up the stairs another colored soldier (Technician Fifth Grade Willie Pratcher), who had been sick, was found lying on the ground and was carried away. (R. 11,14) By means of a fire ladder Rumasio climbed through a window into the Pavia apartment, and in the corridor found "a huge pool of blood". One woman (Maria) had fainted; the other woman (Caterina) was dead. She had a wound in her forearm and her shoulder "seemed to have exploded out. The bone was sticking out from her shoulder". There was flesh sticking on the sides of the door. (R. 11,12)

Rumasio returned to the firehouse where Mario stopped a jeep, in which Lieutenant Colonel Peter L. Urban, Fifteenth Army Group, was riding (R. 12, 14,16). Through an interpreter they explained to him that "they had two colored American soldiers who were involved in a shooting", and brought him inside a large apartment building where accused was sitting with five or six partisans (R. 14,16). Against the wall was "an M-1 rifle". Accused appeared happy to see Colonel Urban as he was concerned about his own safety. Colonel Urban picked up the rifle, unloaded the clip which was not full, looked down the bore, smelled the piece, and ascertained that it had been fired. Accused admitted to Colonel Urban that he had been firing the rifle throughout the afternoon, and that he had been "shooting, killing people around here". The front lines were about two and one-half to three miles away at this time. Colonel Urban completed disarming accused, removing two clips and a belt of ammunition from his person. Accused and his companion (Pratcher), the rifle and the ammunition were turned over to Captain Anderson Q. Smith, Headquarters, 92d Infantry Division. (R. 16-18)

Captain Smith began an immediate investigation and went with Rumasio to the Pavia apartment in Nervi. There he found "one dead woman" (Caterina) and her sister (Maria) who was hysterical. (R. 12,18,19) With the aid of a flashlight they found a bullet hole in the door and an empty .30 caliber cartridge case (Exhibit A) "laying on the stairhead" opposite the door. Captain Smith gave the cartridge case to Maria for safe keeping (R. 8,12,13, 19). There was a large amount of what appeared to be fresh blood on the floor of the apartment (R. 23). The place where Caterina was standing when hit was located, and a sight taken through the bullet hole in the outside door, about 40 inches from the floor, was found to be in line with bloodstains and some human flesh which were on the wall of the apartment (R. 12,19-21). Captain Smith testified that Caterina appeared to him to be

"dead for reasons that she was shot by a high-velocity bullet entering her body in two places, once below the elbow, and once above the elbow, tearing the arm away at the elbow, consequently causing her to bleed to death" (R. 19).

The next day a witness observed blood and flesh in the sill of the door of Caterina's bedroom (R. 28).

Neither Mario Navone nor Rumasio Agostino identified accused (R. 12,14). Mario testified that the colored soldier he found with the rifle was "slightly intoxicated" (R. 14). Colonel Urban testified that he could smell wine on accused's breath but that in his opinion accused was not drunk (R. 16). Captain Smith testified that accused appeared to him to be intoxicated, a conclusion he drew from accused's manner of speech and actions, but that accused was not drunk, recognized him as an officer and answered his questions by saying "'sir'" (R. 22).

Photographs showing the interior of the hallway and building in Nervi, the door of the apartment, the front entrance of the fire station, the stairway, the hall and entrance of the apartment, and the interior view of the doorway, which were made on 15 June 1945 by the official photographer of the 317th Engineer Battalion, were admitted in evidence without objection (R. 23-25,35; Exs. C,D,E,F,G,H). Pursuant to a company order, the supply sergeant of accused's company on 3 April 1945 issued rifle Number 1015505 to accused, which order was in effect on 28 April 1945 (R. 37,38). U. S. Army rifle, .30 caliber, Number 1015505 was admitted in evidence over objection by defense (R. 27,28; Ex. B). Mario Navone testified that the rifle (Exhibit B) seemed to be "the gun" he saw "leaning on the wall", as he remembered "this little butt" (the hand grip) (R. 15). Colonel Urban testified that the rifle (Exhibit B) was "very similar" to the one he took from accused, and that he turned over to Captain Smith "an M-1 rifle, caliber 30" (R. 17). Captain Smith testified that the rifle (Exhibit B) was similar to the one he had received from Colonel Urban (R. 21). Private First Class Frank A. Thompson, Military Police Platoon, 92d Infantry Division, testified that the rifle (Exhibit B), to the best of his knowledge, was the weapon he had received when accused was turned over to him about 0300 or 0400 hours 28 April 1945, and which he in turn delivered to a Lieutenant Rhodes (R. 25-27). First Lieutenant Rhodes, Military Police Platoon, 92d Infantry Division, testified that the rifle (Exhibit B) was the weapon which Private Thompson turned over to him, a fact he knew by the number (1015505) which he stated to the court (R. 27). A .30 caliber cartridge case was admitted in evidence over objection by defense (R. 28; Ex. A). Maria Pavia testified that the case (Exhibit A) was "similar" to the one an American captain turned over to her to keep (R. 8). Rumasio Agostino testified that the case was "similar" to the one he and the captain found on the stairway (R. 12). Captain Smith testified that the empty cartridge case he found was "either this one (Exhibit A) or one similar" (R. 19). Lieutenant Rhodes testified that the case (Exhibit A) was the one Maria Pavia handed to him and which he marked by the figures "'92'" (R. 28). The case and rifle (Exhibits A and B) were sent by Lieutenant Rhodes to a ballistics expert of the Criminal

Investigations Division (R. 29-32,36) who concluded, after examination under the comparison microscope, that a test cartridge fired from the rifle (Exhibit B) and the evidence cartridge case (Exhibit A) were both fired from the same weapon (R. 36,37).

On 29 April 1945, after receiving an explanation of his rights under Article of War 24, accused signed and swore to a statement which was admitted in evidence without objection (R. 32,33; Ex. I). On 15 June 1945 accused stated to the investigating officer that he had signed the statement (Exhibit I) of his own volition, but that there were several things in it that were not quite correct and he wanted to make another statement. The investigating officer then explained to accused his rights under the 24th Article of War and accused signed and swore to another statement that was admitted in evidence without objection. (R. 34,35; Ex. J) The investigating officer made no promises, used no threats, coercion or force, and was certain that accused fully understood the 24th Article of War and all its connotations (R. 34,35). The statement reads, in pertinent part, as follows:

"I knocked on the door, someone asked who was there? I said American Soldiers looking for a place to stay until morning. At first there were a lot of noises in the house including American voices. Then they all started to quite down. I thought by that, someone was going to open the door but again the voices went up into laughter and we waited. I knocked again and again someone asked who is there? Again, I repeated as before. The people inside got a bit quiet and some one as it sounded said Via. I don't know whether they were talking to us or not. Pratcher then said 'well that's funny'. I said it seems to me a bit funny or strange why they don't open the door or even come to it, Its something wrong. If it were Germans here and wanted to rest they would probably have hot coffe(e) for them. So I said I ought to blast at the door and if there is anything wrong, that will scare them out of it. At that time I saw Pratcher holding his stomach saying that he was sick so he started downstairs. I then knocked again and said open up. I fired at the upper right side of the door. All voices seemed to cease. And all people were to my left as far as voices and sound was concerned. I then went downstairs where Pratcher was sitting outside on a bench or something" (Ex. J).

Accused, a member of the 317th Engineer (Combat Battalion), testified that during "that afternoon" and evening he and his companion (Pratcher) consumed one and one-half or two "fiascos" of wine (R. 40). When he came to the hallway and knocked on the door, he heard the voices and footsteps of "quite a few" people; they appeared to be about ten feet to the left of the door (R. 40,42,43,46). They were speaking in "broken American" and he heard one say "'Via'" which means "go or to go" (R. 45). He "felt something was wrong inside" because of the "way they acted toward opening the door, and after we explained to them who we were, and were tired and wanted to sleep, and no

one came to the door" (R. 45). Pratcher left and accused continued trying to enter the house (R. 45,46). Then, he testified, he fired one shot through the door, not with the intention of hitting anyone but "for investigating purposes" (R. 40,43,45,46). He had no special police powers from his commanding officer (R. 45). He knew people were in the house but not near the door (R. 43). He did not think the shot had hit anyone, and when informed the next day at Division Headquarters that someone was killed, he was very much surprised (R. 40,41). He had never seen a bullet ricochet and thought the penetrating power of an M-1 rifle through wood was "about an inch, two inches" (R. 42-44). He heard no voices or footsteps or any sound at all after he fired (R. 42). He waited a few minutes and then went out to the front door and joined Pratcher (R. 41, 42). A fireman approached and accused told him they were looking for a place to sleep. The fireman said his chief wanted to see accused and the latter, making no attempt at evasion, "walked inside with him", set his rifle against the wall and sat down. (R. 41)

4. It thus appears from the uncontradicted evidence that at the time and place alleged accused killed Caterina Pavia Santamaria, the person named in the Specification, by shooting her with a rifle. Accused came to Caterina's apartment at about 0130 hours in the morning, knocked violently on the door and demanded a place to sleep. When informed that they had no place for him he repeated his demands and continued to knock on the door. Caterina and her sister called for help. Accused shortly thereafter fired at least one shot from his rifle which penetrated the door and struck Caterina in the left arm, shattering it from elbow to shoulder. Although her sister gave her aid and attempted to stop the flow of blood, Caterina died in about 15 minutes. Accused admitted and testified that he fired one shot from his rifle through the door, but claimed that the people inside the room were to the left of the door, that he did not intend to hit anyone and that he fired only for "investigating purposes" because he thought something was wrong inside.

The truth of accused's contentions was a matter for determination by the court. Even assuming them to be true nothing contained therein is sufficient to justify his resort to the use of his firearm or to amount to legal provocation or excuse the homicide on the ground of self-defense.

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed*** Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: *** knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is

accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused ***" (MCM, 1928, par. 148a).

The evidence, including accused's pre-trial statement and testimony, presents a reasonable basis for an inference that accused, although a trespasser, was angered and resentful at being denied admittance to Caterina's home and that he fired through the door, as he said, "to scare them out of it". There was, of course, no duty on Caterina's part to open her home to accused or to give him a place in which to sleep. Accused is responsible, therefore, for the homicide which resulted from his illegal act. Malice is clearly inferable from his acknowledged anger and resentment, the deliberate, cold-blooded use of a deadly weapon in a deadly manner, and the fact that accused's actions clearly stamped him as the sole offender throughout. Callous indifference to the life of his victim or vicious malice characterized the behavior of accused. This was a homicide committed deliberately and without legal provocation, justification or excuse. The court properly found accused guilty of murder as charged (MCM, 1928, par. 148a; MTO 6162, Farrell).

5. The civilian witnesses were unable to identify accused and one military witness stated accused's name as "Avery". Objection was made to the introduction in evidence of the cartridge case and rifle, with which accused allegedly fired the fatal shot, on the ground that the witnesses had not identified them properly. Inasmuch as accused admitted and testified that he was on the premises at the time alleged and fired a shot from his rifle through the door into the room, the matter of his identification or the error, if any, in admitting into evidence the cartridge case and rifle is immaterial.

The issue of whether accused was sufficiently intoxicated to prevent his entertaining the intent requisite to constitute murder was one of fact for the determination of the court. As there was substantial evidence that he was not so intoxicated, its findings will not be disturbed.

6. The charge sheet shows that accused is 33 years of age and was inducted 19 November 1942. He had no prior service.

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

William R. Brown, Judge Advocate.

(sick)
Henry C. Bessie, Judge Advocate.

(364)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
26 September 1945.

Board of Review

MTO 7585

UNITED STATES)

v.)

Private JOHN E. H. AYERS
(32 636 673), Company C,
317th Engineer Combat Bat-
talion.)

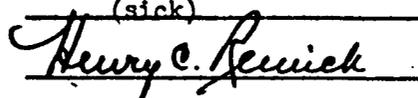
92D INFANTRY DIVISION)

) Trial by G.C.M., convened at
) Rear Echelon, 92d Infantry
) Division, 5 July 1945.
) Dishonorable discharge and
) confinement for life.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

HOLDING by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

 , Judge Advocate.
(sick) , Judge Advocate.
 , Judge Advocate.

MTO 7585

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
26 September 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private John E. H. Ayers (32 636 673), Company C, 317th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions

MTO 7585, 1st Ind.
26 September 1945 (Continued).

(365)

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:

(MTO 7585).



ELLWOOD W. SARGENT
Colonel, J.A.G.D.

Acting Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 120, MTO, 28 Sep 1945)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
2 October 1945

Board of Review

MTO 7613

UNITED STATES)

92D INFANTRY DIVISION)

v.)

Trial by G.C.M., convened at
MTOUSA Disciplinary Training
Center, 22 August 1945.
Death.)

Private CHARLIE ERVIN, JR.
(34 042 926), Company I,
366th Infantry.)

REVIEW by the BOARD OF REVIEW

Irion, Sessions and Remick, 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 92nd Article of War.

Specification 1: In that Private CHARLIE ERVIN JR, Company I, 366th Infantry, did, at Forte Dei Marmi, Italy, on or about 16 January 1945; with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Arnolfo Carresi, a human being by shooting him with a rifle.

Specification 2: In that Private CHARLIE ERVIN JR, Company I, 366th Infantry, did, at Forte Dei Marmi, Italy, on or about 16 January 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Carresi.

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

sentenced to be shot to death with musketry, all members of the court present concurring. 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, Mediterranean 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 for the prosecution shows that on 16 January 1945 accused and Private Mansfield Spinks, both members of Company I, 366th Infantry, were together in the town of Forte Dei Marmi (Italy), which was then about three kilometers from the front lines (R. 6, 23, 25, 26). Three bottles of cognac were purchased and they and other soldiers in various places in the town consumed "Cognac, rum, grappa, whiskey - everything these Italians have over here". Although both "got high", Spinks was not drunk and accused did not appear to be drunk. (R. 6, 12, 16) Some time before 1900 hours (R. 8, 9) Spinks and accused went to a house at Number 5, Via Vittoria Emanuele, Forte Dei Marmi, wherein were living Maria Bertoni Carresi, her husband Arnolfo Carresi (the deceased), her children and other members of her family (R. 6, 9, 16-18). Although Spinks had not been there previously and knew nothing about the occupants of the house, he did know that there were people living there (R. 9, 16). Spinks and accused were each armed with an M-1 rifle (R. 10). In response to knocking, Arnolfo opened the back door and accused entered the kitchen. He left his rifle there, waited a few minutes, went outside and returned with Spinks. Arnolfo tried to close the door but accused prevented him from doing so. Spinks entered the kitchen with his rifle pointed at Maria and her husband, which made them "very frightened". The soldiers went outside, leaving a rifle in the kitchen, and then returned. Spinks "started playing about" with Arnolfo, saying "I am friend; do not be afraid". (R. 19) Spinks and accused asked for chairs, which were furnished them, and then asked and obtained permission to sleep there that night (R. 6, 7, 19, 20). The reason they wanted to spend the night, Spinks testified, was that it was "pretty cool" and he "didn't want to be wandering around because the Germans were patrolling" (R. 9). After Spinks had searched through all the rooms and reported that there were "a lot of children" in the house, he and accused pulled off their shoes and sat down by the fire-place, warming their feet, using the chairs and blankets which the Carresis furnished them. A few minutes later Maria and her husband retired to their bedroom. (R. 6, 7, 20)

Spinks and accused "sat down and talked" for about five or six minutes (R. 6, 9). In the course of their conversation accused asked Spinks "something about was I scared and we ought to argue with him and get rid of the old man", because "he (accused) knew them and had had intercourse with her before" (R. 9, 10). They then made plans that Spinks should go into the bedroom where the Carresis were and should "start harassing them". Accused wanted to get the Carresis up and to "get rid of the old man" (R. 7, 32). Spinks thought that that meant "for us to kill him or wound him" or "shoot him and kill him". Accused said to Spinks "We will finish him off" (R. 11, 32, 33). Thereupon Spinks went into the bedroom, where the Carresis were in bed, and "started hollering

and knocking on the door and hollering at him". Although the Carrisis had placed a table and clothes-chest against the door, they saw a light coming through and heard someone pushing on the door. Inasmuch as he did not want the children to be frightened or anyone to come into the room where his wife was, Arnolfo arose, went with the soldiers to the kitchen and "tried to quiet them down". (R. 7, 8, 20) Maria heard her husband say "I like American soldiers, but that way you are not good" (R. 20). When Arnolfo entered the kitchen Spinks fired a shot into the fire-place (R. 8). Then, Spinks testified,

"the old man *** tried to cool us down. I had my rifle laid down on the side and he grabbed it and said 'Via', and I hit the door, and by the time I hit the door he had it pointed at Ervin and Ervin shot him. It wasn't his intentions to kill him, but to shoot the gun from him; he shot him in the head" (R. 7, 8).

Spinks testified that his (Spinks') weapon "was in the dead man's hand" (R. 9) and that "We didn't intend to kill the man, but to shoot the rifle out of his hand, but the bullet went in the wrong place" (R. 10). He saw accused lift his rifle and shoot (R. 11), saw "him (Arnolfo) hit the floor and I cut out", not bothering to go back for his rifle which he last saw in Arnolfo's hand (R. 8, 10). Accused followed Spinks out the kitchen door (R. 8, 11, 14).

Maria, meanwhile, had heard the first shot and two or three seconds later the second shot, and had jumped out of bed. Putting a coat on over her night dress, she ran out the front door of her home to call for help at the house next door where some partisans lived. (R. 20, 24, 25) As she was about to knock on the door, accused and Spinks "caught hold" of her, "pointed their gun" at her, and said "'Sh -- sh --, boom boom'", "'Come on, figi figi'" (R. 20, 24, 25). She "tried in vain to get away" and told them that she wanted to go to the Red Cross to get help for her husband (R. 8, 13, 21, 24). Although Spinks testified that Maria took his arm and the "three of us together" walked down the street, that they used "no force to make her go" and that she "automatically went" (R. 11, 13, 15), he also testified that accused told him to "carry her on with us" and that "we got her by the arm and she went with us" (R. 8, 13). Maria testified that the two soldiers held her by the arms, between them, and forced her to walk down the street (R. 21, 22). They made her jump a ditch and farther on she fell into another ditch and told them she had hurt her leg. Thereupon first Spinks, then accused, lifted her on their shoulders and carried her on their backs. Occasionally accused would go out in front a little, to see if there were any people. (R. 8, 13, 15, 16, 21-23). While accused carried Maria, Spinks carried accused's rifle (R. 13). Maria did not make an outcry or attempt to call on anyone for help as she passed the houses on the road, because she was "terrorized" (R. 17, 24). The soldiers tried to open several gates which were closed and finally came to an empty house, where they made Maria jump over a fence and enter the house through a window which they had opened (R. 8, 21). Then they "dragged in a spring mattress" from another room and had

sexual intercourse with her (R. 21-23). Spinks testified that he had intercourse with her twice and that accused had intercourse with her four times; that neither he nor accused threatened her; that she did or said nothing that would indicate she was trying to prevent the intercourse; that they had "no trouble with her"; that it was not necessary to hold her; that she did not try to get out or to get away (R. 8, 9, 12, 13, 15). Maria testified that accused had intercourse with her four times and that his companion "raped me twice" (R. 22, 23). They did not "mistreat me physically, but they did everything they wanted to with me". The intercourse was not voluntary; she did not give her consent nor did she struggle. "I let them do as they wished because I knew it would be worse if I tried to do anything" She was afraid they would kill her, as she had known of "others who were finished off". (R. 21) She made one effort to escape, through the window in the bathroom, but found it closed with a piece of wire. Accused would not leave her all night, "because every move I made he caught hold of me and held me tighter". (R. 22) Accused's companion remained in the same room, sleeping occasionally. Accused's rifle was with him, near the bed. (R. 9, 22, 23) Maria testified that she had no opportunity to leave the soldiers the entire time she was with them. She was afraid that they might shoot her, because they had already fired in the house. (R. 25) She had not, prior to the night of 16 January 1945, ever seen or known accused or his companion; accused had never visited her house and she had never had sexual intercourse with him before (R. 23, 24). When the soldiers first came to her house they appeared to have been drinking and she thought that they were drunk (R. 24).

It was stipulated that Captain Albert V. Anderson, Medical Corps, United States Army, formerly 366th Infantry, a duly licensed physician and qualified as a medical expert, would testify that at about 0300 hours 17 January 1945 he examined the body of Arnolfo Caressi, the husband of Maria Carresi, and from his examination found that Arnolfo had been shot in the head. Captain Anderson was of the opinion that Arnolfo "died as the result of this gunshot wound in his head". (R. 30; Ex. C) Sergeant Weston Hoffman, Chief of Section of the Criminal Investigation Section, 92d Division Military Police Platoon, testified that "early the next morning, the 17th", he saw the body of Arnolfo Carresi on the kitchen floor at a house pointed out to him by accused. Arnolfo had a wound, did not breathe, made no movement, and was dead. (R. 28, 29) Maria saw her husband two days later "when the medics came to the kitchen to get him. He was dead". (R. 23)

Sergeant Hoffman testified that (on 20 January 1945) he talked to accused and warned him of his rights under the 24th Article of War.

"I told him that every person in the military service is required to make a statement, even if the statement is that he does not want to make one. I told him that any parts of it could be used against him. I told him that I was not making any threats or any promise of light sentence, and I told him if there was anything in his statement incrim-

inating him, it was his privilege to leave it out. I broke it down and made sure he understood it, and then he made the statement". (R. 26)

Sergeant Hoffman used no duress, offered accused no reward and did not put him in fear in any way. Accused then signed (and swore to) a statement which was admitted in evidence without objection. (R. 26, 27, 29; Ex. A) It reads, in pertinent part, as follows:

"On January 16, 1945 about 2000, I and Spink, (Later identified as Pvt Mansfield Spinks, Co I, 366th Infantry). I had been going to this Italian's house for quite some time. The night of the 16 January 1945, I and Spink had a few drinks and went to the Italian's house. I had been screwing this Italian's wife before. I get high that night and went down to the house, her husband was there. After we stayed there a length of time they go to bed and she (wife) tells us that we can stay all night if we want to. She brought some blankets and threw them across the chair for us. After they go to bed, I and Spink decided to make away with the old man, her husband, and I would make her give him some trim. Spink, who had been drinking got up and went to the door. He went to the door where the children were first. He shined a flashlight in there and said to me, 'There ain't nothing in here but children'. He goes to the door, the woman's husband opened the door. Spink asked the man, 'What about some figi figi', so the man told him, 'Nante, figi, figi'. He (the Spink had an M1 rifle slung on his shoulder; Spink shot in the fire place one shot. He set his rifle against the table. The Italian picked the rifle up, the light went out and I grabbed my gun and shot the Italian man.

"I ran out behind Spink. I had my rifle with me. I grabbed my gun after the shot went off and ran out. I ran out and caught up with Spink just before he got to the gate of the yard. He tells me that he leaves the rifle in the house and that he is scared to get the rifle. So at that time the Italian's wife came out of the front door and started up towards the dispensary, running. I caught her by the arm and stopped her. I led her, I was on one side of her and Spink on the other, up the road. We get so far and we thought that we heard some one in front of us. So I leave her with Spink, I run up in front with my rifle because I was the only one with a rifle. While I left them behind her and Spin(k) stepped in a hole and fell. I think she hurt her hip or leg. We go until we get to a house up there which nobody lives in. We go in the Italian woman's house, Spink and I. We go in the house and go to bed. Spink sleeps in the chair. The woman and I sleep on the

spring. Spink went to sleep and I stayed awake. I screwed her four times and Spink screw- her two times. The next morning Spink said that he was going to 'I' Company, 366th Infantry to draw him a weapon. About twenty minutes after he left me, the woman left. I asked her could she walk, and she said, 'Yes I can walk a little'. I go on to the street with her, she goes to the left and I turned right and went on up the line. She told me to come back the next night" (Ex. A).

After accused had been warned by Sergeant Hoffman of his rights under the 24th Article of War, (on 20 January 1945) he signed (and swore to) a "statement of identification", which was admitted in evidence without objection (R. 27, Ex. B). Therein accused stated, in part, as follows:

"I next went to #5 Via Cesari Battisti and I identified this house to C.I.S. Agents Hardison and Hoffman as the house where the shooting occurred. I called the Italian's wife's name, 'Mary' and identified her as the wife of the man who was shot at this address.

"We went to a house, Spinks, the Italian's wife and myself, #10 with a green fence. The name of the house is, 'La Villanella', 'M. Bergna'; this writing is on a piece of stone in the gateway. I identified this house to Agents of the C.I.S., Hardison and Hoffman.

"I made these identifications to Agents Hardison and Hoffman of the C.I.S. on 20 January 1945" (Ex. B).

Sergeant Hoffman further testified that after he had advised accused of his rights under the 24th Article of War, which accused appeared to understand, he had conversations with accused pertaining to the locality of the offenses and accused "explained the whole thing" to him (R. 27, 28). Accused voluntarily pointed out to Hoffman the house where Hoffman saw Arnolfo's dead body and said "That is the dead man's wife and I called her Mary!". Accused claimed to have been to the woman's house four times previously. (R. 30) Maria and accused had no conversation together at that time (R. 30). Accused later directed Hoffman to "the house where he and Spinks spent the night with the dead man's wife" (R. 29).

Hoffman also testified that he saw accused and Maria together "at the identification", when Maria "looked at him (accused) and smiled" (R. 29, 30). Maria testified that although she had not previously known accused she "could have smiled at him" (R. 31).

No evidence was introduced by the defense and accused elected to remain silent (R. 33).

4. With reference to the offense charged in Specification 1 (murder),

it thus appears from the evidence that at the time and place alleged accused killed Arnolfo Carresi, the person named in the Specification, by shooting him in the head with a rifle. Accused and Spinks, armed with rifles, obtained admittance to the home of Maria and Arnolfo Carresi, and after Spinks had menaced Maria and Arnolfo with his rifle, he and accused obtained permission to sleep in the kitchen. Maria and Arnolfo retired to their bedroom and braced the door. Accused and Spinks then talked for a few minutes and planned "to get rid of" Arnolfo. Accused said "We will finish him off". Pursuant to the plan, Spinks lured Arnolfo from his bedroom by knocking on the door and "harassing" him, and Arnolfo came into the kitchen where accused and Spinks were. Maria heard her husband say that he liked American soldiers, "but that way you are not good". Spinks fired one shot from his rifle into the fireplace and put the rifle down. Arnolfo picked up Spinks' rifle, and accused shot Arnolfo. Spinks saw Arnolfo fall to the floor, and he and accused left the house. A medical officer examined Arnolfo's body the next day, and his stipulated testimony shows that Arnolfo's death was due to a gunshot wound in the head. Maria saw Arnolfo's dead body two days later.

There were no eye-witnesses to the homicide other than accused and Spinks. In a pre-trial statement accused confessed that he and Spinks "decided to make away with the old man". After Arnolfo picked up Spinks' rifle accused stated that "I grabbed my gun and shot the Italian man". The evidence established the corpus delicti and Spinks' testimony corroborated in every essential particular accused's confession, which was properly admissible in evidence (MCM, 1928, par. 114a). The proof of the cause of death and the other circumstances established by the evidence justified the court in concluding that deceased died as a result of the shot fired by accused, although there was no expert testimony that the fatal gunshot wound Arnolfo sustained was caused by a bullet from accused's rifle (NATO 696, Pokorney).

Although Spinks stated that he saw deceased point his rifle at accused, the circumstances proved, including accused's own version of the homicide, do not suggest that accused killed Arnolfo in defense of himself or of Spinks, or that such a defense was legally available to him, "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; also, NATO 1672, Spears; 40 C.J.S., "Homicide", sec. 119a, pp. 989, 990, sec. 120, pp. 993-995). It is amply proved that accused and Spinks entered into a common unlawful venture as a result of which Arnolfo was lured to his death. Although Spinks testified that accused did not intend to kill Arnolfo but merely to shoot the rifle out of his hand, accused himself stated that they had decided to "make away with the old man" and "we will finish him off". Accused played the principal role, provided the modus operandi, and actually fired the shot which killed Arnolfo. It is reasonable to infer that the motive for the premeditated murder was the elimination of deceased in order that accused and Spinks could assault his wife. The callous and brutal manner in which the crime was conceived and committed with a deadly weapon, amply establishes the malice by which accused was motivated in its perpetration.

The circumstances exclude any theory of legal justification or excuse and the evidence is devoid of any matters of extenuation or mitigation. The court was justified in finding accused guilty of murder (MCM, 1928, par. 148a).

With reference to the offense charged in Specification 2 (rape), it further appears from the evidence that at the time and place alleged accused had unlawful carnal knowledge of Maria (Bertoni) Carresi, the woman named in the Specification, by force and without her consent. Maria left her house to seek aid after hearing two shots fired in the room wherein she had heard her husband remonstrating with accused and Spinks. Accused and Spinks seized her when she was knocking on the door of a neighboring house. Threatening her verbally and with a rifle, and coarsely demanding intercourse, they forced her to accompany them through the deserted streets of the town to an empty house. Accused and Spinks forced her to enter a room in the house through a window. Spinks had sexual intercourse with her twice and went to sleep. Accused, who had his rifle with him near the bed, had intercourse with Maria four times and would not leave her until morning.

The fact of penetration was proven by the testimony of Maria and Spinks that accused had "sexual intercourse" with her, and by accused's own statement that he "screwed her four times". Spinks testified that Maria accompanied him and accused to the house voluntarily and submitted to their sexual advances without force. The essential elements of force and lack of consent thus are drawn into dispute, all other essential elements of the offense of rape as testified to by Maria being corroborated by accused's pre-trial statement and the evidence adduced at the trial. The uncorroborated testimony of a prosecutrix may uphold a conviction of rape where her testimony is not contradictory, uncertain and improbable (Bull. JAG, February 1945, sec. 395(10), Wharton's Crim. Ev., 11th Ed., Vol. 2, sec. 916, pp. 1587-1595). Maria's testimony was clear and convincing that under the circumstances her accompaniment of accused and Spinks to the house where the acts of intercourse occurred was in fact under duress. Her version of the occurrence was probable, not uncertain, and not contradictory. It was clearly shown by the evidence that when she was seized outside her house she was going to secure help, and the circumstances in evidence do not lend credence to the conclusion that she accompanied and had intercourse with accused and Spinks voluntarily. Spinks' version that no force was employed is somewhat modified by his testimony that accused told him to "carry her on with us" and that "we got her by the arm and she went with us", as well as by accused's statement that as Maria started to run from her house to the dispensary he "caught her by the arm and stopped her". It is obvious that in view of the physical violence visited upon Maria by accused and Spinks, their threat to kill her, and their previous use of firearms, further physical resistance by Maria was futile after she reached the house. She testified that she was "terrorized" and afraid they would kill her, that although she did not struggle she did not consent to the intercourse, that the intercourse was not voluntary, and that she sought to escape during the night. It is rape, though a female may yield through fear. The issue of consent was one of fact for the determination of the court, and the circumstances proved amply support the inferences that accused's acts of intercourse with Maria

were by force and without her consent. The court was warranted in finding accused guilty of rape as charged (MCM, 1928, par. 148b; CM 236612, CM 236801, Bull. JAG, August 1943, sec. 450; NATO 3940, Maxey et al; NATO 3611, Marcial).

5. A non-commissioned officer, investigating the offenses, testified that before receiving accused's pre-trial statement he warned accused as to his rights under the 24th Article of War using, inter alia, the following words: "I told him that every person in the military service is required to make a statement, even if the statement is that he does not want to make one". The evidence shows that the non-commissioned officer used no duress and offered no reward and that the statement, admitted in evidence without objection by defense, was in fact wholly voluntary. Under these circumstances it is clear that the statement with reference to his rights under the 24th Article of War, made to accused by the non-commissioned officer, while inartistic and inaccurate, was not so erroneous or misleading as to affect injuriously the substantial rights of accused (AW 37).

There was evidence that accused and his companion had been drinking, but Spinks in his testimony and accused in his pre-trial statement evinced a remarkable and detailed recollection of all the events which transpired. The issue of whether accused was sufficiently intoxicated to prevent his entertaining the intent requisite to constitute murder, was one of fact for the determination of the court. As there was substantial evidence that he was not so intoxicated its findings will not be disturbed (MTO 7585, Ayers).

6. This is a companion case to MTO 7187, Spinks.

7. The charge sheet shows that accused is 25 years of age and was inducted 23 April 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder or rape in violation of Article of War 92.

William C. ... Judge Advocate.
Cigao C. ... Judge Advocate.
Henry C. ... Judge Advocate.

(376)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
2 October 1945

Board of Review

MTO 7613

UNITED STATES)

v.)

Private CHARLIE ERVIN, JR.
(34 042 926), Company I,
366th Infantry.)

92D INFANTRY DIVISION)

Trial by G.C.M., convened at
MTOUSA Disciplinary Training
Center, 22 August 1945.
Death.)

HOLDING by the BOARD OF REVIEW

Irion, Sessions and Remick, Judge Advocates.

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

William R. Irion Judge Advocate.

Cyril C. Sessions Judge Advocate.

Henry C. Remick Judge Advocate.

MTO 7613

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
2 October 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

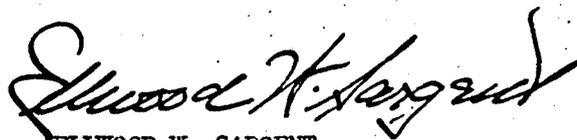
1. In the case of Private Charlie Ervin, Jr. (34 042 926), Company I, 366th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions

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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:

(MTO 7613).



ELLWOOD W. SARGENT
Colonel, J.A.G.D.,

Acting Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 121, MTO, 4 Oct 1945)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APC 512, U. S. Army
29 October 1945

Board of Review

MTO 7658

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|--------------------------------------|---|----------------------------------|
| UNITED STATES |) | 88TH INFANTRY DIVISION |
| |) | |
| v. |) | Trial by G.C.M., convened at |
| |) | Caserta, Italy, 22 September |
| Sergeant CARL E. MEEHAN (36 403 066) |) | 1945. |
| Technician Fourth Grade ARNE N. |) | As to each accused: Dishonorable |
| MYLLY (36 402 943), and Technician |) | discharge and confinement for |
| Fifth Grade WILLIAM C. MOOSE |) | one year. |
| (34 437 332), all of Headquarters |) | MTOUSA Disciplinary Training |
| Battery, 88th Infantry Division |) | Center. |
| Artillery. |) | |

OPINION by the BOARD OF REVIEW

Sessions, Remick and Hughston, Judge Advocates.

Original examination by Hall, Judge Advocate.

1. The record of trial in the case of the soldiers named above, having been examined in the Branch Office of The Judge Advocate General with the Mediterranean Theater of Operations, U. S. Army, and there found legally insufficient in part to support the findings and sentences, has been examined by the Board of Review and the Board of Review submits this, its opinion, to the Acting Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Sergeant Carl E. Meehan, Technician Fourth

Grade Arne N. Mylly, and Technician Fifth Grade William C. Moose, all of Headquarters Battery, 88th Infantry Division Artillery, then of Service Battery, 347th Field Artillery Battalion, acting jointly, and in pursuance of a common intent, did, at Mondragone, Italy, on or about 14 August 1945, feloniously take, steal, and carry away from the presence of Francesca Di Girolamo, 29,500 lire, the property of Francesca Di Girolamo, value about \$295.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced as to any accused. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, confinement at hard labor for four years, and to be reduced to the grade of Private. As to each accused the reviewing authority approved the sentence, reduced the period of confinement to one year, ordered execution of the sentence as thus modified but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the MTOUSA Disciplinary Training Center as the place of confinement. The proceedings were published in General Court-Martial Orders No. 460, Headquarters 88th Infantry Division, 11 October 1945.

3. The evidence for the prosecution shows that about 1300 or 1330 hours on or about 14 August 1945, an Italian civilian known by the nickname of "Scafacchione" accompanied accused, Sergeant Carl E. Meehan, Technician Fourth Grade Arne N. Mylly, and Technician Fifth Grade William C. Moose, members of Headquarters Battery, 88th Infantry Division Artillery, then members of Service Battery, 347th Field Artillery Battalion, to the home of Francesca Di Girolamo, in Mondragone, Italy (R. 7, 9, 11, 17, 18, 21). Francesca had Italian money aggregating approximately 29,500 lire, and two American dollar bills, in a wallet under the mattress of her bed. She saw part of the wallet protruding from the mattress while she was in bed with accused. Thereafter she left her house of her own accord because she did not like the behavior of one of the accused. Accused were the only persons in the house when she left. (R. 7, 9, 21) Accused Meehan went out of the house with Francesca, leaving accused Mylly and Moose in the house. Outside the house Meehan told Francesca to send away the other accused and to stay with him (Meehan), to which she agreed. (R. 7, 9, 10) After remaining outside about 15 minutes, Francesca reentered her house. Mylly and Moose had departed. The furniture was upset, the mattress was overturned, and all of the money was gone. (R. 7-10, 21) Upon reporting the incident to the American military police, Francesca gave to them "dog-tags" and a pair of shorts left at her house by accused (R. 8, 11, 13, 14).

On 14 August 1945 a military policeman, investigating an incident reported by an Italian, visited Francesca's home, and observed that it "was pretty well beaten up". He saw a broken violin, and the mattress and a curtain on the floor. (R. 11)

About 1730 hours 14 August 1945, accused Moose and Mylly were apprehended by military police in a town which was "off-limits". They did not resist arrest. Their "shirt tails were out and their pants was out of their boots", and they appeared to have been drinking. (R. 11, 13-15) Shortly after their arrest and while taking Moose and Mylly to a "pro" station, a military policeman, who had in his possession "Carl Meehan's dog tags and one moccasin", was accosted by three men who asked where he was going with their friends. Returning from the "pro" station the military policeman asked the three men "'who was Carl Meehan'?" Accused Meehan "spoke up", was arrested, and tried to escape, at which time he "wasn't unsteady or drunk but he had liquor on his breath". (R. 12-14) Accused were searched and each had approximately \$95 in his possession (R. 12, 14, 15). Francesca was able to identify "some" of the money at the police station because it consisted of Italian 500 and 1000 lire bills and two American greenback dollars (R. 21).

On 17 August 1945, each accused, after being advised that anything he said might be used against him, signed a separate sworn statement, each of which recites:

"having been acquainted with my rights under the 24th Article of War, and realizing that anything I say may be used against me ***" (R. 16-18; Ex's. 1, 2, 3).

The pre-trial statements were admitted in evidence without objection or restriction as to applicability, and respectively read in pertinent part as follows:

Accused Moose:

"On or about the 14th of August, 1945, I and my friends, Mylly and Meehan were on a pass in Mondragone. We bought a bottle a cognac and we continued drinking, as we already drank before. Then we ran into an Italian boy who said he will take us to a woman. He took us to a certain woman's house. He, the Italian boy, knocked on the door and a woman came out. Only the three of us entered, Meehan, Mylly and myself. Meehan was the first to have sexual intercourse with the woman. Mylly and myself were waiting in another room and drinking. After we all finished Meehan and the woman left the house. Mylly and myself were getting dressed. It was then that I found some money at the edge of the bed. I did not count it when I picked it up. As far as I know Mylly knew I picked up the money. We left the house and started back to camp. We met Meehan a little later, who told us that he has to go back to get his dog-tags. At that time I divided up the money. Each one got about ninety dollars. I am sure that Mylly knew where I got the money from. Meehan must have known too. A little while later Mylly and myself were arrested. Also Meehan was arrested later. I do not recall doing any damage to the house" (R. 17; Ex. 1).

Accused Mylly:

"While being in Mondragone with my friends Moose and Meehan, on or about the 11th August, 1945, we bought a bottle of Cognac. We drank some of it, when we were approached by two Italian boys who asked us if we want a woman. They took us to a certain house. We were not aware the town was off-limits. A woman opened the door. Meehan went in first. Moose and myself followed after a minute or so. The woman brought three glasses and we all had a drink. Later all of us had intercourse with her. I had several more drinks. The woman went outside and Meehan went with her. I started dressing myself, Moose was also getting dressed but I did not watch him very closely. After we left the house, on the way towards the beach, we stopped to talk for a while. Moose took out a bundle of money. When I asked him, where he got it from, he answered that he got it from the woman's house. He divided the money among myself, Meehan and Moose. Each one got about ninety dollars. I do not remember doing any damage to the house" (R. 17; Ex. 2).

Accused Meehan:

"On or about August 11, 1945, I came to the town of Mondragone with two of my friends, Moose and Mylly. It was about 1300 hrs. We went to town and got a quart of Cognac. We drank some of it at a bar, not knowing that the town was off-limits. Then two pimps approached us and asked if we want a woman. They took us out to a house, of which I do not know the street nor the number. The two civilians knocked on the door. A woman opened the door and let us in. We sat down and drank the cognac. I also state that I was the first one to have intercourse with her. The others followed. She asked me to follow her outside. She made arrangements for me to sleep with her the whole night. I was gone about twenty minutes. When I was going back to the house I saw Moose and Mylly. We cut across the field and were headed for town. Moose said 'let's go down and get a drink'. And I answered: 'I have no money'. He dragged out a bundle of money and said: 'Don't worry, I have money. We stopped. I could not figure out where he got so much money. Then he started splitting the money three ways. I got 93.50 dollars. Mylly got the same amount. When I asked him where he got the money I do not recall what he answered. We then got up and started for camp. I went back to get my dog-tags as I remembered that I left it there. I was later arrested by the military police, who already had my dog-tags. I remember that there was no damage done to the house while I was in it. We were all drunk. Mylly told me later that Moose was the one who took the money" (R. 18; Ex. 3).

For the defense First Lieutenant Victor N. Nixon testified that he

was commanding officer of Headquarters Battery, 88th Infantry Division Artillery, and first met accused on the morning of the trial. Accused were transferred to his organization while in the stockade. He testified further that he had the service records of accused, which recorded no punishments under Article of War 104 or previous convictions by courts-martial of any of accused. (R. 21, 22)

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

4. It thus appears from the evidence for the prosecution and the pre-trial statements of accused that at the place and time alleged accused Meehan, Moose and Mylly, who were on pass and had been drinking together, went to the home of Francesca Di Girolamo. There, at about 1330 hours, they had more drinks and each indulged in sexual intercourse with Francesca. While in bed with accused, Francesca observed her wallet, in which she had Italian money aggregating approximately 29,500 lire and two American dollar bills, partially under the mattress. Not liking the behavior of one of accused, Francesca left the house of her own accord. Meehan went with her, leaving Moose and Mylly alone in the house. Outside the house, Meehan and Francesca agreed that the latter was to get rid of Moose and Mylly and spend the night with Meehan. After Meehan and Francesca departed, Moose picked up some money which he found at the edge of the bed. About 15 minutes after leaving, Francesca returned to the house. She discovered that Moose and Mylly were not there, that the furniture was upset, the mattress overturned and the money was gone. On their journey back to their camp, Moose and Mylly met Meehan. Moose divided the money among the three accused, each receiving approximately \$90. Moose told Mylly that the money came from "the woman's house". Meehan asked Moose where he obtained the money, but did not recall the latter's reply. About 1730 hours, military police, who had received a report of the incident, apprehended Moose and Mylly, whose clothing was disheveled and who appeared to have been drinking. Shortly thereafter Meehan, who also appeared to have been drinking, was arrested after he had inquired about the other accused. Each accused was searched and had approximately \$95 in his possession. Francesca identified some of the money at the military police station.

It is thus abundantly clear from the evidence that while Moose and Mylly were alone in Francesca's house, Moose took and carried away the kind and approximate amount of money belonging to Francesca without her consent, as alleged. Although the alleged value thereof was not proved the court was warranted in taking judicial notice that the value of approximately 29,500 Italian lire is approximately \$295, the amount alleged, as established by the Theater Commander, which is a matter of common and general knowledge in this Theater of Operations (MCM, 1928, par. 125; MTOUSA Circular No. 71, 8 May 1945, par. 4a(1)). As to accused Moose, therefore, all of the elements of the offense charged were clearly established, and the court was justified in finding him guilty of larceny in violation of

Article of War 93 (MCM, 1928, par. 149g).

As to accused Mylly, it is established by the evidence that he was present when the money was stolen. The circumstances proved also establish that while accused Mylly and Moose were alone in the house the furniture was upset and the mattress overturned. Upon Francesca's return to her house her 29,500 lire were gone. A short time thereafter Mylly received from Moose some money which the latter disclosed came from "the woman's house". Although Francesca was able to identify only "some" of the money found on all of accused, and that only by type, Mylly's pre-trial statement establishes sufficiently his possession of part of the property stolen. The admission of the three pre-trial statements was unrestricted. Nevertheless, each is competent only as against the accused making it, and recitals in Moose's pre-trial statement attributing knowledge of the offense to Mylly or his participation therein are incompetent as to the latter (MCM, 1928, par. 144c). The other evidence sufficiently establishes, however, the disruption of the house resultant in the larceny of money in circumstances under which the court could conclude knowledge on the part of Mylly. Presence at the scene, the taking and asportation of the money, all of which afforded ample opportunity for Mylly's participation, and receipt and possession of part of the money with admitted knowledge of its source, establish prima facie Mylly's participation in the commission of the offense in concert with Moose. Mylly's version as to how he came into possession of part of the money stolen, as expressed in his pre-trial statement, however believable was nevertheless for the consideration of the court. It was within its province to reject that version. The prima facie case against him was not rebutted by the accused, and accordingly the court was justified in concluding that Mylly at least aided and abetted Moose in the commission of the larceny, and properly found him guilty of larceny, as charged (MCM, 1928, par. 149g).

The evidence establishes that accused Meehan was outside the house with Francesca, who left it on her own volition, at the time the money was larcenously taken by Moose. The circumstances proved preclude any inference that Francesca was enticed or inveigled by Meehan or either of the other accused to leave with Meehan so as to afford opportunity for the larceny pursuant to a preconcerted plan. There is no proof or basis for inference that Meehan had knowledge of Moose's intent to commit larceny of Francesca's money, or that he participated in any way in the accomplishment thereof. Although he later accepted a sum of money from Moose, at that time the offense charged was fully consummated. Even if he was acquainted with the source of the money he received from Moose, which the competent evidence does not establish, his receipt thereof is not an offense lesser included in that charged (CM 210619, Jewell, IX B.R. 298). Under the circumstances of this case, the Board of Review is of the opinion that the evidence is not legally sufficient to support the findings of guilty as to accused Meehan (MCM, 1928, par. 149g; CM 205564, Rose et al, VIII B.R. 197).

5. Although it was asserted in their pre-trial statements and there

was some testimony at the trial that accused Moose and Mylly had been drinking, drunkenness was not relied upon as a defense at the trial, and there was no competent, adequate proof that either of accused were so intoxicated at the time of the commission of the offense that they could not have entertained the intent requisite to larceny. The court was warranted in resolving this question of fact against accused (MCM, 1928, pars. 126a, 149g).

6. The charge sheet shows that accused Moose is 24 years of age and was inducted 31 October 1942 and that accused Mylly is 23 years of age and was inducted 5 October 1942. Accused Mylly had no prior service. No prior service is shown as to accused Moose.

7. 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 sentences as to accused Moose and Mylly, but legally insufficient to support the findings of guilty and the sentence as to accused Meehan, and that all rights, privileges and property of which accused Meehan has been deprived by virtue of the findings and sentence should be restored.

George C. Sessions, Judge Advocate.

Henry C. Reeves, Judge Advocate.

Harold V. Hughton, Judge Advocate.

MTO 7658

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
30 October 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

There is transmitted herewith for your action under the fifth sub-paragraph of Article of War 50½ the record of trial by general court-martial in the case of Sergeant Carl E. Meehan (36 403 066), Technician Fourth Grade Arne N. Mylly (36 402 943), and Technician Fifth Grade William C. Moose (34 437 332), all of Headquarters Battery, 88th Infantry Division Artillery, together with the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences as to accused Mylly and Moose, and legally insufficient to support the findings of guilty and the sentence as to accused Meehan. I concur in the opinion of the Board of Review and recommend that the findings of guilty and the sentence herein as to accused Meehan only be vacated, and that all rights, privileges and property of which accused Meehan may have been deprived by reason of such findings and sentence so vacated, be restored. There is inclosed herewith a form of action designed to carry this recommendation into effect should it meet with your approval.

Heidman

ELLWOOD W. SARGENT
Colonel, J.A.G.D.

Acting Assistant Judge Advocate General

2 Incls:

- Incl 1 - Form of action
- Incl 2 - Record of trial

(As to accused Meehan, findings and sentence vacated. GCMO 125, MTO, 5 Nov 1945)

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