

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

CHINA-BURMA-INDIA INDIA-BURMA THEATER



VOLUME 1 B.R. (CBI-IBT)
CM CBI 15 - CM CBI 240

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

Judge Advocate General's Department

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including

CM CBI 15 - CM CBI 240

(1943-1944)

Office of The Judge Advocate General

Washington : 1946

FOREWORD

By direction of the President, pursuant to Article of War 50 $\frac{1}{2}$, the Branch Office of The Judge Advocate General with the United States Army Forces in the China-Burma-India Theater of Operations was established 27 October 1942; on 24 October 1944, this office was redesignated the Branch Office of The Judge Advocate General with the United States Forces in the India-Burma Theater and at the same time was also empowered to serve the United States Forces in the China Theater. Concurrently with its establishment, the Secretary of War by direction of the President vested in the Theater Commander confirming authority under Article of War 48 and the powers set forth in Articles of War 49 and 50. From its inception until 23 December 1943, Colonel Robert W. Brown, U.S. Army, was the Assistant Judge Advocate General in charge; then Colonel Herman J. Seman, U.S. Army, was acting in charge until 17 November 1944; and from the latter date until its inactivation on 30 November 1945, Colonel William J. Bacon, U.S. Army, was the Assistant Judge Advocate General in charge.

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

Similar collections of the Board of Review materials are being made for each of the several Branch Offices which operated in overseas theaters. This includes the Branch Offices of The Judge Advocate General which were estab-

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

1 May 1946



THOMAS H. GREEN
Major General
The Judge Advocate General

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accused and the offenses of which he was charged. It is therefore clear that the approval of the sentence by the same authority which appointed the court, is a ratification of his act in referring the case for trial despite the variance in name of command appearing on the indorsement. The approval of the sentence sanctions the validity of the reference, adopts the indorsement as his own as commanding general of Services of Supply, United States Forces in China, Burma, India, and confirms the reference.

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

/S/ Thomas N. Tappy, Judge Advocate
/T/ THOMAS N. TAPPY

/S/ Arthur I. Burgess, Judge Advocate
/T/ ARTHUR I. BURGESS

/S/ (On leave), Judge Advocate
/T/ CLAIRE W. HARDY

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

(3)

9 October 1943.

Board of Review
CM CBI 37

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

SERVICES OF SUPPLY

v.

Private Fred J. Laine,
(32511720), Company E,
478th Q.M. Regiment (Truck)
Calcutta, India.

) Trial by G.C.M. convened at
) Calcutta, India, 10 July 1943.
) Dishonorable discharge, total
) forfeitures and confinement for
) 10 (ten) years. The United States
) Disciplinary Barracks, Fort
) Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
HARDY, BEARDSLEY and KIRKWOOD, Judge Advocates.

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

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

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

Specification: In that Private Fred J. Laine, Company "E", 478th Quartermaster Regiment (Truck), did at Calcutta, India, on or about the 12th day of April, 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of K.Z. Hassan, a civilian watchman, four cartons of Philip Morris and Lucky Strike Cigarettes, two packages of Gillette Razor Blades, six tins of Half and Half Tobacco, four boxes of Candy, and several Prophylactic Tooth Brushes, the property of the Army Exchange Service, value of less than \$20.00.

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

Specification 1: In that Private Fred J. Laine, Company "E", 478th Quartermaster Regiment (Truck), did, at Calcutta, India, on or about April 12, 1943, feloniously take, steal and carry away one Pistol, Calibre .45 automatic, of the value of about \$26.97, property of the United States, furnished and intended for the military service thereof.

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Specification 2: In that Private Fred J. Laine, Company "E", 478th Quartermaster Regiment (Truck), did, at Calcutta, India, on or about April 12, 1943, feloniously take, steal and carry away about 600 rounds of ammunition, Calibre .45, ball, of the value of about \$12.60, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Private Fred J. Laine, Company "E", 478th Quartermaster Regiment (Truck), did, at Calcutta, India, on or about May 15, 1943, wrongfully take and use, without consent of the owner and without lawful authority so to do, a certain motor vehicle, to wit, a Chevrolet 4 x 4 truck, Army Number E 1, Motor Number BV-49299, Serial Number 8N409-1635, property of the United States of America, of the value of more than \$50.00.

Specification 2: In that Private Fred J. Laine, Company "E", 478th Quartermaster Regiment (Truck), did, at Calcutta, India, on or about May 15, 1943, wrongfully and unlawfully operate a Motor Vehicle, to wit, a Chevrolet 4 x 4 truck, Army Number E-1, on the public streets while under the influence of intoxicating liquor and in a reckless manner, and did strike a pedestrian civilian Indian man, whose name is unknown, injuring said person, and did fail to stop and render such assistance as was needed.

He pleaded guilty to Specification 2 of Charge III and to Charge III and not guilty to all other charges and their specifications. The plea of guilty to Specification 2 of Charge III and to Charge III was subsequently changed to not guilty (R.47). He was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for ten (10) years. The reviewing authority disapproved so much of the findings of guilty of Specification 2 Charge III as provided "and did fail to stop and render such assistance as was needed", approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. The sole question requiring discussion by the Board of Review is as to the sufficiency of the oath administered to the witness Z.A. Shaw. The certificate of correction appended to the record by the president of the

court and the trial judge advocate under the provisions of Par. 87b, MCM, recites that the following oath was administered to such witness:

"You swear by your God Allah that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you Allah."

Article of War 19 prescribes that all persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form:

"You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

The use of the foregoing form of oath has been said to be mandatory (Winthrop, Military Law and Precedent (Reprint 1920), page 285). A prerequisite to the consideration of the testimony of a witness is that he shall have been sworn in substantial compliance with the provisions of Article of War 19 (Par. 149 i, MCM). It must therefore be determined whether the oath administered to the witness Shaw constituted such substantial compliance with the article as to permit the court to give consideration to his testimony and to support a finding of guilty if based thereon.

The variance from the form set forth in A.W. 19 consists of the insertion in the first sentence of the prescribed form, after the word "swear" of the words "by your God, Allah" and of the substitution of the word "Allah" for the word "God" at the end of the prescribed form. Webster defines "Allah" as "The Supreme Being of the Mohammedans" and God as "The Supreme Being xxx". (Webster's New International Dictionary, 2nd Ed.). The phrase, "by your God Allah", added mere words of clarification for the benefit of the affiant and in no way altered the substance of the oath. In like manner the use of the word "Allah" in substitution for the word "God" at the end of the oath was in no manner a change of the sense of the oath but was a specific designation of the Supreme Being by a name comprehensible to an Indian Moslem. Such synonymous term "Allah" instead of "God" cannot be considered a substantial departure from the prescribed form of oath.

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

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the findings of guilty and the sentence.

Claire W. Hardy

Judge Advocate.

Grenville Beardsley

Judge Advocate.

Joseph A. Kirkwood
(Disqualified by reason
(of having reviewed)
(record as Asst. Staff)
(Judge Advocate)

Judge Advocate.

CM CBI 37. (Laine, Fred J.) 1st Ind.

Office of the Assistant Judge Advocate General, USAF, CBI,
APO 885, 9 October 1943. To: Commanding General, SOS,
USAF, CBI, APO 885.

1. In the case of Private Fred J. Laine, 32511720, Company E, 478th Q.M. Regiment (Truck), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is desired that the file number of the record be placed in brackets at the end of the published order, as follows: (C.M. CBI 37).

Robert W. Brown,
Colonel, J.A.G.D.,
Asst. Judge Advocate General.

(Sentence ordered executed. GCMO 25, CBI, 6 Sep 1943)



WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

(9)

24 January 1944.

Board of Review
CM CBI #47

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

v.)

Major Russel E. Hollis,
O-418090, Headquarters,
10th Air Force.)

) Trial by G.C.M., convened at
) New Delhi, India, 28 September
) 1943. Dismissed from the
) service.

OPINION of the BOARD OF REVIEW
VALENTINE, KIRKWOOD and VAN NESS, Judge Advocates

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

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

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

Specification 1: In that, Russell E. Hollis, Major, A.C., Headquarters, Tenth Air Force, while acting as contracting officer, Air Force Supplies, Tenth Air Force did, at New Delhi, India, on or about the 9th day of April, 1943, wrongfully attempt to acquire or possess a financial interest in the Allied Chemical Works, whose business was to include the manufacture and sale of Articles of a kind of which it was a function of his office as contracting officer to make purchases for the Government, viz. Hydraulic Brake Fluid and De-Icer Fluid.

Specification 2: In that Russell E. Hollis, Major, A.C., Headquarters, Tenth Air Force, while acting as contracting officer, Air Force Supplies, Tenth Air Force did, at New Delhi, India, on or about the 19th day of January, 1943, wrongfully attempt to acquire or possess a financial interest in Balgopal Das and Company, whose business includes the manufacture and sale of articles of a kind of which it was a function of his office as contracting officer to make purchases for the

CBI 47
HOLLIS, RUSSEL E., Major,
O-418090

Government, viz. and slushing compound.

Specification 3: In that Russell E. Hollis, Major A.C. Headquarters, Tenth Air Force, while acting as contracting officer, Air Force Supplies, Tenth Air Force did, at New Delhi, India, on or about the 22nd day of June, 1943 with intent to deceive Dan P. Callahan, Colonel, A.C., Chief, Maintenance and Repair Division, his commanding officer, wilfully and knowingly make a false official statement in writing, to the effect, that no agreement or contracts, with individuals, firms, or corporations, had been entered into by the said Major Russell E. Hollis, except an agreement with Balgopal Das and Company, which statement was known by the said Major Russell E. Hollis to be untrue at the time.

The accused pleaded as follows: To Specification 1 of the Charge: "Not Guilty"; To Specification 2 of the Charge: "Not Guilty"; To Specification 3 of the Charge: "Not Guilty"; To the Charge: "Not Guilty". The accused was found guilty of Specifications 1, 2 and 3. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, Pursuant to Article of War 50½, the order directing execution of the sentence was withheld.

EVIDENCE

Accused was Contracting and Purchasing Officer, 10th U.S. Air Force between the periods 7 October 1942 and 20 May 1943. (Pros. Exh. 'C' A 'D'). In this capacity he could and did purchase de-icer fluid, plastic compound, slushing compound and other products. (R.11, 53).

Accused entered into an agreement in writing on 9 April 1943 with Dhawan and his partners, (R.24) by the terms of which the accused was paid Rs. 2500 salami money (R.27). In return over certain of his patented formulas for products such as he purchased for the Government which were to be manufactured and sold by Dhawan. The accused was to receive 3% of gross sales (Pros. Exh. 'Q'). Accused advised Dhawan that he would receive U.S. Army orders through proper channels (R.28). By letter dated 15 May 1943 (Pros. Exh. 'T'), the accused terminated the agreement with Dhawan and Company.

In addition to the foregoing activities, the accused carried on similar negotiations with Ralgopal Das. A final agreement was never signed. (R.38). However, accused was paid Rs. 10,000 salami money by Das (R.39) and a tentative draft of a written agreement was drawn (Pros. Exh. 'M'). The negotiations were terminated 22 June 1943. (R.80).

Having heard about these activities of the accused, Colonel Felton wrote to Colonel Callahan, who, in turn, "directed" the accused to comply with the basic communication of Colonel Felton. (R.12).

By indorsement to a follow-up letter from Colonel Callahan (Bros. Exh. 'I') the accused wrote: "The sole agreement, and this never in final form, has been with Baglopal Das and Company for manufacture under my patents of Slushing Compounds and Plastic Leak proof Fuel Cells".

3. A question is raised by the omission from specifications 1 and 2 of the word intent. Both specifications employ the words "wrongfully attempt" and this obviates any other allegation of intent. The word attempt connotes an intent to do the thing attempted. "The only distinction between an 'intent' and an 'attempt' to do a thing is that the former implies the purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution". (6 C.J. 550 and cases there cited). It follows that the animus of the accused was properly charged in both specifications.

4. The objection is raised to the failure of Specifications 1 and 2 to allege an overt act. Matters of evidence, as distinguished from the facts essential to the description of the offense, need not be averred. (31 C.J.P. 672). These specifications are based upon attempts to do that which is forbidden by AR 600-10, June 2, 1942 which prohibits acquisition or possession by an officer of a financial interest in any concern whose business includes the manufacture and sale of articles of a kind of which it is the duty of the officer to make purchases for the Government. The specifications set forth the elements of the offense as stated in such Army Regulation; to allege overt acts would be pleading the evidence, and, though necessary to be proved, need not be averred. In any event, it does not appear that the substantial rights of the accused have been prejudiced by any error, if such there be, of pleading. (AW 37).

5. Specifications 1 and 2 allege that the accused attempted to "acquire or possess". While it is, improper to allege more than one offense in the alternative (Par. 29 b, p. 19, M.C.M. 1928), nevertheless, the present case is not similar to a situation where proof of one or two alternatives, negatives the truth of the second as would be true in an allegation such as "lost or destroyed". Just the one offense has been averred in the present instance since the attempt to acquire is lesser than and included within the attempt to possess; and by proving the attempt to possess, the attempt to acquire is of necessity established.

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6. Specifications 1, 2 and 3 in designating the organization of the accused avers: "Headquarters, Tenth Air Force". The accused testified that his organization was the "Tenth Air Force Command". The 10th Air Service Command was a part of the 10th Air Force at the time of the commission of the crime. The variance, if any, is immaterial since the organization of an accused in a specification is designated to indicate that the accused is under the jurisdiction of the Court-Martial. The mere fact that the organization is misstated would not vitiate the specification providing there is no question as to the identity of the party and providing the court trying the offense had jurisdiction over the accused. While there is some question as to whether or not the accused was a member of the command appointing the General Court, nevertheless, that question is immaterial since the Court was properly constituted and the accused was a person subject to military law.

7. Another question arises from the exclusion of evidence which the defense sought on cross examination to elicit from the witness Dhawan that the written contract (R.25,26) was not to become operative until certain patents were secured and the transactions approved by appropriate Military authorities. The contract between accused and Dhawan was in evidence without objection. While accused was testifying, the law member expressed the view that the excluded evidence had then become competent (N.77) and allowed the accused to testify concerning the verbal understanding which he contended existed as a condition precedent to the operation of the written contract. Thus all of the excluded evidence was before the court and if accused had felt that his evidence needed corroboration he then had the opportunity of recalling the witness Dhawan for the purpose. The court would undoubtedly have let the excluded evidence in if it had been proffered at this time, and it was incumbent upon the accused to make the offer. "Where the court, after refusing to admit certain evidence offered by a party, intimates that it will consider a new offer of such evidence, but no such offer is made, the ruling of the court in excluding the evidence will not be considered on appeal". (3 C.J. 827 and cases there cited, also 64 C.J. 127). In addition, the ruling of the court was directed more to the regulation of the cross examination than to the ultimate exclusion of evidence, and the court could, in the exercise of its discretion, thus limit the scope of the cross examination, without committing error. (64 C.J., p. 151).

8. On the question of intent there is abundant competent evidence in the record from which the court could, as it very properly did, draw the inference that the accused intended to commit the respective offenses set forth in the specifications 1 and 2. Accused was procurement officer for the Engineering Division, and as such could purchase hydraulic fluid, de-icer

fluid, plastisizer, leak proof coverings and slushing compounds (R.53). This put him in position to know the requirements of his outfit for these products and the opportunity for profits a manufacturer would have in this field. He knew these products were required by the Government of the United States and so advised Dhawan who was owner or one of the partners of Allied Chemical Works (R.24) during the negotiations (R.26) which led to the execution of the contract (R.25). Accused employed a lawyer (R.48) to put the contracts in writing. He knew that Dhawan expected to sell these fluids to the United States and that he would be entitled to 3% royalties on all sales so made. In order that the plant for the manufacture of these articles might be well located, accused wrote Dhawan on 5 June 1943, pointing out that "for military reasons" it would be well to set up a plant at Agra so as to be close to "our Depot activities" (R.29). He then wrote a note (R.55) which Mr. Kapur of Dhawan & Company took to Colonel Felton in an effort to obtain orders from the Government for the tank compound, de-icer fluid and hydraulic fluid (R.56). Mr. Kapur was disappointed and upset at not being able to get the Government business which had been promised by accused. Colonel Felton telephoned accused to tell him what had transpired and advised to do something about the matter immediately. Accused requested that Mr. Kapur be sent to him without delay (R.56). Accused collected Rs. 2500 from and delivered to Dhawan the specification for the manufacture of hydraulic brake fluid under the contract. (R.25, 27). Accused and his attorney conducted similar negotiations with Das (R.36, 37), looking toward the acquisition of Indian patents and the manufacture of certain plastic compound, containers and other plastic products (R.38) thereunder (R.40,41). Accused collected 10,000 rupees and was to have received 3% royalties on all sales of the plastic products manufactured by Das (R.39,44). Das was told by accused that his sales to the Government could be scrutinized carefully and only a reasonable profit would be allowed. Das understood that when he secured the patents and started the manufacture of plastic products he could make his own price and the government would pay it (R.45). Accused was authorized in his official capacity to purchase some of the products which were the subject of his negotiations with Das (R.53). In the letter of accused to Colonel O'Keefe (R.81) and his (the accused's) testimony (R.74, 75) it is perfectly clear that all along he was trying to establish business relationships with both Dhawan and Das which would be beneficial to himself not only after he returned to an inactive status but also while he was an officer engaged in purchases. The fact that the accused wanted it thoroughly understood that when production started he did not expect Das to "gouge" the government indicates clearly that accused was contemplating substantial sales to the Government (R.76), and that perhaps some investigation might follow. On 17 June 1943 accused wrote to Das as follows:

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"a. That no royalties will be paid to Russell E. Hollis while on Active Duty in India and this is to be part of our contract."

"b. I also wish it to appear as a matter of record that there is no agreement or understanding between us concerning the sale of merchandise by you to the 10th A.S.C." (Pros. Exh. 'I')

From all these facts, it would appear that the necessary intent has been proven.

9. An intent to commit a crime not accompanied by an overt act to carry out the intent does not constitute an attempt. (M.C.M. 1928, corrected to April 30, 1943, pa. 152 p. 190). In order that there may be an attempt to commit a crime there must be some overt act in part execution of the intent to commit the crime, but which falls short of the completed crime. (16 C.J. p. 113). Each case must depend largely upon its particular facts and the inferences which the jury may reasonably draw therefrom. Something more than mere preparation or planning is essential. (Id. p. 114). While the act need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must be such as will apparently result, in the usual course of events, if not hindered by extraneous causes, in the commission of the crime itself. The act relied upon need not be an act which is ordinarily a part of the criminal transaction itself, but may be one which, although somewhat remote, leads up to it. The term 'act', however, is to be liberally construed and whenever the design of a person to commit crime is clearly shown slight acts done in furtherance of this design will constitute an attempt. (Id. p. 114, 115).

From the record it appears that accused, while contracting officer, carried on extensive negotiations with Das and Dhawan. Accused had started the process of obtaining patents, had employed an attorney for the purpose of contracting with Das and Dhawan, and with the latter had, in fact, at one time, signed an agreement. Such acts go beyond mere stages of preparation, and are acts done in furtherance of the design to have manufactured certain items and to receive for himself a monetary return from the sales thereof. The actual transaction had commenced and would have ended in the offense if not interrupted. The acts and activities of the accused, as revealed from the record, were extensive, and are clearly more than mere acts of preparation.

The court by its findings, determined that accused had entered into a contract with Dhawan and this was one of the necessary overt acts, which, if carried through to completion would have resulted in the commission of the offense which accused is charged with attempting to do. (R. 31). It is true that accused terminated this agreement by his letter dated 15

May 1943, written to Dhawan (R.56). However, there was evidence before the court that Kapur, Dhawan's partner in the Allied Chemical Company, had talked to Colonel Felton and expressed disappointment about not getting any business from the Army as he had been promised. This information came to the attention of accused (R.56), from Colonel Felton, resulting in the foregoing letter of termination. The evidence is such that the court was justified in finding that accused's activities has come to light and were known to superior authority causing him to terminate his activity and that such termination was not voluntary on his part but was prompted by the discovery of his actions. Especially does this appear when the letter cancelling the agreement (R.31) is taken into consideration with his letter to Colonel Felton, written the same day (R.57) stating he will not complete an agreement tentatively discussed with Dhawan. This was written subsequently to Colonel Felton's phone call about such agreement. The only evidence before the court was that consent of higher military authority was required before any agreement with Dhawan became effective was the testimony of the accused (R.77). The court, within its province to judge the credibility of witnesses and the weight of their testimony, rejected such evidence. Therefore, it is clear that the overt acts of accused, if not acted upon by a circumstance independent of his will, would have resulted in the commission of the greater offense.

In regard to the tentative plan with Das, the court came to a similar conclusion. The negotiations and discussions were sufficient overt acts that if not terminated would have led to a resulting contract and the ultimate commission of the greater offense. The acts of accused in this respect were terminated at the request of Colonel O'Keefe (R.84). The court, within its province, must have disbelieved and rejected the testimony of Bas (R.38, 45) and accused (R.77), to the effect that there was a condition precedent to the proposed contract.

10. Specification 3 does not allege verbatim the false official statement. Although better practice would have indicated that the false statement be so averred, "A-writing may be set out verbatim or in substance only". (P.140, Winthrop "Military Law and Precedents" 1920).

11. Specification 3 avers that the accused knew the allegedly false statement to be untrue. The defense contends that the accused is not apprised of the facts upon which the averment is based. While it may be argued that better practice would have indicated that the accused be apprised of the fact that the official statement was false because of the previously existing Dhawan agreement, nevertheless, the material facts necessary to constitute the alleged offense have been averred, the specification is definite and certain, and the specification is sufficient under A.W. 37.

12. The question is presented whether or not the indorsement upon which specification 3 is based was properly introduced into

evidence since there is a question as to whether it is an admission against interest or a confession. It is believed, however; that even though the indorsement be considered a confession, it was of a voluntary nature, despite the fact that the accused was "directed" to reply by his superior officer. This is not the case of a young and raw recruit. The accused in the present instance, is a man of mature years, an officer of high rank, holding a position of considerable responsibility. The only evidence indicating that the statement was involuntary is the fact that it was made to a military superior, but the other circumstances mentioned above, together with the fact that the indorsement was written from Agra to a military superior in Delhi (which would tend to negative any suggestion of compulsion) would indicate that the statement was a voluntary one (see par. 114b, p. 116, MCM 1928). No objection to the introduction of this evidence was made.

13. The evidence contents that in so far as specification 3 is concerned, an intent to deceive has not been proven. It is true that the Dhawan agreement was cancelled prior to the writing of the indorsement. It is believed, however, that when the accused wrote "The sole agreement *** has been with Balgopal Das & Co., *** " that he knew such statement to be untrue. Had he written "The sold agreement *** at this time **** ", the statement would probably have been a true one. The fact that the staff judge advocate assisted the accused in the preparation of the indorsement is immaterial since it is not clear from the record that the accused supplied the staff judge advocate with all the necessary information. In addition, since the accused signed the completed indorsement, he thereby adopted the language, which he knew to be untrue, as his own. The accused had every opportunity to make a complete disclosure, but he failed to do so and with the letter before him, with ample time to give it consideration, and with full knowledge that trouble was brewing over his transactions with Dhawan and Das, it is perfectly apparent that he withheld the information of his transactions with Dhawan. Surely a person possessed of so keen an intellect as that of accused will find no escape from want of proof of intent in this record. A sane man is presumed to intend the necessary, natural and probable consequence of his voluntary acts, and this presumption of law will prevail unless the jury upon all the evidence and a fair consideration thereof entertains a reasonable doubt whether an intention really existed. (16 C.J. p. 81 and cases there cited).

"The general rule is that, if it is proved that the accused committed the unlawful act charged, it will be presumed that the act was done with a criminal intention, and it is for the accused to rebut this presumption. The act of itself is

evidence of intent; and it is no defense that the offender entertains a belief that the law is wrong, or that it is unconstitutional." (16 C.J. p. 81, Reynolds v. United States, 24 F Gas. No. 14, 459, 11 Blatchf. 200).

There are certain cases in which the burden is on the prosecution to prove either by direct or circumstantial evidence that the accused had the required intent when the crime was committed or the act done. "But it is sufficient in such cases to prove facts from which the specific intent may be inferred." (16 C.J. p. 81, Crosby v. Peo. 137 III. 325. Com. v. Hersey, 2 Allen (Mass.), 173; Roberts v. Peo. 19 Mich., 401287).

14. The evidence submits the following argument: "The findings of guilty of specifications 1 and 2, as amended by the Court in closed session after final submission of the case by the addition of words involving new elements and issues, if such specifications as so amended are held to define any military offense at all, exceeded the powers of the Court and were errors prejudicial to the substantial rights of the accused". It will be noted that the language of each finding following the phrase "not guilty as written but guilty as revised as follows:" is identical with the language (R.4) of the specification to which it relates except for the interpolation in the language of such specification as incorporated in the finding of the words, 'for his private advantage' between the words "possess" and "a", and except for interpolation of the words 'the transactions of', between the words "in" and "the", in the fourth and fifth lines respectively of each such specification.

Paragraph 78-C, M.C.M. 1928, page 64, states:

"Permissible findings include *** guilty with exceptions with or without substitutions and not guilty of the exceptions and guilty of any substitutions as stated below. * * * one or more words or figures may be excepted and, where necessary, others substituted, provided the facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. * * * if the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charge, the court may by its findings except appropriate words, etc., of the specification, and, if necessary, substitute others instead, finding the accused not guilty of the excepted matter but guilty

of the substituted matter * * * ".

The practice of making partial findings of guilty by employing the phraseology "not guilty as written but guilty as follows:" followed by a revision of the specification of the charge is of recent origin, and is not to be commended. The safe practice for a court is to follow the directions of paragraph 78b of the Manual for Courts-Martial and to specifically find the accused guilty, except for certain words stated in the finding, substitution therefor respective appropriate words, of the excepted words not guilty, or the substituted words guilty, as prescribed. In this case, however, the effect of the words added (rather than substituted) is not to change the nature or identity of offense, or to make the punishment greater than that for the offense as originally charged in the specifications. To acquire or possess for "his private advantage" a financial interest "in the transactions of" a firm or company as originally charged. The phrase "for his private advantage" narrows the scope of the specification. A financial interest in the transactions of the company is lesser than and included in "a financial interest in the company". Undoubtedly the intent of the court, in changing the language of such specifications as was done in the findings, was to make more specific the elements of the offense and to state the exact basis of their findings as understood by the members of the court in the light of the evidence. Doubtless, they thought that the language of the original specifications was too inclusive. By these findings, the court intended to find the accused guilty of not all but of part only of the unlawful conduct charged, and to narrow the scope of the specifications to "direct" and "personal" interests as distinguished from "direct" and other interests not personal to the accused, and "special" participation in the profits of transactions of firms and companies as distinguished from the "general" interests involved by ownership in whole or in part of such firms or companies.

Of course, the revision of a specification in findings so as to involve a finding of guilty of a greater offense or of a different offense or of an offense not a lesser offense included in that averred in the specification would be fatal error. (Dig. Ops. J.A.G. 1912, Discipline 12 A 5-7, p. 537, 539). The findings were under consideration although informed and irregular nevertheless, are findings of guilt in substance of specifications 1 and 2 of the charge and the revisions of such specifications in the findings of guilty are not such irregularities as prejudice the substantial rights of the accused. In accordance with the provisions of A.W. 37 the findings made by the court under specification 1 and 2 of the charge are legal findings under the offense as alleged in said specification 1 and 2.

15. In addition to the arguments advanced by the defense, there is a further consideration to be noted with reference to the truth or falsity of the allegedly false statement. (Specification 3).

The question is presented whether the accused is limiting the "sole agreement" referred to in the indorsement to those "for manufacturing under my patents of Slushing Compound," and thereby admitting or at least not denying that there might be other contracts.

It is believed, however, that the language employed, rather than limiting, enlarges upon and explains the "sole agreement".

16. The question arises as to whether or not the element of personal advantage as substituted by the court in its findings, has been proved. There was an agreement between Dhawan and accused.

The very terms provided in the agreement between Dhawan and accused conclusively proves that accused was to benefit by the sales of Dhawan. The agreement as written contains no restrictions on sales to any party. That in fact such agreement might have been personally disadvantageous to the accused is an excursion into the realm of conjecture and is not supported by any of the evidence. It is clear that the agreement was drawn with the view that a pecuniary remuneration would accrue to accused. The tentative agreement with Daa contains similar provisions, and it, too, if carried into effect would have been to his private advantage.

17. There is a variance between specification and proof in two minor instances;

a. Specification 3 avers that the offense was committed at New Delhi, whereas the evidence discloses that the accused was in Agra at the time he wrote the indorsement.

This is an immaterial variance (p. 138 Winthrop Military Law & Precedents, 1920).

b. Specification 3 alleges that the offense was committed while accused was acting as contracting officer on 22 June 1943. The evidence discloses that accused was relieved of those duties on 20 May 1943.

The fact that the accused was or was not acting as contracting officer at the time of making the false statement is not of the gravamen of the offense and the variance is therefore not material.

24 January, 1944.

Subject: Board of Review holding in the case of Major Russell E. Hollis, Headquarters, 10th Air Force.

To: Assistant Judge Advocate General, USAF, CBI, APO 885, U.S. Army.

I disagree with the opinion of the majority of the members of the Board of Review concerning their conclusions as to specification 1 and 2.

In regard to specification 2 of the charge; the evidence is not legally sufficient to support the findings of the court.

Evidence of a proposed agreement between accused and Balgopal Das for the manufacture of certain items for which accused was to receive royalty based on sales was introduced. (R.41). Also, under this, accused was to, and actually did, receive money for the purpose of obtaining Indian patents on his formulas. On direct examination by the prosecution, Balgopal Das testified: "If these supplied to the Government, in that case, he would have to be sure whether he be allowed to take the 3%, but if allowed he would take it, otherwise no". (R.38). And (R.45) "The whole purpose of the negotiations after we discussed it may be possibility of Supply Department might take these leak proof containers but he couldn't take any action on that until he could get in touch with legal advisers." The accused testified in effect that part of the negotiations were based on his ability to obtain the approval of The Judge Advocate General to enter such agreement, whereby he would receive moneys from the company. (R.77).

There is no evidence to the contrary, and it is apparent that the court was wholly disregarded the testimony of accused, corroborated by the witness for the prosecution, looked solely to the proposed agreement, and found that accused attempted to interest himself in the financial transactions of such company for his private advantage. By such action the court has arbitrarily rejected evidence about which there is no dispute or conflict and have disbelieved the testimony of accused and part of that of a prosecution witness elicited on direct examination, and by defense on cross.

Where the case is tried by a jury and the court, the credibility of particular witnesses and the weight and value to be given to their testimony are questions exclusively for the jury, even in case where there is no conflict in the testimony. (23 GJS p. 604-648). This rule applies to the testimony or statement of accused or to the prosecutor or

prosecutrix. Nevertheless, while the jurors are the sole judges of the credibility of witnesses, and they alone have the right to say what weight shall be given to their testimony, they have no right, arbitrarily, to reject the testimony of a witness, unless they believe he knowingly and wilfully swore falsely to a material fact, in which case they may disregard any part of his testimony which is not corroborated.

The evidence adduced in this case is direct and positive to the effect that there was a condition precedent to any agreement, tentative, contemplated or otherwise, becoming effective. This condition was, in effect, that approval would have to be obtained from proper authorities in the military establishment. This clearly negatives any intent on the part of accused. No part of the record reveals any justifiable reason for the rejection of this testimony by the court in its considerations. The court, absent any reason, could not be considered in that it was an attempt to vary a written instrument by parol; though, in fact, no contract existed. 32 C.J.S. p. 857 states that parol evidence is admissible to show conditions precedent, which relate to the delivery or taking effect of the instrument, as that it shall only become effective on certain conditions or contingencies, for this is not oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed.

Otherwise, the court has decided contrary to the evidence in the record and made its findings when there are actually no facts upon which to base such decision.

As to specification 1 of the charge, the court committed error that was prejudicial to the substantial rights of accused in excluding testimony of Dhawan (R.32, 34) and Lal (R.50), all of which should have been admitted as bearing on the question of intent. If answered as revealed in accused's Proffer of Testimony following the record, such evidence would have had a substantial bearing on the guilt or innocence of accused. The questions and expected answers were:

Witness: Mr. Achraj Ram Dhawan.

Q. Wasn't it your understanding that your agreement, that has been referred to here, was not to be operative until Major Hollis procured those patents here?

Objection. Objection sustained.

Proffered answer: Yes.

Q. Was there anything further to be done before the agreement which has been offered here, became effective?

Objection. Objection sustained.

Proffered answer: We both understood and agreed that before the agreement became finally operative there were two things still to be done, that is, it would have to be approved by the proper U.S. Military Authorities in its final form and Major Hollis was to obtain patents on his inventions in India at his own expense. When the patents were obtained they were to be assigned with full information about the invention. At that time approval of the U.S. Authorities also had to be obtained or the authorities refused a approval the agreement was not to be finally operative.

Q. Isn't it a fact that Major Hollis and you understood that before this agreement became operative the agreement would have to be approved by proper U.S. Authorities?
Objection. Objection sustained.

Proffered answer: Yes.

Witness: Mr. Harjainan Lal.

Q. With respect to the agreement with Dhawan, which is Prosecution Exhibit 'Q', was there any agreement between the parties with respect to the time when that agreement would become finally operative?
Objection. Objection sustained.

Proffered answer: The agreement was that it would not be finally operative until the military authorities approved it and until the patents were obtained.

An actual agreement was made with Dhawan and such testimony was relevant and competent as to the existence of a condition precedent to such contract. Par. 2e (2) (b) AR 600-10, 2 June 1942 enjoins one contemplating having outside interests to inform himself of pertinent laws, regulations and standards of the service, and, if in doubt, to report all pertinent facts to the War Department and request instructions. The accused may not have literally complied with such provisions, but such testimony, if adduced, would have shown his good faith and intent. To exclude it was harmful error.

It is true that the court permitted accused to testify to this matter when the defense presented its evidence. It may be that, under the niceties of civil jurisprudence, where the court, after refusing to admit certain evidence offered by a part, later admits other evidence thereof, any error is cured and it becomes incumbent upon the party complaining to renew or at that time introduce the testimony previously excluded, if he desires that such testimony be considered. However, it is to be noted that the evidence sought to be

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elicited was from witnesses for the prosecution. To require the accused to call the witnesses would at that point make them his witnesses. The situation differs materially from those instances wherein the evidence excluded is from one's own witnesses and later admitted by other testimony. The evidence sought to be drawn from the prosecution's witnesses was vital. If admitted from witnesses other than the accused, there then might be no reasonable basis for complaint as such testimony would have much greater probative value.

The prosecution is not charged with the duty of obtaining a conviction. The duty of the defense is not to secure an acquittal, and it is the duty of the prosecution and the defense to orderly, honestly and without acrimony present the unshielded truth to the court. The court has a duty to ascertain the truth or falsity of the matters alleged in the specifications. Ordinarily defense counsel is not one versed in law and may not be expected to know the finer, technical points of trial and procedure. To do justice and protect the rights of an accused, he should be given every opportunity, consistent with the ordinary rules of evidence, to clear himself of the accusations. A technicality should not operate to his substantial prejudice.

Nor may we obviate the error on the theory that such matters were outside the scope of direct examination and, thus, improper to go into on cross examination. The prosecution had brought forth evidence of the agreement and the negotiations concerning it. Matters discussed and agreed upon in connection with such contract that were conditions precedent to its effectiveness are coupled with and are necessary to the very existence of the agreement. As such they were admissible at that time.

As to specification 3 of the charge, I concur with the result reached by the majority of the Board of Review. The sentence is authorized for the offense committed.

/s/ Robert C. Van Ness

/t/ Robert C. Van Ness,
1st Lieutenant, JAGD.

GM CBI 47 (Hollis, Russell E.)

29 January, 1944.

MEMORANDUM:

Subject: Record of Trial by General Court-Martial,
Hollis, Russell E.

1. Careful consideration has been given to the opinion of the Board of Review in the case of Major Russell E. Hollis, O-413090, Headquarters, 10th Air Force. Upon trial by general court-martial, this officer was found guilty of two attempts to obtain an interest in concerns manufacturing products of a kind which it was a function of his office to make purchases for the Government and of making false official statements in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority confirmed the sentence and forwarded the record under A.W. 48. The Commanding General, USAF, CBI, who has been vested by the President with the powers of the Commanding General of the Army in the field, confirmed the sentence.

2. The errors and alleged errors in the record of trial in the above case have been fully discussed in the majority opinion of the Board of Review attached herewith, and in the commendable review of the Staff Judge Advocate of the 10th Air Force. It would serve no useful purpose to rediscuss what has been fully covered by the Board in its considered opinion.

There is, however, a dissenting opinion which needs comment. In that opinion, it is stated that the evidence is not legally sufficient to support the findings of guilty as to specifications 1 and 2 of the charge. This is based on the ground that Balgopal Das testified, in substance, that the entire agreement between himself and the accused was tentative, and subject to the approval of the Judge Advocate General; that the accused himself also testified to that effect; and that there was no evidence to the contrary. Hence the Court has not the right to reject evidence about which there was no dispute or conflict. The principle of law thus enunciated is correct. In this case, however, the facts indicate that there is evidence to the contrary. There is the evidence of the agreement itself, which contains no such statements as those made by the witnesses as well as other surrounding circumstances. If the Court chose to believe that the agreement had been varied by the verbal understanding mentioned by the witness Das, it had the right to do so. But apparently it did not. In my opinion, the rule of law upon which the dissent is based, therefore, has no application to this case.

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One or two points mentioned in the majority opinion need clarification.

The accused wrote to Das on 17 June 1943 (R.76) to point out that no royalties would be paid to him while on duty in India, and that there was no agreement as to the sale of merchandise to the 10th Air Force Command. There is nothing in this understanding, if such it was, that would prevent Das from making payments of royalties on sales to the Government made during the accused's active duty in India, after his return therefrom. It is also noted that the accused did not attempt to say that he would take no royalties from sales to the 10th Air Service Command, for which he was contracting officer, but merely that there was no special agreement or understanding to that effect, despite the general agreement to pay the accused royalties on all sales. An attempt to inject into the negotiations or contract, clauses such as these at such a time, after an investigation into the accused's conduct in this affair, might well have led the court to believe it as an indication of culpability, rather than of innocence.

In paragraph 12 of the Board of Review's holding, is discussed the question as to whether the indorsement written by the accused, which is the basis of the allegation in specification 3, is an admission against interest or a confession, and if the latter, whether it was voluntary. I assume the Board meant a confession or admission as to specifications other than specification 3. The indorsement in question is an admission, and not a confession, since it does not admit all of the elements that constitute offenses charged. In any event, other evidence in the case is so compelling that the decision on this point either way would not affect the substantial rights of the accused.

3. I therefore approve and concur in the opinion of the majority of the Board of Review.

/s/ H.J. Seman,
/t/ H.J. SEMAN
Colonel, JAGD

Assistant Judge Advocate General.

CM CBI #47 (Hollis, Russell E.) 1st Ind.
Branch Office of the Judge Advocate General with USAF
CBI, APO 885, 29 January 1944.

To: The Commanding General, USAF, CBI, APO 885, U.S. Army.

1. In the case of Major Russell E. Hollis, O-418090, Headquarters 10th Air Force, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holdings and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order, as follows: (CM CBI 47).

/s/ H. J. Seman

/t/ H. J. SEMAN

Colonel, JAGD,

Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 2, CHI, 2 Feb 1944)



WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

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Board of Review
CM CBI 49

December 22, 1943.

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

v.

COE, VICTOR H.
Tech. Sgt. 19090778,
3rd Per. Sq., Chabua, India
Age: 20 yrs.
Enlisted: 14 Feb 1942

) Accused was tried by G.C.M.
) convened at Kunming, China on
) 15 October 1943. He was found
) guilty and sentenced to dis-
) honorable discharge, to forfeit
) all pay and allowances due and
) to become due and to be confined
) at hard labor at such place as
) the reviewing authority may di-
) rect for 4 years. The Review-
) ing Authority approved sentence
) and designated the United States
) Disciplinary Barracks, Fort Leaven-
) worth, Kansas as the place of con-
) finement, but suspended the dis-
) honorable discharge until the
) soldier's release from confine-
) ment.

HOLDING BY THE BOARD OF REVIEW
SEMAN, BEARDSLEY, and VALENTINE, Judge Advocates

(1) The record of the trial in the case of the above named enlisted man having been examined by the Military Justice section of the Branch Office of The Judge Advocate General, with the United States Army Forces in China, Burma and India and having been found partially insufficient to support the findings and the sentence, has been referred by the Assistant Judge Advocate General in charge of such Branch Office to the Board of Review constituted therein for examination in accordance with the provisions of Article of War 50½, and the Board of Review, having examined such record of trial, submits this its opinion to the Assistant Judge Advocate General.

(2) The accused was tried upon the following charges and specifications:

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

Specification: In that Technical Sergeant Victor H. Coe, 19090778, did at Yunnanyi, China, on or about 5:00 P.M., September 14, 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation

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kill one Woo Hwa Ting, a human being by shooting him with a 45 cal. automatic pistol.

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

Specification: In that Technical Sergeant Victor H. Coe, 19090778, did, at Yunnanyi, China, on or about 5:00 P.M., September 14, 1943, with intent to do bodily harm, commit an assault upon Lt. Chen Shi Sun, by shooting him in the body with a dangerous weapon, to-wit, a 45 cal. automatic pistol.

Charge III: Violation of the 61st Article of War.

Specification: In that Technical Sergeant Victor H. Coe, 19090778, did at Yunnanyi Air Base, China, on or about 1:00 P.M., September 14, 1943, without proper leave, go from the properly appointed place for his assigned duty, after having repaired thereto for the performance of said duty.

Charge IV: Violation of the 96th Article of War.

Specification: In that Technical Sergeant Victor H. Coe, 19090778, was at Yunnanyi, China, on or about 5:00 P.M., September 14, 1943, drunk and disorderly in uniform in a public place, to wit, a public street in the Village of Yunnanyi, China.

Upon arraignment he pleaded not guilty to all the charges and specifications. The findings of the court were as follows:

Of the specification to Charge I: Guilty except the words "with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Woo Hwa Ting, a human being by shooting him with a 45 caliber automatic pistol" and of the excepted words, not guilty, of the substituting words, guilty.

Of Charge I: Not Guilty, but guilty of a violation of the 93rd Article of War.

Of the specification of Charge II; Guilty except the words "with intent to do bodily harm, commit an assault upon Lt. Chen Shi Sun, by shooting him in the body with a dangerous weapon, to wit, a 45 caliber automatic pistol" and substituting therefor the words:

"wrongfully shoot one Lt. Chen Shi Sun in the body with a 45 caliber automatic pistol" and of the excepted words not guilty, of the substituted words guilty.

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Of Charge II: Not guilty but guilty of a violation of the 96th Article of War.

Of the specification to Charge III: Guilty except the words, "without proper leave, go from the properly appointed place for his assigned duty, after having repaired thereto for the performance of said duty" and substituting therefor the words,

"fail to repair at the fixed time to the properly appointed place of duty for duty" and of the excepted words, not guilty, or the substituted words, guilty.

Of Charge III: "Guilty"

Of the specification to Charge IV: "Guilty"

Of Charge IV: "Guilty"

No evidence of any previous convictions was offered. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due and to be confined at hard labor at such place as the reviewing authority may direct for four years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks at Fort Leavenworth, Kansas, as the place of confinement and suspended the dishonorable discharge until the soldier's release from confinement.

(3) The competent evidence tends to show that on the morning of 14th September 1943, at about 0900 to 1000 o'clock accused came into the air field at Yunnanyi with a pilot, a co-pilot and a navigator but with no one to help him with repairs to the airplane which needed repairing. The plane landed, and accused immediately started to work with the ground crew upon the task of replacing faulty spark plugs and such other work as was necessary to put the air plane in good running condition (R 4-5). The accused and Sgt. Bailey with some other members of the ground crew worked until 12:00 o'clock noon (R 11) at which time the work was taken over by another crew. At that time only about two hours more was required to finish the repairs (R 17). Accused, Sgt. Bailey and the other men helping them on the airplane went to Sgt. Bailey's room in the hostel or barracks where accused took one or more drinks of gin (R 11-12) after which they all went to lunch. From lunch they went back to Sgt. Bailey's room and continued to drink gin until accused had consumed about a pint of gin and one big drink of JinBao, which is very powerful stuff (R 20-21). At about 1600 o'clock (R 12) accused left the quarters of Sgt. Bailey for the air field. In an intoxicated or drunken condition, he was unable

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to find his way to the air field and went to a tea house in Yunnanyi, where he sat down for tea with a Chinese mechanic (R 44). The accused was highly intoxicated or drunk. He was seen to point his .45 caliber pistol at Lt. Sun by several other Chinese (R 47). After tearing the insignia patches from Lt. Sun, he left the tea house with Lt. Sun following behind him (R 47). When accused had reached a point about 50 meters from the tea house he charged his pistol (R 48) and Lt. Sun thereupon turned back and began to walk very rapidly to the rear (R 48). When he had reached a point about 10 meters from the accused and while his back was still toward accused he heard a shot which he thought came from the "American's point" (R 49). Immediately after hearing a shot, he felt something hit him in the side like a piece of wood and, upon turning his head, he saw a Chinese falling at a place about half way between himself and the accused (R 53). Lt. Sun never identified the Chinese man whom he saw falling nor did he know what became of him. Two other Chinese saw a wounded man at about the point where Lt. Sun saw the Chinese fall, but none of them stated his identity and none of them knew how he was wounded or injured (R 61,65). One man saw the wounded man going into a nearby small house (R 62). At about 6:00 o'clock on the evening of September 14th some Chinese took to the hospital (R 70) of Dr. Yu, the only hospital in Yunnanyi, a man whose name they gave as Woo Hwa Ting, who had been wounded by a bullet which entered from the back and ranged upwards about five inches through the stomach and out in front (R 71). This man was about 25 or 30 years of age (R 62) and about five feet six inches tall and very thin (R 74). He was the only patient who entered the hospital that evening, suffering from a bullet wound (R 72). Dr. Yu first saw him about 1830 o'clock (R 74). Major Burns, assisted by Dr. Yu, operated upon the wounded man about 1900 or 2000 o'clock. He died next morning about 0700 o'clock.

Major Burns is familiar with .45 automatic pistols and believed that the wound in the Chinese upon whom he operated, was of a size that could be caused by a bullet of a .45 caliber pistol (R 57). However, the hole in the patient could have been caused by a rifle or any other bullet he testified. All that Major Burns could say about the wound was that he believed it was a bullet hole of some kind (58). Accused's pistol was received in evidence as prosecution's Exhibit D.

(4) Neither Dr. Yu nor Major Burns knew the name of or could otherwise identify the man whom they saw in the hospital and upon whom they operated. Neither one had ever seen the man before or knew anything whatsoever about him. There was no witness who ever undertook to identify the man whom Lt. Sun saw fall after the shot was fired nor does any witness under-

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take to say whether that man lived or died or how seriously he was wounded. There is no evidence in the record to show that this man was not treated there and that he did not recover.

There were stray bullets from either .45 pistols or rifles whizzing through the air occasionally around the air field, the barracks and in the village of Yunnanyi (R 16-18) to such an extent that some American soldiers considered it safer to remain in the barracks than to go into the Village (R 16). No one seemed to know the source of these bullets or the purpose for which they were fired. To hear them whizzing by was a common occurrence (R 16).

There is no competent evidence in the record from which the court might infer that the deceased was Woo Hwa Ting, named in the specification under Charge I as the victim of the homicide. The law member asked the prosecution and defense to stipulate that he was the man. This was not done. Instead an affidavit made by Dr. Yu before Major McIntyre was offered in evidence by the prosecution, without objection by the defense, which placed before the Court the name of the deceased as it appears in the specification. Dr. Yu testified that the name appearing in his statement was the name of the deceased as it appeared on his hospital record. The hospital record would have been the best evidence of this fact, if it was a fact. A further ground of objection to the affidavit was that Dr. Yu had been furnished the name appearing on his hospital record by Captain Moses. This recital in the affidavit was hearsay. Captain Moses did not testify and it is not known how he secured the name.

This affidavit might have been called to the attention of Dr. Yu for the purpose of refreshing his recollection. Upon the making of a proper foundation, viz., that the witness when he testified had no independent recollection of the contents of the statement but that he knew that its contents were true at the time he made the writing, it might have been properly received in evidence. On the face of the record as it stands, the admission of the affidavit was improper, and it does not appear that the failure of defense counsel to object to its admission was intended as a waiver of all grounds of objection, understandingly made. Neither the error in admitting the exhibit nor its prejudicial effect can be said to have been waived. The following decision is illustrative of this conclusion:-

*Accused was found guilty of being unable to perform

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his duties as an Officer as a result of over indulgence in alcoholic liquor, in violation of A.W. 96. The medical officer testified without objection that accused was hospitalized for six days for acute alcoholism, but the witness did not testify he saw the witness in question. Held: This testimony was incompetent because not necessarily based on observation. It may have been based on reports of others. The mere failure of the accused to object to this testimony was not a waiver of its incompetence (MCM 1928, par. 126c), CM 231727 (1943)

Decisions enunciating the same vital principles are to be found in recent Bulletins of the Judge Advocate General (Volume II: No. 2, par. 395 (18), p. 60; No. 5, par. 395 (18) p. 184; No. 6, par. 395 (2), p. 236; No. 8, par. 395 (11), p. 306).

Moreover, it appears that the name contained in Exhibit C is Woo Kwa Ting, while the name averred in the Specification is Woo Hwa Ting.

While we recognize the fact that the court, prosecution and the defense in this case performed their duties in a very inaccessible section and under conditions far from conducive to efficient preparation and trial of a case, yet we can not overlook the fact that the rights of the accused demand that certain elements must be established before he can be convicted of manslaughter, one of which is proof that accused shot the particular victim named in the specification and that he died as a result of such wound.

On this point the rule generally applicable in homicide prosecutions is stated in 30 Corpus Juris at page 288 in the following language:

"The identity of deceased is included as an element of the corpus delicti by some authorities, but the propriety of this is denied by others. In any event, however, the identity of the person killed with the person alleged to have been killed must be fully established."

In support of this statement, the following decisions by courts of last resort are cited:

People v. Ah Fung, 16 Calif. 137.
Ausmus v. People, 47 Colo. 167, 107 P. 204, 19 AnnCas 491.
Smith v. State, 80 Fla. 710, 86 S. 640.
Bull v. Com., 96 S.W. 817, 29 KyL. 949.

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State v. Dickson, 78 Mo. 438
State v. German, 54 Mo. 530.
14 Am.R. 481.
State v. Ah Chuey, 14 Nev. 79, 33 Am.R. 530.
People v. Wilson, 3 Park Cr. 199.
Bolder v. State, 140 Tenn. 118, 203 S.W. 755.
Taylor v. State, 35 Tex. 97.
Lightfoot v. State, 20 Tex. A. 77.
Smith v. Com., 21 Gratt. (62 Va.) 809.
State v. Fainagan, 26 W. Va. 116.
Reg. v. Cheverton, 2 F. & F. 833.

There is no competent proof in the record that accused either shot or injured Woo Hwa Ting, or that the man who died in the hospital was Woo Hwa Ting or even was the man whom accused actually shot. The Board of Review under the law, cannot escape the conclusion that the record is legally insufficient to support the findings of guilty under Charge I and its specification.

To support the finding of guilty of Charge III it is necessary that the record contain evidence that a certain authority appointed at certain time and place for the accused to perform a certain duty as alleged, and that the accused failed to repair to such place at the proper time, or that having so reported he went therefrom without authority from anyone competent to give him leave to do so. Par. 132 (M.C.M. 1928) page 146. The competent evidence in this record fails to disclose that any authority had appointed a certain time and place for the accused to repair for duty on his airplane or, that, having so reported pursuant to an order from competent authority, he went from the place of duty so assigned without authority from anyone competent to give him leave to go. The evidence disclosed that accused left his airplane and that another crew was at work on the plane.

6. By its findings of guilty under Charge II and its specification the court has found the accused guilty of wrongfully shooting Lt. Chen Shi Sun by shooting him in the body with a .45 caliber automatic pistol, in violation of the 96th Article of War. The court has found him not guilty of the shooting, "with intent to do bodily harm," probably because of the evidence of accused's intoxication at the time. If this finding of guilty is a mere finding of guilty of assault and battery then the maximum punishment permissible for upon the findings of guilty under this specification and charge is confinement at hard labor for a period not exceeding six months and forfeiture of two-thirds of the soldier's pay for a like period (Par. 104c, M.C.M. 1928).

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An automatic pistol is a deadly or dangerous weapon per se. Assault with a deadly weapon is an offense greater in degree and subject to more severe punishment than mere assault and battery under most penal codes. No maximum punishment for assault with a deadly or dangerous weapon in violation of the 96th Article of War is expressly prescribed by paragraph 104c, M.C.M. 1928. That paragraph provides however, that, "offenses not *** provided for remain punishable as authorized by statute or by the custom of the service." The 42nd Article of War authorizes punishment by confinement in a penitentiary where an act or omission is recognized as an offense of a civil nature and is punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States or by the law of the District of Columbia, and the 45th Article of War provides that the period of confinement in a penitentiary in such a case shall not exceed that authorized by the law which under the 42nd Article of War permits confinement in a penitentiary. Assault with a deadly weapon (without intent to do bodily harm) is not denounced by the Federal Penal Code of 1910, but Section 22, 502 of the Code of the District of Columbia provides:-

"Every person convicted of an assault with intent to commit mayhem or of assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years."

It may be said then that the maximum penalty for assault with a deadly weapon is dishonorable discharge, total forfeiture and confinement at hard labor for a period not exceeding 10 years or that the offense is analagous to that of an assault with a dangerous weapon with intent to do bodily harm in violation of the 93rd Article of War, the maximum punishment for which is dishonorable discharge, total forfeitures and confinement at hard labor for 5 years, The sentence imposed by the court, and approved by the reviewing authority is to dishonorable discharge, total forfeiture and confinement at hard labor for 4 years and does not exceed the maximum punishment authorized for the offenses as to which the record of trial is legally sufficient to support the findings of guilty.

For the reasons stated, the record is legally insufficient to support the findings of guilty under Charges I and III and their specifications, and is legally sufficient to support the findings of guilty under Charges II and IV and their specifications, and is legally sufficient to support the sentence.

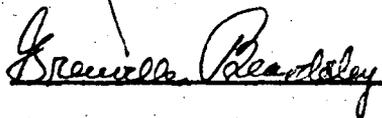
While the record of trial in this case is technically

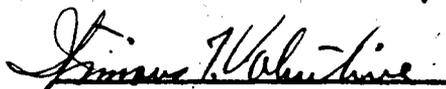
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legally sufficient to support the sentence, nevertheless, the court, in determining the nature and extent of the penalty to be imposed by its sentence, must have taken into consideration its finding that the accused was guilty of manslaughter, a serious offense. It is therefore believed that the sentence should be reduced. Under all the circumstances a reduction of the period of confinement at hard labor to two years would be adequate punishment in this case.


_____, Judge Advocate


_____, Judge Advocate


_____, Judge Advocate

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CM CBI49 (Coe, Victor H.) 1st Ind.

Branch Office of The Judge Advocate General with the United States Army Forces in China, Burma and India, APO 885, 26 December, 1943.

To: The Commanding General, United States Army Forces in China, Burma and India.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (Pub. No. 325, 75th Cong.) and by the act of August 1, 1942 (Pub. No. 693, 77th Cong.), is the record of trial by general court-martial in the case of Technical Sergeant Victor H. Coe, 19090778, 3rd Ferry Squadron, together with the foregoing opinion of the Board of Review constituted in the Branch Office of the Judge Advocate General with the United States Army Forces in China, Burma and India.

2. I concur in said opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty under Charges I and III and the specifications thereunder be vacated and that the period of confinement be reduced to two years.

3. Inclosed herewith is a form of action designed to carry into effect the recommendation hereinabove made should it meet with your approval.


Robert W. Brown,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

2 incls.

- Incl. 1 - Record of trial.
- Incl. 2 - Form of action.

(Findings of guilty under Charges 1 and 3 and Specifications thereunder vacated. Sentence confirmed but confinement reduced to two years. As thus modified sentence ordered executed but dishonorable discharge suspended. GCMO 1, CHI, 1 Jan 1944)

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

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5 January 1944.

BOARD OF REVIEW

C.M. CBI 54

UNITED STATES

v.

Private Lowell E. Presley,
(36046639), 159th Engineer
Dump Truck Company.

) SOS, USAF, CBI

) Trial by G.C.M., convened at
) Ledo, Assam, India, 30 Oct.
) 1943. DD; TF, CHL, 15 years
) (DD, TF, CHL, 10 years approved
) by R/A). U.S.D.B., Fort
) Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, 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 63rd Article of War.

Specification 1: In that Private Lowell E. Presley, 195th Engineer Dump Truck Company, did, at Ledo, Assam, India, on or about September 2, 1943, behave himself with disrespect toward 2nd Lieutenant Seymour Nobel, his superior officer and officer of the Day, by saying to him, "You dirty rotten cocksucker" "Go ahead and shoot me you dirty son-of-a-bitch" "Take off your pistol and I'll whip your ass", "I will give you a reason then to fight", or words to that effect.

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

Specification 1: In that Private Lowell E. Presley, 195th Engineer Dump Truck Company, did, at Ledo, Assam, India, on or about September 2, 1943, strike 2nd Lieutenant Seymour Nobel, his superior Officer, who was then in the execution of his Office, as Officer of the Day, on the arm with his fist.

CHARGE III: Violation of the 83rd Article of War.

Specification 1: In that Private Lowell E. Presley, 195th Engineer Dump Truck Company, did, at Ledo, Assam, India,

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on or about September 2, 1943, through neglect suffer a vehicle, truck $\frac{1}{2}$ ton 4 X 4 of the value of about \$900.00 Military property belonging to the United States, to be damaged by running the said vehicle into a steel post near Ledo, Assam, India.

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

Specification 1: In that Private Lowell E. Presley, 195th Engineer Dump Truck Company, did, at Ledo, Assam, India, on or about September 2, 1943, wrongfully take and use without consent of the owner, and without lawful authority, a certain motor vehicle, to wit, a $\frac{1}{2}$ ton 4 X 4, C & R Truck, Motor No. 20195691, property of the United States of America, of a value of more than \$50.00, furnished and intended for the military service thereof.

Accused pleaded not guilty to and was found guilty of all the Charges and Specifications, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. The reviewing authority approved "so much of the sentence as provides for dishonorable discharge, confinement at hard labor for 10 years and forfeiture of pay and allowances due and to become due", designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under the provisions of Article of War 50 $\frac{1}{2}$.

3. About 0530 in the morning of 2 September 1943, T/5 Joseph G. Maxwell, heard three shots, a call for help, and went to the sentry post (R.5) by the Post Exchange at Ledo, Assam, where he saw a wrecked government vehicle which had lodged against an iron guard rail after striking a building. Tire marks indicated it had been driven from Margarita toward Ledo (R.6). Accused was covered with brick dust from the building and his shirt was torn. He said he was not hurt. He cursed and struck the Officer of the Day, Lieutenant Noble. Accused seemed to be "sort of hysterical-like" (R.6). Corporal of the Guard, Alfonso J. Gouzalez, answered the call (R.7). Accused was trying to back up the car, but the wheels spun and it would not move. The Officer of the Day arrived. The accused was "getting sassy" and wouldn't listen. The Officer of the Day ordered the sergeant of the guard to take him to the stockade. Accused pushed the sergeant aside and struck the officer and called him a "cocksucker". The officer grabbed the hand of accused, who hit again. Accused was then taken to the stockade. Corporal Edwards J. Keating testified that the "United States Jeep" was a wreck. Accused was behind the wheel (R.9). It

seemed "like he was a little hysterical". One word led to another, and the Officer of the Day ordered him taken to the stockade. Accused struck the Officer of the Day. Accused said it was an accident, that he swerved to avoid cows. He asked the Officer of the Day to "take off his bar, and take off his pistol, and he would kick the shit out of him", Accused was hysterical. Private Francis R. Marple testified (R. 10) the accused said the accident was caused by dodging cattle which had run across the road. Lieutenant Noble told him he would help him all he could. Accused struck him and called the officer "a damned fool", said, "Shoot me you dirty cocksucker", and struck him (R.11). Second Lieutenant Seymour Noble testified that he was Officer of the Day and upon going to the vicinity of shots, near the Finance Office, saw a wrecked jeep (R. 12). After questioning accused he told him to go to the sergeant of the guard (R.12). Accused called witness a "dirty cocksucker" and "a son-of-a-bitch", broke away and struck him with his fist. The car was an Army Jeep. Technical Sergeant Carl W. Gallimore testified that he dispatched vehicles for the military police, that he had not given accused or any one authority to use jeep No. W-20195691, a military police car, and that he saw it in the shop the morning of September 2. The car was a wreck (R.14). Second Lieutenant Thomas E. Chubb identified Prosecution's Exhibit A, completed Q.M. Form 260, relating to car W-20195691 (R.16) and testified that the estimated cost of repairs, \$60.65 (Pros.Ex.A), was correct (R.17). Accused was warned of his rights and testified that early in the morning of 2 September 1943, he was on the left of the road, came upon some cows near the Finance Office, turned to miss them, lost control of the car (R.18) on the railroad (R.19) and ran into a brick wall. After the car was stopped, his remembrance of what went on was faint (R.18). The next thing he remembered he was in the guard house (R.20). He got the car at motor pool about 0430 when no one was around and "took myself a ride" (R.21). He was an M.P. and his understanding of what to be done to obtain permission to drive a jeep was "just being an M.P." (R.22).

4. The record fails to show that three-fourths of the members of the court present at the time the vote was taken concurred in the sentence, and hence the record is not legally sufficient to support so much of the sentence as imposes confinement at hard labor in excess of 10 years (A.W.43). The sentence is divisible (C.M. 229156, Dig. Ops. J.A.G., Sec. 400, Bull. July 1943, p. 269), and since the record shows that two-thirds of the members present at the time vote was taken voted to adopt the sentence, that portion of the sentence which the reviewing authority approved, dishonorable discharge, total forfeitures and confinement at

hard labor for 10 years may be ordered executed, if the record of trial is otherwise legally sufficient to support it.

5. The uncontradicted evidence adduced by the prosecution substantially supports the findings of guilty, of Charges I, II and IV and the specifications thereunder. We regard any variance between the proof that accused "cursed" (R.5) Lieutenant Noble and said to him, "cocksucker" (R.7) "damned fool", "sock me you dirty cocksucker" (R.11) "dirty Cocksucker" and "son-of-a-bitch" (R. 12) and that he called him bad names, and the allegations of the Specification of Charge I that accused said to his superior officer, "you dirty rotten cocksucker", "Go ahead and shoot me you dirty son-of-a-bitch", "take off your pistol and I'll whip your ass", and "I will give you a reason to fight", as so trivial and unsubstantial as to be of no consequence. The list of the offense charged was disrespect to a superior officer by opprobrious words and contumelious and denunciatory language (Par. 134a, M.C.M. 1926, p. 147) and the evidence clearly supports the finding of the court that accused was guilty of such conduct.

Although there is no express testimony or other proof of the value of the vehicle described in the specification of Charge IV, the proof that the cost of the repairs would be \$60.65, is a circumstance from which the court might find that value of the jeep was more than \$50.00.

6. As to Charge III and its specification, the uncontradicted testimony of the accused is that he drove off the roadway to avoid hitting cattle, which wandered onto the road (R.18-19). The explanation is not so improbable or unreasonable in itself as to justify the court in disregarding it. A.W. 83 does not make punishable the loss or damage of property except when it results from willfulness or negligence. Even stopping of pay to make good a loss has been held to be unauthorized in the absence of fault or negligence. (Dig. Ops. J.A.G. 1912-40, par. 1517, p. 714, July 24, 1933). While the accused was "at fault" in driving the vehicle without permission, such fault was not the proximate cause of the accident. There are no facts or circumstances shown by the evidence from which it could reasonably be inferred that accused was intoxicated or under the influence of drugs or that he operated the car at an excessive rate of speed. There being no evidence of any fault or negligence on the part of the accused directly connected with the damaging of the vehicle, the record is not legally sufficient to support the findings of guilty of Charge III and its specification.

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

committed during the trial, except as stated. The maximum punishment authorized under the findings of guilty, which the record of trial is legally sufficient to support, is death. The record is therefore legally sufficient to support that portion of the sentence, which the Reviewing Authority approved, viz. that the soldier be dishonorably discharged the service, forfeit all pay and allowances due and to become due, and be confined at hard labor for 10 years.

Grenville Beardsley, Judge Advocate

Itimous T. Valentine, Judge Advocate

Robert C. Van Ness, Judge Advocate

1st Ind.

Branch Office Judge Advocate General, USAF, CBI, 8 January 1944.

To: Commanding General, SOS, USAF, APO 885.

I concur in the foregoing opinion of the Board of Review.

/S/ H. J. Seman,
/T/ H. J. SEMAN,
Colonel, JAGD.,
Assistant Judge Advocate General.



WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

(45)

12 January 1944.

Board of Review
CM CBI # 65.

UNITED STATES)

v.)

Private Alexander J.
Durand, 31208674, Hq.
Base Section #2, SOS)

) Trial by G.C.M., convened at
) Calcutta, India, December 4,
) 1943. Dishonorable discharge
) and confined at hard labor
) for ten (10) years.

OPINION of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates.

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

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

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

Specification: In that, Private Alexander J. Durand, Headquarters Company, Base Section No2, Services of Supply, did, at Calcutta, India, on or about 12 August, 1943, feloniously take, steal and carry away 44 dozen Hacksaw Blades, value about \$1,277.76, the property of the Government of India.

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

Specification 1: In that Private Alexander J. Durand, Headquarters Company, Base Section No. 2, SOS, did, at Calcutta, India, on or about 25 September 1943, strike Captain Charles R. Holman, his superior officer, who was then in execution of his office on the shoulder with his hand.

Specification 2: In that Private Alexander J. Durand, Headquarters Company, Base Section No. 2, SOS, did, at Calcutta, India, on or about 25 September

1943, offer violence against Captain Charles R. Holman, his superior officer, who was then in execution of his office, in that he, the said Private Alexander J. Durand, did say to Captain R. Holman, "Take off your glasses and I will knock hell out of you", or words to that effect.

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

Specification 1: In that Private Alexander J. Durand, Headquarters Company, Base Section No. 2, SOS, having been placed in arrest in his quarters at 77 Park St., on or about 25 September 1943, did, at Calcutta, India, on or about 25 September 1943, break his said arrest before he was set at liberty by proper authority.

The accused pleaded as follows: To the specification of the Charge: "Not Guilty"; To the Charge: "Not Guilty"; To Specification 1, Additional Charge I: "Not Guilty"; To Specification 2, Additional Charge I: "Guilty"; To Additional Charge I: "Guilty"; To specification 1, Additional Charge II: "Guilty"; To Additional Charge II: "Guilty". Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for ten (10) years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks nearest the Port of Debarkation as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the order directing execution of the sentence was withheld.

3. As to the original Charge and Specification thereunder it appears from the record that the owner from whom the goods were stolen was alleged, at the time of reference of trial, to be the British Government. This date was 18 October 1943. (See 4th Ind. to letter of transmittal of Charges and 1st Ind. to Charges referring the case for trial). Subsequently, by letter dated 3 November 1943, from J. B. Langford, Deputy Secretary to the Government of India, it appears that the owner was the Government of India. It is clear that the change in the specification of the charge was made to read Government of India after reference for trial but before service on accused. Par. 34, MCM 1928, corrected to April 20, 1943, obvious errors may be corrected and the charges may be redrafted over the signature thereon, provided the redraft does not involve any substantial change or include

any person, offense or matter not fairly included in the charges as received. (Dig. Ops. J.A.G. 1912-40, Sec. 428 (9)). Neither the Judge Advocate nor the court has the power to make substantial amendments to specifications without the authority of the convening authority. Par. 73, MCM, permits the court to direct an amendment to a specification under certain circumstances, but this change was made by the TJA and before trial, not under the direction of the court.

Winthrop Military Law and Pres. 2nd Ed. p. 155 states:

"But *** so far as concerns the court and the parties *** charges duly referred for trial are, in law, ordered to be tried as they stand".

But at page 187, it is stated:

" *** while the judge advocate may correct obvious errors of form and mistakes in names, dates, amounts etc. known to him from having communicated with the witnesses or otherwise, to be incorrect, he cannot properly venture upon material amendments of substance ***"

From the language quoted, it would appear that the amendment of the specification to properly describe the owner of the property stolen was not improper. The accused was not substantially prejudiced thereby.

4. Through the evidence is conflicting as to the actions and presence of the accused, the accused (R.26) and one other witness (R.24) testified that he did not go to the place where the stolen goods were disposed, yet other direct evidence is clear that he was present at the time and did dispose of some property. (R. 7,8,16,17). The court was warranted in believing the latter testimony. The evidence reveals that accused and another man took a box from shed #4 at King George Dock to a godown at Circular Garden Beach Road at which place the hack saw blades alleged to have been stolen were picked up the same day by the Provost Marshal(R. 7,8,9,16,17). The box was similar to one containing hack saw blades belonging to the Government of India (R. 18,20) which were short landed, that is, could not be traced in the shed. One such box was found in the godown to which accused had delivered the box. The evidence taken as a whole clearly warrants a finding that accused stole something, and there were circumstances in evidence from which the court could find that the box in evidence was the same as that taken and delivered by accused.

The fact that a box of hack saw blades, part of a shipment located in the shed of King George Dock was found on the same day in the same godown to which accused made a delivery of a similar packing case warrants the finding that the former was taken and delivered by accused. Where the evidence is circumstantial the circumstances must not only be consistent with guilt, but inconsistent with innocence. (Dig. Ops. J.A.G. 1912-40, Sec. 395, (9)). The finding of a packing case similar to the one accused had taken warrants the inference that it was the same one. Property shown to have been disposed of by accused may be identified either by direct or by circumstantial evidence. Identity may be established by proof of any peculiarity of, or mark upon, the things to be identified, serving to distinguish it from other things of the same sort. (36 C.J. 906). During cross examination of accused, he was asked by the Trial Judge Advocate, the following: (R.27)

Q. Did you refuse to give a statement to the Military Police?

A. Yes, I believe I did.

Of course the accused had the right to remain silent when questioned by the investigating officer without such silence later being used as evidence of his guilt, otherwise the guarantee against self incrimination would be meaningless. In this case, however, in light of the whole record it does not appear that accused was substantially prejudiced.

5. In regard to specification 2, Additional Charge I, the specification alleges an offer of violence against a superior officer who was in the execution of his office in that accused said, "take your glasses off and I will knock hell out of you " or words to that effect. This is not an offer of violence within the meaning of Article of War 64. Par. 134, MCM 1928, states that a mere threatening in words would not be an offering of violence in the sense of the Article. The specification, however, does set out an offense under Article of War 63, and the fact that it was laid under Article of War 64, is not material in this instance. (Dig. Ops. J.A.G. 1912-40, Sec. 394 (2)).

6. Subject to the comments in the foregoing paragraph, the evidence as to specifications 1 and 2 of Additional Charge I and the specification and Additional Charge II, is legally sufficient to support the findings of the court. The uncontradicted evidence shows that on 25 September 1943, accused was under arrest (R. 25,31) and that on the same day, he broke arrest (R.29) and was found outside his quarters

(R.29,32). He was picked up by the Military Police and when brought in to see the Medical Officer, whose office was across from the orderly room, he went into the orderly room and said to his superior officer, who was then in the execution of his office, "What do you think you are trying to do to me (R.29,33,35). Take off your glasses and I will knock hell out of you". (R.29,31,32,33). Accused then went around the desk (R.29) and struck Captain C.R. Holman, (R.30,31,32,35), the superior officer. The blow by the accused landed on the officer's shoulder (R.30,31).

8. There is evidence in the record that accused had been drinking (R.29,34,35), and one witness was of the opinion he was too drunk to know what he was doing (R.35), yet he could walk and could be clearly understood, (R.35) and had control of his physical and mental faculties (R.34). From the evidence, the court could properly conclude as it did.

The court was legally constituted. There are no errors substantially prejudicial to the rights of the accused. The maximum punishment authorized is death. The record is legally sufficient to support the sentence.

Grenville Beardsley, Judge Advocate

Itimous T. Valentine, Judge Advocate

Robert C. Van Ness, Judge Advocate



WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

(51)

29 January 1944.

Board of Review
CM CBI 71

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

v.)

Private Joseph A. Dunn,
32063900, 540th Port Com-
pany, T. C., Base Section
2.)

) Trial by GCM convened at Cal-
) cutta, India 31 December 1943.
) Dishonorable discharge, total
) forfeitures, and confinement
) at hard labor for the term of
) his natural life.

OPINION of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and KIRKWOOD, Judge Advocates

1. The record of trial in the case of the enlisted man named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General in charge of the Branch Office of the Judge Advocate General with the United States Army Forces in China, Burma and India.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Joseph A. Dunn, 540th Port Company, Transportation Corps, did, at Calcutta, India, on or about 10 November 1943, with malice aforethought willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private Chester (NMI) Harrison, 35214607, 540th Port Company, Transportation Corps; by stabbing him in the chest with knife.

Accused pleaded not guilty to, and was found guilty of, the Charge and its specification, and was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated The United States Penitentiary nearest the Port of Debarkation as the place of confinement, withheld the order directing execution of the sentence, and forwarded the record of trial for action under the provisions of Article of War 50½.

3. After two soldiers of the Port Company identified a dead body on 10 November 1943, as that of Chester Harrison, Major Horace Pettit, MC, performed an autopsy. He found a fan shaped wound about 7 cms. long, and 3 cms. wide, which penetrated the right lung to a depth of 3 cms. A great deal of blood was in the right cavity. In witness' opinion death resulted from this wound, which appeared to have been inflicted by a knife blade about six inches long (R. 7,8). Private John W. Steward, 541st Port Company, TC, on 10 November 1943 was drinking "country whiskey" (R.10) with deceased, accused and other soldiers. Accused and deceased got into a fight in Nytra Ghosh street, in which the participants stood up, lay down and rolled over. Accused could walk all right. Witness saw no knife used or any stabbing done (R.10). He went away for a time, and when he returned, helped Gregory put Harrison in a truck. Harrison had been stabbed, on the left side of the chest. Steward couldn't tell then whether Harrison was alive or dead. Witness could not say for how long an interval he was absent from the scene. He himself was drinking "pretty heavy". Private Tyree Young, 541st Port Company, TC, saw accused and deceased get into an argument which led to a fight (R. 12). Witness separated them after several attempts and left the scene. Dunn had been drinking, but witness couldn't say whether he was drunk. He could stand on his two feet, and could walk "all right by himself". He saw no weapon used. They were still fighting when he went away (R. 13). Witness next saw Harrison dead and in a coffin at the 112th Station Hospital. Witness had been drinking in the locality of the fight between 2 and 3 o'clock, and the fight began about a half hour after he arrived. He didn't know the cause. "It was not a friendly fight". He had known both participants, who were good friends, a long time (R. 14). Private Stanley Gregory, 541st Port Company, Calcutta, was being driven in a truck between 3 and 4 p.m. from King George Docks to Eden Gardens, which was stopped by congestion of traffic caused by a crowd watching a fight near Watgunge Street. He got off the truck and went with a little Indian boy to where accused and deceased were fighting in the presence of a "big crowd". Young was trying to stop the fight and to pull the participants apart. Deceased didn't want to fight (R. 15). After four attempts, Young got the combatants separated, and Harrison ran down the street to get away. Accused ran after him, raised his hand and "swiped Harrison", who ran on to the corner. An Indian said, "Chester is finished". Witness went to him. He was lying down. A British truck stopped. Witness helped pick up deceased and to take him to the hospital, where the major said he was dead (R. 15). Gregory did not see any knife, but heard deceased "hollar" when accused took a "swipe" at him. Accused came back up the street past witness, who did not see him again until after dark (R. 16). Both Dunn and Harrison were drunk and stumbling, but "I don't think they were too drunk (R.14). Once or twice "after Tyree Young separated

them", Harrison said, "Let's not fight" (R.17). Both accused and deceased were good friends (R. 18). Jamel Khan saw accused throw deceased down. "Then from the scramble on the ground they got up and Dunn chased and stabbed Harrison" (R. 19). After stabbing deceased, Dunn went to a trough and washed the knife and his face and hands. The knife was bloody (R. 19). It was about 8 inches long. Accused had been drinking (R. 20). He closed the knife and went along the street toward camp. Munishi Mia saw accused and another man fighting about 4 p.m. on 10 November 1943. "The man who is not here" walked away, and the prisoner abused him and approached him. He pulled a knife and stuck it in "the man who is not here" (R. 22). Accused ran toward Munshin Road and joined some men who had a bottle. After the stabbing he put the knife in his pocket (R. 23). Musraf Ali saw the fight and saw accused run after the stabbing and join some other people. He saw accused put the knife in his pocket (R. 24) and saw him stab deceased. Witness was only a few feet away (R. 25).

4. The only witness called for the defense was the accused who was warned of his rights (R. 25). He went to the grog shop about 8 in the forenoon, and met Harrison in the afternoon. In the meantime he had been drinking Indian Gin. He had a fight with Harrison but could not recall why, or any of the details, or what happened after the fight. He and Harrison were good friends and he did not recall using a knife on him. (R. 26). He carried a knife that, was about 4 or 5 inches long, but did not use it on that day that he knew of. "I can't recall anything". (R. 27).

5. It was earnestly contended by the defense counsel that the accused was drunk at the time of the homicide and therefore could not legally be found guilty of murder but only of the lesser included offense of manslaughter. He based this contention upon the following language of par. 126c, MCM 1928, pp. 136-6:

" * * In certain offenses, as murder, larceny, burglary, and desertion, a specific intent is a necessary element. In such a case the specific intent must be established either by independent evidence, as, for example, words proved to have been used by the offender, or by inference from the fact itself.

*** *** *** ***

"Drunkenness.- It is a general rule of law that voluntary drunkenness, whether caused by liquor or drugs is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where

such intent is a necessary element of the offense."

Specific intent as an element of murder is implied in the definition of malice is the characteristic which distinguishes voluntary manslaughter from murder. An intentional homicide, if not justifiable or excusable, is murder and not manslaughter. Malice is "a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief" (U.S. v. Lewis, 111 Fed. 630), and consists in the intentional doing of a wrongful act without legal justification or excuse (U.S. v. Hart, 162 Fed. 192). It may be express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances susceptible of proof (U.S. v. Lancaster, 44 Fed. 896). It need not be evidenced by words only, but may be inferred from circumstances. (Hotema v. United States, 186 U.S. 413, 46 L. Ed. 1225). Previous friendship with the victim may not be inconsistent with express malice at the time of the killing (Kota v. People, 136 Ill. 655). Implied malice is that which is inferred from the naked fact of the homicide. Malice is implied when no considerable provocation appears or when all the circumstances of the killing show a wicked and malignant heart.

6. That accused had been drinking is undisputed. The evidence, however, does not establish that he was so drunk as not to know what he was doing, but tends rather to indicate the contrary. Other soldiers in the group sought several times to separate him and his victim. Despite their efforts and the statement of the deceased that he did not want to fight any more, the accused returned to the attack. When separated the last time, the deceased broke away and fled down the street. Accused pursued, overtook and stabbed him. Then he washed the blood from his knife and hands, folded the knife and placed it in his pocket, walked calmly away and disappeared from the scene. As to these facts there is no dispute. These circumstances are such as to furnish reasonable support for the conclusion of the court that the accused knew what he was doing when he stabbed the deceased. The question was one of fact, committed to the court for its determination, and there is substantial evidence to support its conclusion.

7. The charge and specification as originally drafted, averred the commission of manslaughter in violation of the 93rd Article of War. Such charge and specification were stricken out by lines drawn with pen and ink, and a new charge and specification averring the commission of murder in violation of the 92nd Article of War were typed beneath it. The typing of the new charge and specification was done upon a typewriter having large type faces and fitted with a worn

ribbon, while the original charge and specification were typed upon a machine with smaller type and equipped with a fresh ribbon. The difference in the typewriting is quite apparent, and it is equally apparent that the affidavit to the charge and specification was typed upon the same typewriter and about the same time as the charge and specification alleging murder. The affidavit to the charges was sworn to before Major Jay W. Scovel, J.A.G.D., whose initials appear at the left of and also above the lines striking out the original charge and specification. The signature, to the jurat, such initials and such lines are in ink identical in color and appear to have been made with the same pen. The affidavit is dated November 15, 1943. On that date, Major Scovel was base judge advocate of Base Section No. 2, SOS, USAF, CBI. Three days later, the charges were referred by the Commanding General, Base Section No. 2, to an officer for investigation, in accordance with the provisions of A.W. 70 and paragraph 35a, MCM. On November 21, such investigating officer submitted his report of investigation and his recommendation for "trial by general court-martial; charge, violation of A.W. 92; specification, murder," to the Commanding General, Base Section No. 2, who on 23 November 1943, forwarded the charges, report of investigation and other papers to the Commanding General, SOS, USAF, CBI, with his recommendation for trial by general court-martial. On 10 December 1943, a copy of such charge and specification was served upon the accused.

8. No question was raised at the trial as to the legal sufficiency of the charge and its specification. "Obvious errors may be corrected and the charges may be redrafted over the signatures thereon, provided the redraft does not involve any substantial charge or include any person, offense, or matter not fairly included in the charges as received" (Par. 34, MCM, p. 22). A redraft so as to charge murder rather than manslaughter would appear to be a "substantial change" and murder is an offense greater than and "not fairly included" in a charge of manslaughter. Nevertheless, it would seem reasonable to conclude that the charges were redrafted before and not after the accuser swore to them. The accuser thereby preferred the redrafted charge and specification and not that originally drawn. To reach a different conclusion, it would be necessary to ignore the applicable presumption that the proceedings were regular unless the contrary clearly appears on the face of the papers (Discipline XV C, p. 570, Dig. Ops. J.A.G. 1912). In any event, the charge and specification upon which accused was arraigned and tried were those which the Commanding General of the Base Section caused to be investigated under A.W. 70, and forwarded after such investigating to the Commanding General exercising general court-martial jurisdiction, with his recommendation

for trial by general court-martial. Such were the charge and specification which, after consideration and advice as required by A.W. 70, the Commanding General exercising general court-martial jurisdiction referred for trial. It was a copy of that charge and specification which was served upon the accused before trial. The requirements of A.W. 70 are procedural and for the benefit of the accused. It has been held that complete absence of verification does not effect the jurisdiction of the court and may be waived by the accused either explicitly or when, as in this case, there is a failure to object to such an irregularity (C.M. 197674, Par. 428(7), Dig. Ops. J.A.G. 1912-40 p. 296).

9. The record implies that some statement was made "off the record" by the President of the Court concerning the "unimportance of evidence showing drunkenness of the accused" (R. 25). It does not appear that any evidence offered by the accused on this or any other point was excluded. The better practice is for all such statements to be fully set forth in the record. In this case, however, it appears that all the evidence which the defendant desired to offer was received by the court. The contentions of the defense counsel in respect to the effect of evidence that accused had been drinking or was drunk were fully argued, (R. 27) and the provisions of the Manual for Court-Martial applicable to the consideration thereof were read to the court (R. 25). It does not appear that accused or defense counsel were limited in any respect in the presentation of any defense available to the accused.

10. The record of trial recites that three fourths of the members present at the time the vote was taken concurred in each finding of guilty (R.29). Except as to convictions of offense for which the death penalty is made mandatory by law, - and murder is not such an offense, - the record should show only the concurrence of two-thirds of all the members present at the time the vote is taken (A.W. 43). This irregularity does not disclose the vote of any member and could not have prejudiced the accused in any substantial right. Even if the record improperly recited that all the members concurred in the findings, such a recital being improper as disclosing how each member of the court voted and thus violative of A.W. 19, nevertheless the validity of the proceedings and of the sentence would not thereby be affected (Articles of War LXXXIV C 2, Dig. Ops. J.A.G. 1912). The irregularity may be disregarded.

11. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. A sentence to either death or to life imprisonment is made mandatory by A.W. 92 upon conviction of murder. In the opinion of the Board of Review, the record

of trial is legally sufficient to support the findings of guilty and the sentence.

Grenville Beardsley , Judge Advocate

Itimous T. Valentine , Judge Advocate

Joseph A. Kirkwood , Judge Advocate

1. The first part of the document is a list of names and addresses of the members of the committee.

2. The second part of the document is a list of names and addresses of the members of the committee.

3. The third part of the document is a list of names and addresses of the members of the committee.

4. The fourth part of the document is a list of names and addresses of the members of the committee.

A.P.O. 885,
26 April 1944.

Board of Review
CM CBI 85

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

10th AIR FORCE

v.)

) Tried by G.C.M., convened at
) APO 465, c/o Postmaster, New
) York, N.Y., 10 February 1944.
) To be dismissed the service.

1st Lt. Morton Fisher, 0561011,)
530 Fighter Bomber Squadron,)
311th Fighter Bomber Group.)

HOLDING OF THE BOARD OF REVIEW

BEARDSLEY, VALENTINE and KIRKWOOD, Judge Advocates.

1. The record of trial in the case of the above named officer has been examined by the Board of Review, and the Board of Review submits this, its holding, to the Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China Burma and India.

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

CHARGE I: Violation of A.W. 93.

Specification: In that 1st Lieutenant Morton (NMI) Fisher, 530th Fighter Bomber Squadron, 311 Fighter Bomber Group, Air Corps, did, at India on or about 27 December 1943 with intent to defraud, feloniously sign the name of T. Lewis, 1st Lieutenant, Air Corps, to a packing and loading list in the following words and figures, to wit:-

Emergency Reproduction (packing or loading list) Sheet No. 1

WAR DEPARTMENT

Q.M.C, Form No. 490

A.P.O. 465

STATION

Revised: February 8, 1938

Warehouse 4 King George Docks

Date 27/12/43

Consignee

Carried by truck

From Ship truck

B/L No. 5603

Car Initials

Destination Din Dun

(60)

Routing S. S. Wiley Post Seal No. _____
Date Shipped 27/12/43 Authority U. S. Army.

U.S.Nos. on pkgs.	No. & King of pkgs.	C O N T E N T S	GROSS Unit	WEIGHT. (Pounds) TOTAL
Bent.OMI	30 Cases "	Beer Pabst Blue Rib	38	
Total	30 Cases			X X X 1140

/S/ T/5 E. Prevard CHECKER _____ PACKER
SHIPPER
Received the above articles in apparent good order
and condition (except as noted) this date _____
s/- T. Lewis, 1st Lt. A.C.

which said paper was a writing of a public nature which might operate to the prejudice of another.

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

Specification: In that 1st Lieutenant Morton (NMI) Fisher, 530th Fighter Bomber Squadron, 311 Fighter Bomber Group, Air Corps, did, at _____ India on or about 27 December 1943 for his own personal gain and benefit and to the prejudice of good order and military discipline knowingly, wilfully and unlawfully order and cause T/5 Alvin J. Martin, 145th Ordnance M.V.A. Company, to perform manual labor by loading cases of beer upon a truck, the beer being for the personal use and benefit of the said 1st Lieutenant Morton (NMIO Fisher, Air Corps.

Accused pleaded not guilty to the specifications and charges, and was found guilty of Charge I and its specification, and not guilty of Charge II and its specification. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, USAF, CBI, for action under the 48th Article of War. The Commanding General, USAF, CBI, confirmed the sentence.

Pursuant to AW 50¹/₂, the order directing the execution of the sentence was withheld and the record of trial was forwarded to The Judge Advocate General's Branch Office for China Burma and India.

3. The evidence for the prosecution may be summarized as follows:

Captain James D. Hewitt, commanding 145th Ordnance Motor Vehicle Company, testified that on 26 December 1943, at a club in accused requested the loan of a truck to haul equipment from the docks. Witness agreed to let him have the truck, and it was furnished for such purpose the following evening (R.5). 1st Lt. Henry M. Horton of the same unit testified that on the evening of 27 December 1943, accused, with Mr. Worth of China National Aviation Corporation, drove a jeep to the motor vehicle assembly line, and requested a truck, which witness furnished with a driver as he had heard the conversation between Captain Hewitt and accused at the club the night before (R. 8,10). Witness directed T/5 Martin, the truck driver, to follow accused in the jeep to the King George Docks. Martin testified that at the dock arrangements were made for his truck to enter and that he drove to the S.S. "Wiley Post". He was invited aboard by accused and, after supper on the boat, helped load 30 cases of beer on the truck. A "tally-out sheet" was necessary in order to drive a truck out of the dock and witness saw accused hand a tally-out sheet to a soldier (R. 12, 13). T/5 Eddie Prevard, 540th Port Bn., testified that on the evening of 27 December accused asked him to check out 30 cases of beer which he said Major Port had authorized him to get. Witness testified that accused gave his name as "Lewis" and signed "1st Lt. Lewis" on a tally-out sheet (Pros. Ex. 1) in witness' presence (R. 15,17). Witness turned the original tally-out sheet in at the dock office, after giving accused a carbon copy. Major John G. Fort, Transportation Corps, executive in charge of the movement of freight on the docks, testified that he never gave authority to accused, or to Lt. Fisher, or to Lt. Lewis, to remove beer in any quantity from the docks. The 30 cases of beer in question were Government property consigned to the Post Exchange. Witness identified a tally-out sheet (Pros. Ex. 1) as being made on the regular form in use by his office. It acknowledged receipt of 30 cases of beer and had been in witness' possession since its execution. It was a part of the official papers on his office (R. 18).

At the close of the evidence on behalf of accused, the prosecution sought to reopen its case in chief (R. 26) and called 1st Lt. Isadore F. Haxel, Headquarters 10th Air Force, as a witness. Lt. Haxel testified that he was designated as investigating officer, and that during the investigating witness met accused and took a statement from him. Witness advised

accused of his rights in accordance with AW 24 and told him that he did not have to make any statement, but that anything he said might be used against him if the case went to court. Witness identified a document as the statement made by accused to him at APO 465 on 25 December 1944 (R. 27). The trial judge advocate offered such statement in evidence. The defense objected on the ground that the prosecution had previously rested its case and that the statement was not in the nature of rebuttal testimony. The law member stated that unless the court knew what was in the statement no ruling could be made. Thereupon the trial judge advocate withdrew his offer, and proceeded to inquire of witness whether after being warned of his rights, accused had made any statement as to his guilt or innocence. The defense objected on the ground that such testimony would be hearsay, which objection the law member sustained (R. 27).

4. The evidence on behalf of the defense consisted of testimony by Captain S.M. Newcomb, 530th Fighter Bomber Squadron, 311th Fighter Bomber Group, immediate commanding officer of accused (R.19), Captain George D. Bruch (R.20) of the same organization, and Captain L.C. Harris (R.22) of that organization, that they had known accused since the summer of 1942, had observed the manner of his performance of duty continuously since then, that accused's duties were performed in a superior manner, and that his retention in the military service was desirable. By agreement, a letter signed by Colonel Charles G. Chandler, commanding 311th Fighter Bomber Group, was received in evidence (R.23). It was also agreed that if Colonel Chandler were present in court he would testify that accused's services as squadron supply officer had been exceptionally fine, and that regardless of the outcome of the case, he would desire to have accused returned to his organization for duty under his command.

Accused took the stand (R.25), stated that he desired to make an unsworn statement, and, in answer to the question of his counsel, "tell the story as you know it", stated that on the night of December 27 he did not mention Major Fort and did not know him, that he had been truthful and had figured in the apprehension of two others involved in more serious offenses and the recovery of "two-thirds of the beer", that he had told Corporal Prevard (R.26) that he had an order, but that he did not say that he "had an order from anyone for the beer". There was no question from Corporal Prevard. It had been accused's observation that it was usual for trucks "to come down there and do that sort of thing".

5. In addition to defense counsel, accused introduced as his individual counsel Staff Sgt. James F. Nash, Signal Corps, and Sgt. Elmer E. Keeley, Air Corps (R.2). On 23 February 1944 they submitted to the Commanding General, 10th Air Force, a

letter signed by them as such counsel, bringing to the attention of the reviewing authority their opinion that the offense of forgery in violation of AW 93 had not been shown by the proof that defendant signed a fictitious name to a tally-out sheet. They urged that at common law the crime of forgery consists of signing the name of another, so as to alter the position of that person to his prejudice, that since the person whose name was forged was fictitious and did not exist he could not be prejudiced, that hence forgery had not been shown to have been committed, and that the evidence if it showed the accused to be guilty of any offense, showed him to be guilty of obtaining property by false pretences in violation of AW 95. The reviewing authority attached such letter to the record, and the contentions made therein have been carefully considered by this Board of Review together with the matters appearing in the record of trial.

6. From the evidence it seems to us to be apparent, as it did to the court, that accused, without any authority so to do, obtained 30 cases of beer, that he signed the name of a non-existent fictitious person to a receipt therefor, and that without the giving of such receipt he would not have been able to leave the dock with the beer. The court was justified in finding that accused's intent was to defraud the Government of 30 cases of beer. The tally-out sheet (Pros. Ex. 1) was in effect a receipt. It was of apparent legal efficacy and could, as it actually did, operate to the prejudice of the Government and of the custodian of the beer in causing permission to be given to remove the beer from the dock, which permission would have been refused in the absence of the false and fraudulent signature on such receipt. To constitute the offense of forgery, the name falsely signed must be that of some person other than that of the accused. "1st Lt. T. Lewis" was not accused's name. It was necessary that the accused then and there intended to defraud someone. It was not necessary to constitute the offense that the person defrauded be the person whose name was signed to the receipt. It was enough that such receipt be capable of operating to the prejudice of another. (Par. 149j, MCM, 1928, pp. 175-6). The instrument was apparently sufficient to support a legal claim and to effect a fraud. (Milton v. U.S. 110 Fed. (2d) 556).

Falsely personating another and signing his name is forgery, if the signer's intent is to have it received as the instrument of such other person, and if the instrument so signed is such as to be of legal efficacy (37 C.J.S. 38; Cornelius v. State, 27 Okla. Cr. 331, 227 Pac. 845; Parvin v. State, 132 Tex. Cr. 172, 103 S.W. 2d 773). Signing the name of a fictitious and non-existent person to an instrument with intent to defraud is forgery, if such instrument on its face appears to possess

legal efficacy, so that it may be used to the injury of another (37 C.J.S. 39, People v. Gould, 347 Ill. 298, 179 N.E. 848). It is enough that the false instrument be made with intent to defraud and that it is of such character that it might defraud or prejudice another. An instrument is such as to be the subject of forgery if it affects property and could be used as evidence either for or against the apparent maker or against any other person. The evidence in this record is legally sufficient to establish forgery. The fact as asserted by accused's individual counsel that accused's conduct was such as to constitute the offense of obtaining property by false pretences, or common law larceny or other offense, is immaterial.

7. Usually the prosecution or defense offers the evidence to support its theory of the case before resting its case in chief. It sometimes happens that in the presentation of evidence, one side or the other overlooks the presentation of evidence available to his side. That happened here. In such case a party is not foreclosed from presenting available evidence, but counsel may request leave of the court to reopen the case and present such evidence. Such motion is addressed to the sound discretion of the court. Ordinarily the motion is granted except when by granting the motion hardship or injustice would result to the other party. After the necessary foundation had been laid by testimony of Lt. Haxel as to the authenticity and voluntary character of the statement signed by the accused, during the investigation of the charges pursuant to AW 70, it is difficult to perceive why such statement should not have been received in evidence even though the prosecution had previously rested its case in chief. The trial judge apparently was uncertain of his rights and withdrew the motion before the court could pass upon it (R. 27). He then sought to elicit testimony from Lt. Haxel as to whether accused said anything to him as to his guilt or innocence. The defense objected that such testimony would be hearsay. The law member sustained the objection. In this he committed error. What the accused says and does under such circumstances is not subject to the objection that it is hearsay. Since this error was in favor of the accused, obviously he was not prejudiced.

8. The court was legally constituted and had jurisdiction of the person of the accused and of the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. The punishment, although severe, is authorized for the offense of which the accused was found guilty. The Board of Review is of the opinion that there is evidence sufficient to warrant the findings of guilty, and

it therefore holds the record of trial to be legally sufficient to support the sentence.

/s/ Grenville Beardsley, Judge Advocate.
/t/ GRENVILLE BEARDSLEY

/s/ Itimous T. Valentine, Judge Advocate.
/t/ ITIMOUS T. VALENTINE

/s/ Joseph A. Kirkwood, Judge Advocate.
/t/ JOSEPH A. KIRKWOOD

(66)

CM CBI 85 (Fisher, Morton) 1st Ind.

Judge Advocate General's Branch Office with USAF, CBI, APO 885,
U. S. Army, 26 April 1944.

To: The Commanding General, USAF, CBI, APO 885, U. S. Army.

1. In the case of 1st Lt. Morton Fisher, 0561011, 530th Fighter Bomber Squadron, 311th Fighter Bomber Group, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved and concurred in. Under the provisions of AW. 50 $\frac{1}{2}$, you now have authority to order the execution of the sentence. (Under authority of note to AW. 50 $\frac{1}{2}$, page 217, MCM 1928 a separate communication is submitted, recommending suspension of the execution of the sentence during your pleasure).

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case it is requested that the file number of the record appear in brackets at the end of the published order, as follows: (CM.CBI. 85)

H.J. SEMAN,
Colonel, JAGD.,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 4, CBI, 3 May 1944)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

(67)

APO 885,
20 March 1944.

Board of Review
CM CBI #91.

UNITED STATES

v.

Pvt. Ollie V. Traylor, (38046361)
Company D, 21st QM Reg. (Truck)
and

Pvt. Nelson (NMI) Edward (33103626)
Company D, 21st QM Reg. (Truck).

SERVICES OF SUPPLY
USAF in CBI

) Trial by G.C.M. convened
) at APO 689, c/o Postmaster
) New York, N.Y., 21 January
) 1944. Dishonorable dis-
) charge, total forfeitures
) and confinement at hard
) labor for the period of 7
) years to each of the
) accused.

OPINION of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and KIRKWOOD, Judge Advocates

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

2. Accused were tried upon the following charges and specifications:

CHARGE I: Violation of A.W. 93.

Specification 1: In that Private Nelson Edward (then Private First Class), Co. D, 21st Quartermaster Regiment (Truck), and Private Ollie V. Traylor, Co. D, 21st Quartermaster Regiment (Truck), acting jointly and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 14 September 1943, with intent to do him bodily harm, commit an assault upon gunner F.D. Baldy, British Armed Forces, by shooting at him, with a dangerous weapon, to wit, a service rifle.

Specification 2: In that Private Nelson Edward (NMI) (then Private First Class), Co. D, 21st Quartermaster Regiment (Truck) and Private Ollie V. Traylor, Co. D, 21st Quartermaster Regiment (Truck), acting jointly, and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 14 September 1943; with intent

to do bodily harm commit an assault upon Miss H. Fenn, by striking her on the shoulder with a dangerous thing, to wit, a stone.

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

Specification: In that Private Nelson Edward (then Private First Class), Co. D, 21st Quartermaster Regiment (Truck), and Private Ollie V. Traylor, Co. D, 21st Quartermaster Regiment (Truck), acting jointly, and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 14 September 1943, wrongfully seize Miss H. Fenn by the wrist and attempt to drag her across a road.

The accused pleaded not guilty to and were found guilty of all specifications and charges. Each accused was sentenced to dishonorable discharge, forfeitures of all pay and allowances due or to become due and confinement at hard labor for seven (7) years. The Reviewing Authority approved the sentence and designated the United States Disciplinary Barracks, nearest the port of debarkation in the United States as the place of confinement. The stockade at staging area, Base Section No.1 near Malir, Karachi, India, was designated as the place of temporary confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the order directing the execution of the sentence was withheld and the record of trial was forwarded to the Branch Office of The Judge Advocate General.

3. The evidence for the prosecution discloses that on the evening of 14 September 1943, the two accused, together with Privates Le Blanc and White were travelling in a United States Army vehicle between Digboi and Margherita (R.13,17,19, 22,24). Private Le Blanc stopped the vehicle at Private Edward's request at a point where Gunner F.D. Baldy, a British soldier, and Miss H. Fenn, a British woman were sitting by the side of the road (R.18;19). Both accused got out of the vehicle, went up to the British couple, and inquired of them whether they were having a nice time, whether they were going to Margherita, and whether or not they wanted a drink. Gunner Baldy replied in the negative to each question. He was asked for a cigarette and reached into his pocket for his cigarette case. One of the accused started feeling about Baldy's person. He shoved that accused away and told him to take his hands off. At this time the second accused came from behind the vehicle, levelled a rifle at Baldy and Miss Fenn and said: "Hold everything". (R:22,23). One accused struck Baldy in the face. Miss Fenn stepped in front of Baldy as the rifle was levelled at him. Miss Fenn was told to go away, that she would be alright, but that they wanted to shoot Baldy. One accused was pulling on Miss Fenn's wrist. He then bent down to pick up a stone, Baldy kicked this accused in the face and told

Miss Fenn to run. They ran away together. The rifle was fired, the bullet passing Baldy's head. Miss Fenn was hit in the back by the stone, and screamed. The stone caused her to stumble in her flight (R.28). Baldy did not see the stone actually thrown, but "I only saw Miss Fenn struggling" (R.23). There was evidence that the two accused had been drinking (R.17,18,20,26).

4. The accused did not take the witness stand, and no testimony or other evidence was offered in their behalf.

5. The defense argued that the voluntary drinking of the two accused, while not an excuse for the crime committed, should be considered by the Court as affecting the mental capacity of the two accused to entertain the necessary specific intent. This office has held (CM CBI #45), Shelton, Jesse W. that:

* * * * the fact of his drunkenness, if it stood alone, would negative his ability to formulate the specific intent charged. The evidence is uncontradictory however in respect to other facts which indicate that accused knew what he was doing and acted with some premeditation and deliberation * * "

In the present instance accused were able to carry on connected conversation with the British soldier and Miss Fenn, to level a gun at Baldy, to take hold of Miss Fenn's wrist and pull her along the road, to stoop and pick up a stone, to fire the rifle with some degree of accuracy, to throw the stone straight enough to hit Miss Fenn, and then to get back into the Government vehicle, and proceed on their mission.

This Board is necessarily limited to the determination of the question whether or not there is any substantial evidence in the record to support the Court's findings. Such evidence is present, and any question as to its weight was for the court.

6. It was contended by defense counsel that the stone thrown was not shown to be a dangerous weapon. While a 'stone' may not ex vi termini be a dangerous weapon, nevertheless it appears from the evidence as to the manner in which it was used, that it must have been a weapon such as might endanger life or inflict great bodily harm.

"A deadly weapon is not one that must or may kill. It is an instrument which is likely to produce death or a great bodily harm under the circumstances of its use. The deadly character of the weapon depends sometimes more upon the manner of

its use and the condition of the person assaulted than upon the intrinsic character of the weapon itself".

State v. Archbell, 139, N.C. 537, 539, 51 S.E., 801.

That decision cited with approval State v. Sinclair, 120 N.C. 603, 27, S.E., 77; State v. Norwood, 115, N.C. 789, 20 S.E. 712, 44 A.N., S.R. 498. In the present case the evidence is undisputed that a stone was hurled by one of the two accused, who were acting jointly and in pursuance of a common intent, with utter disregard for the safety of those at whom the stone was thrown. No intent other than the desire to inflict bodily injury and prevent the flight of the victims could have actuated the hurling of the stone. Had this stone struck Miss Fenn in the head it might have killed her or caused serious bodily injury and, as a matter of fact, the stone did strike her close to the head, i.e., on the shoulder. While the record is silent on the question of the size and shape of the stone as well as the force with which it was hurled, nevertheless the evidence does reveal that it struck Miss Fenn with such force that she was caused to "stumble" and "struggle". It is to be noted that the stone struck not a man but a woman and that "an instrument which might be harmless when used upon a strong man, may become deadly when used upon a very frail and delicate woman". State v. Archbell, 139 N.C. 537, 539; 51 S.E. 801. It is also to be noted that "whether a weapon is deadly does not depend so much on the result of its use as on its size and character, the manner of its use, the size and strength of the person using it and the person on whom it is used". State v. Beal, 87 S.E. 416, 170 N.C. 764. The person using the stone in the present instance was a soldier. He had struck British soldier in the face and pulled a struggling woman by the wrist. It was this accused who hurled the stone that struck Miss Fenn with such force that she was caused to stumble. From these facts the court could infer that the strength of the person using the stone was not inconsiderable.

7. The defense contended that the wording of the specification under Charge II did not adequately apprise the two accused of the offense with which they were charged. The wording of the specification is: "Did wrongfully seize * * * and attempt to drag * * *". It is apparent that the specification contains all the elements necessary to the proper averment of an assault and battery, and describes the offense with precision such as to enable the accused to offer any defense they might have and to ensure against any possibility of their being twice placed in jeopardy for the same wrongful act.

8. It is to be noted that the Army serial number of Major John P. North as copied into the record differs from the serial number of Major North as disclosed on the order appoint-

ing the court. The first name of 2nd Lt. Bernard A. Frank, assistant trial judge advocate, is misspelled Berbard (R.2). The name of one of the victims of the assault is spelled Boldy in Specification 1 of the charge, and Baldy throughout the record. "Bernard" and "Berbard", as well as "Boldy" and "Baldy" are idem sonans. These irregularities could not prejudice the accused and should be disregarded. (CM CBI 45, Jesse W. Shelton).

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

/s/ Grenville Beardsley
/t/ Lt. Col. Grenville Beardsley

/s/ Itimous T. Valentine
/t/ Major Itimous T. Valentine

/s/ Joseph A. Kirkwood
/t/ Captain Joseph A. Kirkwood



WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

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Board of Review
CM CHI 100

New Delhi, India.
25 March 1944.

UNITED STATES

v.

MOSS, FRANK (NMI)
Technician 5th Gr. (35363422)
Headquarters and Service Co.
1883rd Eng. Aviation Bn.

Trial by G.C.M., convened at
APO 689, 1 February 1944.

Reduced to Grade of Private,
Dishonorable discharge, forfeit
all pay and allowances due and
to become due, confinement at
hard labor for 2 years 6 months.

Confinement in The United States
Disciplinary Barracks nearest
the port of Debarkation.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and KIRKWOOD, Judge Advocates

The record of trial in the case of the soldier named above having been examined by the Board of Review in the Branch Office of The Judge Advocate General, established with the United States Army Forces in China, Burma and India is found to be legally sufficient to support the sentence.

(Sgd.) Grenville Beardsley, Judge Advocate
(Typed) Grenville Beardsley

(Sgd.) Itimous T. Valentine, Judge Advocate
(Typed) Itimous T. Valentine

(Sgd.) Joseph A. Kirkwood, Judge Advocate
(Typed) Joseph A. Kirkwood

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CM CBI #100 Moss, Frank 1st Ind.
J.A.G.B.O. USAF, CBI, APO 885, U.S. Army, 27 March 1944.

TO: The Commanding General, S.O.S., USAF, CBI, APO 885.

1. In the case of Tech 5th Gr., Frank Moss, ASN 35364322, Headquarters and Service Company, 1883rd Engineer Aviation Bn., 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 and concurred in. Under the provisions of A.W. 50 $\frac{1}{2}$, you have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. To identify the order with the record of trial, it is requested that the file number appear in brackets at the end of the published order, as follows: (CM CBI 100).

3. From the evidence in this record and the findings of guilty made by the court, it appears that accused was drinking with Private Melvin H. Reed and other soldiers of their organization, while passengers on a railroad train. Accused became annoyed at Reed and assaulted him with a knife. Other soldiers attempted to restrain accused. Reed, in self defense, ran to the door of the car and jumped. Accused said that if any one didn't like it or had anything to say about it, he would make them jump too (R.19). According to one witness the accused said, "As far as I remember he said he should have killed him right there, and that that was the way he used to do in civilian life". (R.7, 24). Although the record is silent as to the fate of Reed, it would appear from the accompanying papers that he was killed by the leap from the train. If this be an established fact, then under the law, accused was guilty of murder (26 Am. Jurisprudence 29 Corpus Juris 1095-6). A similar case was reviewed in Adams v. People, 109 III.444, 50 Am. Rep. 617, where it was held that defendants were guilty of murder, when by threats of violence to a person, or by displaying deadly weapons in a threatening manner, they caused him to jump to his death from a moving train.

4. Accused has been in jeopardy and cannot now be tried for murder, since the assault, of which he stands convicted, is a lesser offense included in the murder.

5. However, accompanying the record of trial is a copy of the proceedings of a board of officers convened under AR 600-550, which board concluded that Private Reed's death was due to his own misconduct and was not in line of duty. This conclusion appears to have been based in large part on the testimony of accused, who was not then under charges, that deceased committed suicide. The conclusion of the line of duty board is contrary to the testimony in this case. Since a man cannot be both the victim of murder and a suicide, it would appear that serious injustice has been done the next of kin of Private Reed. It is suggested that appropriate action be taken to reopen the pro-

ceedings under AR 600-550, so that such next of kin will not be deprived of the death gratuity of six months pay and other benefits accruing to the survivor of a soldier, who it now appears, was killed in line of duty.

/s/ H.J. Seman
/t/ H.J. SEMAN
Colonel, JAGD.,
Assistant Judge Advocate General.



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UNITED STATES ARMY FORCES CHINA BURMA INDIA

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A.P.O. 885,
7 April 1944.

Board of Review
CM CBI # 109

UNITED STATES

v.

Sgt. James M. Wright (32691923)
Company B, 858th Engineer
Aviation Battalion

SERVICES OF SUPPLY
USAF in CBI.

) Trial by G.C.M. convened at
) APO 689, c/o Postmaster,
) New York, N.Y., 10 February
) 1944.

) Reduction to Private, dishon-
) orable discharge, total for-
) feiture and confinement at
) hard labor for 5 (five) years.

OPINION of the BOARD OF REVIEW

BEARDSLEY, VALENTINE and KIRKWOOD, Judge Advocates

1. The record of trial in the case of the above named soldier has 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 the Judge Advocate General's Branch Office for China, Burma and India.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Sergeant James M. Wright Company "B", 858th Engineer Aviation Battalion, did, at or near Canastel, Algeria, on or about November 2, 1943, with intent to do him bodily harm, commit an assault upon Corporal Wallace J. Wilson, Company "B", 858th Engineer Aviation Battalion, by shooting him in the left shoulder and in the left arm with a dangerous weapon, to wit, a rifle.

Accused pleaded not guilty to and was found guilty of the specification and the charge. He was sentenced to be reduced to the grade of private, to dishonorable discharge, to forfeiture of all pay and allowances due or to become due, and to confinement at hard labor for 5 (five) years. The Reviewing Authority approved the sentence and designated the United States Disciplinary Barracks nearest the port of debarkation in the United States as the place of confinement. The stockade at Staging Area, Base Section No. 1, North Malir, Karachi, India,

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was designated as the place of temporary confinement. Pursuant to Article of War 50½, the order directing the execution of the sentence was withheld and the record of trial was forwarded to The Judge Advocate General's Branch Office for China, Burma and India.

3. The only legal question which requires extended treatment concerns the sufficiency of the evidence to support the finding of guilty. The only evidence was that offered on behalf of the prosecution. No evidence was offered by or on behalf of the accused. The prosecution's case stands uncontradicted and unchallenged as to the facts which the testimony of its witnesses tends to establish. We deem it important to set out all the testimony in detail.

Captain Leo A. Zelezinski, Battalion Surgeon, 858th Engineer Aviation Battalion, testified that about midnight 2 November 1943, he was awakened and taken to the dispensary to treat Corporal Wilson, a member of the 858th Engineer Aviation Battalion, who had been shot. Witness identified the wounded man as Corporal Wilson by his "dog tags" (R. 5). One bullet struck Wilson in the fore-arm, the other in the medial aspect of the upper arm close to the axillary region, in witness' opinion, fracturing the bone (R. 6). Staff Sergeant Richard Figgs, Company "B", 858th Engineer Aviation Battalion testified that he knew accused. Witness was off duty on the night of 2 November 1943. Sgt. Harvey Douglas, Corporal Henry and he were talking in the company street sometime after 9 o'clock (R. 7). After a time, Corporal Wilson and another soldier came up and joined the conversation. About an half hour thereafter, Sgt. Wright and Sgt. Widbee came up the street. "We called to them and they came over". Sgt. Wright said: "Hello, greasy-belly", to which Corporal Wilson answered: "Hello, drunk". Wright was angered and an argument ensued. Wright went to the tent where he and witness bunked together. After awhile, he came out and called Sgt. Widbee. Witness told Corporal Wilson to go to his tent, but he did not do so. Sgt. Wright soon went back to his tent and after 3 to 5 minutes came out again. Witness heard a clip being loaded and asked Sgt. Widbee (R. 8) if he had given Wright ammunition. Widbee said that he had. Witness suggested that Widbee would be as much to blame as the man who fired the shots if anyone got hurt. Widbee left to get the ammunition from accused. Witness went to get the carbine. As witness was looking "for them", he heard the shooting. He didn't come out of the tent until it was over. It was about 40 feet from where Wilson and the other men were talking, to the tent where accused got the carbine. Wilson did not act in a threatening manner or make any threatening moves toward the accused. Accused had been drinking. There were three tents (R. 9), to one of which Wilson was

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assigned, adjoined by another tent, and a third tent, beyond that, to which Sgt. Wright was assigned. Witness went to the tent to get the carbine and Widbee to get the ammunition so nothing would happen. As witness went to the tent, accused came out (R. 10). There were only two carbines in the tent, one issued to witness and the other to accused. The other soldiers in the tent were armed with rifles. All of the rifles were there (R. 11). Witness found his carbine in the tent (R. 11), but the other carbine was missing. About six or seven minutes after Wright came out of the tent, witness heard seven or eight shots (R. 10). After witness heard the shots, he went out and saw accused going to the Orderly Room. Accused had his carbine then. Witness asked him for the carbine. Accused said he was going to give it to the first sergeant. Witness did not ask accused if he had done the shooting. He thought he had (R. 12).

Corporal John L. Henry, Company "C", 858th Engineer Aviation Battalion, testified that he knew the accused and that about 2 November 1943, he was in the Company "B" area, talking with him and with Sgt. Figgs and Sgt. Douglas in the Company street. Corporal Wilson returned from town and joined the group. Sometime after that, accused and Wilson had words. There were no threats and Wilson displayed no weapon (R. 14). Accused argued for a while, then left and soon came back with a rifle in his hand. He did not give any warning. Witness started running. A number of shots were fired. In his flight from accused, witness fell and broke his arm. If accused warned any man to get out of his way before he fired, "witness did not see him". There were three tents in a row, the tent by which the conversation took place, another tent, and a third tent to which accused was assigned. Accused had the rifle when he came out of his tent the second time. Wilson did not go toward accused when he came out. Witness did not know where Wilson was shot (R. 15). What witness had referred to as a "rifle" in accused's hand was actually a "carbine" (R. 16). When they saw accused with a carbine, witness and Douglas started to run (R. 17). Witness ran before he heard the shots. He did not know where Wilson ran and whether there were any other men in the Company street. When witness ran, Wilson was the only one left there (R. 18).

Technician 4th Grade Harvey J. Douglas, Company "B", 858th Engineer Aviation Battalion, swore that on the night of November 2, 1943, he was at Oran, Africa and talked with Corporal Henry and Sgt. Figgs in the company street. Corporal Wilson came up later and stopped to talk. Accused came up the company street and joined the group. There was an exchange of words between accused and Wilson, and an argument started (R. 19). Witness did not hear Wilson threaten accused at any time or see him draw a knife or any weapon. During

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the quarrel, accused left and came back with a carbine. Accused did not give any warning. Witness ran; "I know I ran to get away from the gun". There were shots fired, a number of them. (R. 20). Witness could not say how many. He did not run toward accused, but ran down the company street, away from him. He saw no one else with a gun in the company street. Accused had been drinking but witness was not sure he was drunk; however, he thought he was (R. 21). Sgt. Figgs had told Wilson to leave the scene. He did not do so (R. 22). Accused came up with the carbine to where Wilson, Henry and witness were standing. Accused did not make any threats; he left the group, went to his tent and came back with the carbine. Witness thought he was coming after Wilson and he ran (R. 24).

Defense counsel made an extended argument on behalf of the accused, urging that on the night in question, he was intoxicated and could not have entertained the specific intent to shoot anyone (R. 25). Following this, he said:

"Bear in mind that there was a lot of testimony -- but Corporal Wilson, who was shot, is not here. We do not know actually what happened that night. All we do know is that a shooting occurred. The witnesses brought up before the court here saw the rifle and disappeared. We don't know what happened after that. We could say it was self-defense. We could say a lot of things. We don't know who shot that rifle. Corporal Wilson was shot in the arm. He is the only one who can tell us who shot that rifle. The others ran away. It is possible Corporal Wilson made a lunge for Sergeant Wright and the accused had to shoot to save his life. There has been no proof that he brought out his rifle to shoot. * * * He could have been called by the first sergeant to take his rifle for inspection. That is actually where he went afterward. Or he could have been bringing the rifle out to clean it. Or he could have brought it out just to shoot it, and Corporal Wilson accidentally got in the line of fire and got shot. * * * (R. 26).

4. The Manual for Courts-Martial defines "assault" in the following language:

"An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. (Clark & Marshall). Raising a stick over another's head as if to strike him, presenting a firearm ready for use within range of another, striking at another with a cane or fist, assuming a threatening attitude and hurrying toward another, are examples of assault." (Par. 1491, MCM, 1928, p. 177).

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The assault here averred in the specification of the charge was an assault with a deadly weapon, a rifle, with intent to do bodily harm. This offense is an assault aggravated by the specific present intent to do bodily harm to the person assaulted, by means of a dangerous weapon. In such a case, it is not necessary that any bodily harm actually ensue or, if bodily harm is actually inflicted, that it be of the kind intended. A weapon is dangerous when it is used in such a manner that it is likely to produce death or a great bodily harm. It is stated in par. 149m, MCM, 1928, p. 180, that the proof necessary to support the charge of assault with intent to do bodily harm with a dangerous weapon is the following:

"(a) That the accused assaulted a certain person with a certain weapon, instrument, or thing; and

(b) the facts and circumstances of the case indicating that such weapon, instrument, or thing was used in a manner likely to produce death or great bodily harm."

It appears from the evidence in this case that at the time and at the place alleged in the specification the accused after an argument, went to his tent, procured a carbine and loaded it with a clip of cartridges. The circumstances were such as to impress two non-commissioned officers with the importance of securing from the accused the carbine and the cartridges. When he came toward the group, of which the victim named in the specification was a member, accused was carrying the carbine in such manner as to cause the members of the group to flee, one so precipitately and in such great haste that in his headlong flight he broke his arm. The carbine was discharged several times. It would not seem to be essential to a valid specification charging the offense that the person toward whom the violence was directed be actually struck by a bullet. The offense of assault with a deadly weapon with intent to do bodily harm was complete when the accused presented the firearm ready for use within the range of Wilson and the other members of the group in a threatening manner, since a carbine is a weapon capable of producing death or great bodily harm. The circumstances in evidence indicate that such carbine was used in a manner likely to produce death or a great bodily harm. The uncontradicted testimony proves that not only was there an offer or attempt on the part of the accused to do violence to the soldier named in the specification, but that such violence was actually done. The fact that Corporal Wilson of Company "B", 858th Engineer Aviation Battalion was sometime later found to be suffering from two bullet wounds was some evidence from which the court might infer that Corporal Wilson, Company "B",

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858th Engineer Aviation Battalion, had been shot by the accused in the commission of such assault, since proof of identity of names give rise to the presumption of identity of persons.

5. The suggestions made in the argument of the defense counsel to the court (1) that accused could have discharged his weapon in self defense, or (2) that he had been called (at a late hour at night) to bring his rifle to the first sergeant for inspection, or (3) that he brought it out to clean it, or (4) that he brought the weapon out to shoot it, and that Corporal Wilson accidentally got in the way (R. 26), appear to be frivolous, and in view of the facts and circumstances in evidence, it is not surprizing that such alternative hypotheses were rejected by the court.

6. In passing upon the sufficiency of the evidence in a case in which the President is neither the reviewing nor the confirming authority, it is not the province of a Board of Review or the Judge Advocate General, and neither has the right, to weigh the evidence. The rule applicable in such a case has been stated as follows:

"In passing upon the sufficiency of the evidence in such cases, it is their province merely to determine whether or not there is in the record any substantial evidence which, if uncontradicted, would be sufficient to warrant the findings of guilty. It is exclusively the province of the court-martial, including the reviewing, and if there be one, the confirming, authority to weigh evidence, judge of its credibility, and determine controverted questions of fact. C.M. 145791 (1921)." Par. 408(2), Dig. Ops. J.A.G., 1912-40, p. 259.

It has also been held:

"In the exercise of its judicial power of appellate review, the Board of Review treats the findings below as presumptively correct, and examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review, and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustrative of justice. C.M. 192609." (Par. 408(2), Dig. Ops. J.A.G., 1912-40, p. 259).

The right to draw proper inferences from the evidence was a function of the general court-martial, and if its conclusions do not do violence to reason, this Board of Review may not sub-

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stitute its finding of the ultimate facts for that which was reached by the court. The rule followed by the Board of Review and the Office of the Judge Advocate General is the substantial translation into military law of the procedure followed by the Supreme Court of the United States and by the various Circuit Courts of Appeal as well as by the various state supreme courts. It is generally held that the rule that a court of review will not weigh the evidence applies whether the evidence is direct or circumstantial or partly direct and partly circumstantial.

In Crumpton v. 138 U.S. 361, the Supreme Court reviewed a conviction for murder, pursuant to which the death sentence had been passed. The evidence for the government was circumstantial. There was testimony that deceased and defendant were riding together. Shots were heard later in the neighborhood of a hole where the body of the deceased was afterwards found. Soon afterward the defendant was seen riding one horse and leading another. That night, he stated that they had met a man who induced deceased to go with him; that deceased had directed him to take the horses, to take charge of his effects and to pay his debts in case he did not return by a certain time. Six weeks later the body of the deceased was found in the hole referred to. In his head was a bullet hole. Prior to the disappearance of deceased, defendant had come upon the hole and was familiar with its location. He had in his possession an overcoat of the deceased the day after his disappearance. Upon the discovery of the body, defendant left his home and went to a place about 20 miles distant, where he was arrested. In that case, a number of witnesses testified on behalf of the defendant to circumstances consistent with his innocence. He took the stand and denied his guilt. In affirming the judgment and sentence of death, the Supreme Court said that there could be no doubt that in the face of such testimony, it would have been improper to direct a verdict for defendant, and that the weight of the evidence and the extent to which it ^{was} contradicted or explained by the testimony on behalf of the defendant were questions exclusively for the trial court, and were not reviewable upon writ of error. In a subsequent case in which the defendant was convicted of murder upon circumstantial evidence and sentenced to be hanged, the Supreme Court also affirmed the conviction, refusing to consider an assignment of error that the judgment was not supported by the evidence, where there was some substantial evidence of guilt. (Moore v. U.S. 150 U.S. 57, 61-63.)

7. We cannot escape the conclusion that the record of trial in this case discloses substantial evidence, which supports the findings of guilty. The reviewing authority and his staff judge advocate are authorized by law to weigh the evidence, which we may not do. The staff judge advocate re-

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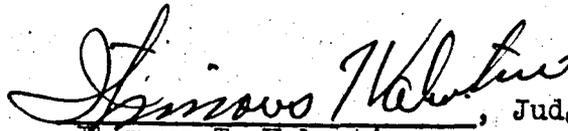
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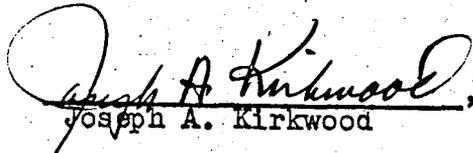
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commended approval of, and the reviewing authority has approved the sentence.

8. The court was legally constituted. The record discloses no errors or irregularities which prejudice any substantial right of the accused. The punishment is authorized for the offense of which the accused was found guilty. It must therefore be held, and we hold, that the record of trial is legally sufficient to support the sentence.

Grenville Beardsley, Judge Advocate
Grenville Beardsley

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

Joseph A. Kirkwood, Judge Advocate
Joseph A. Kirkwood

CM CBI 109 (Wright, James M.) 1st Ina.
J.A.G.B.O., USAF, CBI, APO 885, U. S. Army, 10 April 1944.

TO: Commanding General, S.O.S., USAF, CBI, APO 885, U. S. Army.

1. In the case of Sergeant James M. Wright, ASN 32691923, Company B, 858th Engineer Aviation 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 and concurred in. Under the provisions of A.W. 50 $\frac{1}{2}$, you have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this incorsement. To identify the order with the record of trial, it is requested that the file number appear in brackets at the end of the published order, as follows: (CM CBI 109).

3. The trial of this case leaves much to be desired. Many points which could have been covered by the Assistant Trial Judge Advocate were left untouched, whether because he could not prove certain facts or for other reasons, is unclear.

However, attached to the record of trial as an exhibit to the report of the investigation of the charges by the officer designated for that purpose pursuant to the 70th Article of War, is a written confession, which is signed and sworn to by the accused. In this sworn confession, the accused stated under oath that he understood the purpose of the investigation, and that his rights had been fully explained to him by the investigating officer. In this statement he completely acknowledged his guilt. In reaching my conclusion as to the legal sufficiency of this record of trial, I have of course given no consideration whatever to such sworn confession. Reference is now made to it solely for the purpose of suggesting that the confession could well have been used by the Assistant Trial Judge Advocate and, after laying the proper groundwork, introduced this confession in evidence. Then there would have been no question whatever as to the sufficiency of the evidence. It may be of course, that for some reason, undisclosed by the record and the papers in the case, introducing this document was not indicated. In any event, although the case is a close one, I am convinced of the sufficiency of the evidence and concur in ~~the excellent~~ opinion of the Board of Review.



H. J. SELMAN,
Colonel, J.A.G.B.O.,
Assistant Judge Advocate General.

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WITH THE
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A.P.O. 885,
11 April 1944.

Board of Review
CM CBI # 110. .

UNITED STATES

vs.

Technician 5th Grade Ben (NMI)
Smith, 35577593, Company "B"
849th Engineer Aviation
Battalion.

SERVICES OF SUPPLY
USAF in CBI

Tried by G.C.M., convened at
Ledo, Assam, India, 11 Feb-
ruary 1944. Reduction to
grade of a private, dis-
honorably discharge the ser-
vice, total forfeiture and
confinement at hard labor
for 3 (three) years.

HOLDING of the BOARD OF REVIEW

BEARDSLEY, VALENTINE and KIRKWOOD, Judge Advocates

1. The record of trial in the case of the above named soldier has been examined by the Board of Review and the Board of Review submits this, its holding, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office for China, Burma and India.

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War:

Specification: In that T/5th Grade Ben (NMI) Smith, Company "B", 849th Engineer Aviation Battalion, did, at Ledo, Assam, India, on or about 5 December 1943, wilfully, feloniously, and unlawfully kill Private Willie J. Johnson, 38314309, Company "B", 849th Engineer Aviation Battalion, by shooting him in the body and the head with a rifle.

Accused pleaded not guilty to and was found guilty of, the specification and the charge. He was sentenced to be reduced to the grade of private, to dishonorable discharge, total forfeiture of all pay and allowances due or to become due and to be confined at hard labor for 3 years. The reviewing authority approved the sentence and designated the U.S. Disciplinary Barracks nearest the port of debarkation in the United States as the place of confinement. The stockade, Staging Area, Base Section #1, North Malir, Karachi, India, was designated as the place of temporary confinement. Pursuant to Article of War 50½, the order directing the execution of the sen-

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tence was withheld and the record of trial was forwarded to The Judge Advocate General's Branch Office for China, Burma and India.

3. The evidence for the prosecution may be summarized as follows: On the morning of 5 December 1943, at about 8 o'clock, accused (R. 7) and a number of officers and enlisted men of the 849th Engineer Aviation Battalion were preparing to establish battalion headquarters and set up tents for the officers and men of the battalion at a point just above the 62nd marker on the Ledo Road. On the previous night, caterpillar tractors had plowed up traces or ledges in the side of a steep hill in preparation for the establishment of rows of tents. The three upper tiers were for the tents of the enlisted men and the lower tier was for company headquarters, the orderly room, and the medical tent (R. 6). To go from the lower to the upper ledge it was necessary to go up a 45 percent grade. A "cat" or bull-dozer could go up this grade without difficulty, but a truck could not (R. 6). Accused had taken his bed and equipment up to the end of the ledge next to where the trail begins. Willie J. Johnson was on the same ledge with accused but about 15 or 20 feet from him, making ready to put up his tent. Lt. Stemas and Sgt. John A. Scruggs were about 15 feet from where accused and Willie J. Johnson were (R. 10); The tent space laid off by the deceased overlapped that of accused and over this question an argument followed (R. 7). Opening the argument, accused said that he was not going to move his tent "for any son-of-a-bitch, or words to that effect." (R. 7-8). Willie J. Johnson answered that he was going to move it for him. Lt. Stemas and Sgt. Scruggs were at that time trying to figure out some way to pitch the tents without overlappage or other trouble. During the argument, Willie J. Johnson started walking toward accused. The rifle which had been issued to accused and upon which he had put his name, was either upon or beside his bed. Willie J. Johnson started toward accused from a distance of about 15 feet (R. 8-9). Johnson had in his hand at the time a knife with a blade about 5 or 6 inches long, used by him in cutting the ropes of his tent (R. 9). As Johnson approached accused, accused picked up his rifle and made "what looked like a butt stroke" (R. 8-21) and told Johnson not to come any closer (R. 10-24). When Johnson reached a point about 9 feet from accused he (accused) stood up, brought his rifle down and fired two shots at deceased (R. 8). Lt. Stemas heard but did not see the first shot. He saw the second shot fired at Johnson who was at that time in a falling position (R. 8). Neither accused nor Willie J. Johnson had actually put up his tent (R. 8). Accused said about the time of the shooting that he had shot Willie J. Johnson and that he meant to kill him; that he would kill any other "son-of-a-bitch who would come

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after him with a knife" (R.9,18). After Johnson was shot and fell, his knife was within 4 or 5 inches of his right hand (R. 14). After the fatal shots were fired, Lt. Stemas pulled out his pistol and demanded that accused give him the rifle. Accused refused to do so, saying that he would not give it up until Lt. Jenkins, his company commander, came (R. 10, 18).

Captain Zola P. Alpert, Medical Corps, battalion surgeon, 849th Engineer Aviation Battalion, was immediately called and ran up the hill to where Willie Johnson lay dead, and made an examination of the body (R.8). He had heard the shots fired but was some distance from where the homicide occurred. Upon examination of the body by Captain Alpert, two bullet wounds were found, one entering the left chest and the other the left temporal region with the point of the exit of the latter above the right ear. The examination further disclosed that Willie J. Johnson was dead (R. 14). In the opinion of Captain Alpert, the death of Willie J. Johnson was caused by the bullet wound in his head. Accused was standing near the body of deceased when Captain Alpert made his examination (R. 14).

Captain Paul Klingensmith, 20th General Hospital, as receiving officer at the hospital, examined the body identified as Willie J. Johnson and found two wounds apparently produced by two missiles, one of which entered the left of the anterior midline near the second rib, and was about $\frac{1}{2}$ centimeter in size, passed through the body and out through the posterior chest wall to the right of the mid-line, making a wound approximately 2 centimeters in size (R. 15, 16). The other wound, $\frac{1}{2}$ centimeter in size, entered behind and above the left ear and went out on the right side, making a wound at the point of exit approximately 6 centimeters in size. In the opinion of Captain Klingensmith, the death of Willie J. Johnson was produced by the gun shot wounds in the head and chest, either one of which could have been fatal (R. 16). There were no powder burns on the clothing or skin of deceased. (R. 16).

There were available paths or ways by which accused could have retreated from the scene of the argument, if he had elected to do so, without going past Willie J. Johnson (R. 12). The rifle with which accused shot Johnson was loaded prior to the shooting (R. 11). Johnson was taller but not as broad as accused (R. 12). During the argument over the tent space, Johnson threatened to throw accused over the hill.

Sgt. John A. Scruggs, Company "B", 849th Engineer Aviation Battalion, heard the argument between Johnson and

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accused and saw accused grab his rifle and hold it as if to make a butt stroke. A second later the shots were fired (R. 18). Sgt. Scruggs observed that accused could have retreated if he had desired to over the edge of the ledge, through the woods or down the path or out the way used by natives going to and from the camp site "there was plenty of ways to escape" (R. 19). Sgt. Scruggs heard accused say to Johnson, "Don't come any closer" (R. 24). The two shots were fired in quick succession. (R. 20). Sgt. Scruggs himself had staked off the space for Johnson's tent. There was confusion over the tent space. He observed the first shot fired by accused at Johnson, and put it this way: "The first shot was fired as if he was going to make a short jab from the hip" (R. 21). Sgt. Scruggs noticed that Johnson was about 9 feet from accused when he fell and that his head was about 3 feet from accused after the shooting. Johnson fell on his back toward accused (R. 38). Sgt. Scruggs said that both the accused and Johnson were about the same size.

Technician 5th Grade Robert White, Company "B", 849th Engineer Aviation Battalion (R. 23) was present when the fatal shots were fired. He heard the argument over the tent space but paid no attention to it. Among other things, he heard Johnson say: "If you keep on, somebody is going to hell", to which accused answered, "don't you go first". Corporal White saw Johnson when he started toward accused with his knife and heard accused give the warning: "Don't come any further" (R. 24). Johnson did not heed but kept coming. As Johnson got within about 8 feet of accused, Corporal White noticed that accused was standing with a rifle in his hand and saw him fire the shots at Johnson. Corporal White heard accused say immediately after the shooting that he meant to kill him and "that he would kill any other son-of-a-bitch who would draw a knife" (R. 24). Corporal White noticed that Johnson was walking rather fast as he approached accused (R. 25).

4. Accused did not testify, nor was any reference made to his right to do so after the prosecution rested its case. However, defense offered the testimony of several witnesses, among whom was Sgt. John D. Corbin, Company "B", 849th Engineer Aviation Battalion, who testified that "we was up to a place fixing a space for our tent". Johnson's tent was interfering with the space of accused. Johnson said he would not move his tent but insisted that "I am going to put my tent here". Accused then said, "No, you'll have to wait. We saved this space when we come up. There is just enough space for our tent". Johnson said that he was going to put his tent there anyway. The argument continued and Johnson said to accused: "Look out, or you will be going over that hill"; to which accused answered: "Then let it be you first". Sgt. Corbin then heard accused say: "Don't come further with

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the knife" (R. 26). Then two shots were fired by accused at Johnson. Corbin observed that there was a ravine in back of where accused was standing; there were cots and other things belonging to soldiers lying around, but witness could not say whether accused had any way of escape (R.26). In answer to a question as to whether accused could have retreated witness answered, "Maybe he could have gone out the left side". When the first shot was fired Sgt. Corbin looked up and saw Johnson falling forward (R. 29). Sgt. Corbin did not see accused make any effort to get away from Johnson (R. 30). Sgt. Corbin and accused had lived in the same tent together (R. 30).

Private Van Darling, Company "B", 849th Engineer Aviation Battalion, was on duty at approximately 8:45, 6 December 1943. He saw accused when he "went up and claimed off a tent space for a group of boys and myself" (R. 33). He heard accused speak to Johnson about putting up another tent which would overlap the tent space claimed by him. An argument followed, during which Johnson started toward accused with a knife. Accused said three or four things and when Johnson got within 2 or 3 or 4 feet of him, accused shot Johnson (R. 33). When Johnson was advancing on accused, Van Darling noticed that accused's rifle was lying on his bed behind him. He saw accused rise up with the rifle as if to make a butt stroke, then raise the rifle and fire it. This witness observed bags and tents and other things which the boys had brought up lying all around accused. He also observed that the cliff was behind accused and a bed was beside him (R. 34). This witness could not see any way through which accused could escape, except by where Johnson was standing (R. 33).

Technician 5th Grade James L. Wolfe, Company "B", 849th Engineer Aviation Battalion, was on duty at approximately 8:45, on 6 December 1943, and about the time they were setting up the tents it was discovered that there was some conflict between the claim of the tent site of Johnson and accused. An argument followed, but "most of the soldiers thought it was just a G.I. argument" (R. 37). Witness looked around and saw Johnson going toward accused. Accused picked up his rifle as though he were going to hit Johnson with the butt (R. 37). Then accused shot Johnson who was coming toward him with a knife (R. 37). During the argument there was a space of about 15 feet between Johnson and accused (R. 37). Wolfe heard accused say right after he had shot Johnson that he would kill any other man who came on him with a knife. (R. 38). Wolfe said of accused's chances of retreat: "could not have turned around. He would have to make a high jump and go over all the stuff and tents" (R. 39).

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5. Accused was tried upon a specification under the 93rd Article of War charging him with voluntary manslaughter. MCM, 1928, App. 4, p. 249.

MCM, 1928, par. 149a, p. 165 says:

"Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation. * * * The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide.

In voluntary manslaughter, the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm."

Clark & Marshall Crimes, 4th Edition, par. 253, defines voluntary manslaughter as follows:

"Voluntary manslaughter is an intentional homicide in sudden passion or heat of blood caused by a reasonable provocation and not with malice aforethought. The following principles apply to this grade of felonious homicide:

1. The killing is intentional.
2. It must be without malice.
3. The provocation must be so great as reasonably to excite passion in an ordinary man and cause him to act rashly and without reflection * * *."

30 Corpus Juris, p. 68, par. 238 states:

257952 "The fact that accused is a soldier, in uniform, and that he has been taught by the military authorities that an American soldier should never retreat, call for no distinction or discrimination in the application of the established rule of law in the civil courts".

The evidence of the prosecution, as well as that of the defendant, conclusively sustain the proposition that accused intentionally killed deceased by firing two lethal shots into his body from an army rifle, which is, of course, a deadly weapon. The statement attributed by all the witnesses to accused "that he intended to kill him (deceased) and that he would kill any other person who came on him with a knife" together with all the facts and circumstances disclosed by

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the testimony, makes the accused guilty of at least voluntary manslaughter, unless his conduct can be justified and the killing excused on the grounds of proper self-defense. MCM, 1928, par. 148a, p. 163 lays down the rule for a proper application of the plea and proof of self defense, where it is said:

"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. * *."

In 30 Corpus Juris, par. 239, the rule is thus stated:

"An ancient common-law rule, frequently spoken of as the doctrine of 'retreat to the wall' is that a person is not justified or excused in killing one who attacks him, unless he first retreats so far as he can do so without increasing his real or apparent peril." U.S. vs King, 34, Fed. 302; U.S. vs. Herbert, 26 F, Cas. No. 15, 345a, 2 Hays. & H. 210.

U.S. vs Herbert (Crim. Ct. Dist. Col. 1856) Fed. Cas. No. 15, 354a states:

"A man is bound to retreat from the moment danger becomes apparent, unless, from the fierceness of the attack, he is prevented from doing so."

Whether under the evidence in this case accused was brought within the rule of self-defense as defined and applied was a question directed to the General Court-Martial before which the accused was tried. The court and not the Board of Review are the weigh-masters of the evidence. In the recent case of CM CBI 109 (Wright), this question was passed on by this Board. The Board then held:

"In passing upon the sufficiency of the evidence in a case in which the President is neither the reviewing nor the confirming authority, it is not the province of a Board of Review or the Judge Advocate General, and neither has the right, to weigh the evidence. The rule applicable in such a case has been stated as follows:

'In passing upon the sufficiency of the evidence in such cases, it is their province merely to determine whether or not there is in the record any substantial

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evidence which, if uncontradicted, would be sufficient to warrant the findings of guilty. It is exclusively the province of the court-martial, including the reviewing, and if there be one, the confirming, authority to weigh evidence, judge of its credibility, and determine controverted questions of fact. C.M. 145791 (1921). Par. 408(2), Dig. Ops. J.A.G. 1912-40, p. 259.'

"It has also been held:

'In the exercise of its judicial power of appellate review, the Board of Review treats the findings below as presumptively correct, and examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review, and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustrative of justice. C.M. 192609 (par. 408(2), Dig. Ops. J.A.G. 1912-40, p. 259).'"

The same opinion quotes at length from *Crumpton v. U.S.*, 138 U.S. 361 where the same principles are applied and approved.

There is abundant evidence in this record to sustain the conclusion that accused killed Willie J. Johnson by firing shots into his body from an American Army rifle in such a way as to produce instant death. There were many ways by which accused could have retreated and prevented the homicide. All of the evidence tended to show that both bullets entered the left side and passed through and out the right side of Johnson, and at least one witness testified that Johnson fell on his back. From this evidence, an inference could be logically drawn that Johnson, even if he intended to inflict death or serious bodily harm upon accused when he started the advance, changed his mind when he saw the death dealing instrument, with which the accused was then equipped, pointed directly toward him and himself sought to abandon the affray and retreat, but was prevented from doing so by the well aimed and deadly shots of accused.

257933 Three witnesses stated that the homicide occurred on the 6th of December 1943, instead of the 5th as alleged in the specification and stated by the majority of witnesses (R. 15, 32, 37). The testimony of these three witnesses clearly shows that they were talking about the same homicide as that referred to in the specification, therefore this slight discrepancy in the testimony is of no importance.

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When the prosecution rested its case, accused was not given the usual warning with reference to his right to take the stand as a witness or to make a sworn or unsworn statement. It was, however, disclosed at the close of the argument that accused had been warned by Defense Counsel as to his rights as a witness. Therefore, no substantial rights of accused were affected.

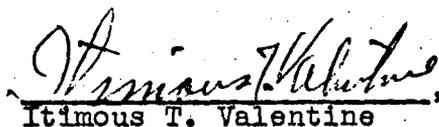
MCM, 1928, par. 20d, p. 125 states:

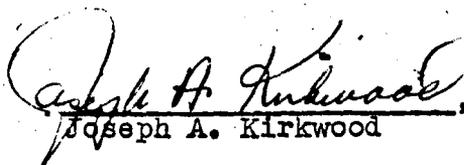
"Accused is, at his own request, but not otherwise, a competent witness. His failure to make such request shall not create any presumption against him."

6. Upon all the evidence in this record, we cannot escape the conclusion that the record of trial discloses substantial evidence upon which the court was justified in basing its findings and sentence.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The punishment is authorized. MCM, 1928, par. 104c, p. 96. The Board of Review is of the opinion that there was sufficient evidence to sustain the findings and support the sentence of the court, and it therefore holds the record to be legally sufficient to support the sentence.


Grenville Beardsley, Judge Advocate


Itimous T. Valentine, Judge Advocate


Joseph A. Kirkwood, Judge Advocate

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harm, commit an assault upon Munaswamy, an Indian, by shooting him in the arm.

Accused pleaded not guilty to Specification 1 of the Charge and to the Charge. No plea was entered as to Specifications 2 and 3 of the Charge. He was found guilty of Specifications 1, 2 and 3 of the Charge and of the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 7 years. The reviewing authority approved the sentence, designating the Federal Reformatory or Correctional Institution nearest the port of debarkation as the place of confinement. Pursuant to A.W. 50½ the record of trial was forwarded to the Branch Office of The Judge Advocate General, China, Burma, India, the order directing the execution of the sentence being withheld.

3. The testimony for the prosecution disclosed that Pvt. Alvin G. Nichols and accused on January 26, 1944, started drinking at about 10.30 hours, and, during the course of the day, consumed about 3 quarts of Indian liquor (R.4,5). Accused smoked 3 marijuana cigarettes, one of them being smoked after supper (R.7,10). Nichols, in referring to accused, testified: "He didn't appear to be drunk. He had a reaction. He sometimes appeared to be ready to fall down. I don't think he was drunk." (R.7)

During the evening accused asked Nichols to go with him to get some liquor. The two men proceeded to the dhobi walla tent, accused taking his rifle with him (R.8). Nichols went into the tent and accused went around to the rear (R.4). Nichols heard someone who sounded like accused, ask for liquor and then he heard shots (R.5). Nichols testified that the shots were fired from the position where accused was standing and that the shots entered the tent from the same direction. After the first three shots, Nichols crawled out of the tent and warned accused that he would likely as not kill somebody if he shot into the tent. Accused asked Nichols to go back to see if they had any liquor. Nichols complied (R.8). Three or four more shots were fired after Nichols advised accused that there was not any liquor. Accused told Nichols to get out, "he was going to tear it down". Nichols testified that the shots were coming from the direction where accused was standing, but he could not say that accused fired them (R.9). When the last shot was fired there was a groan. Accused left. Nichols heard him moving through the brush and followed him. He caught up with accused about 150 to 200 yards away. Accused had his rifle with him. Nichols told accused he had hit somebody, to which accused replied that he didn't care. At this time accused was acting as if he was drunk (R.9).

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The Investigating Officer, 1st Lt. Robert H. Zoesch, testified that he interviewed accused, advised him of his rights,

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read a statement made by him, and asked him if that was his statement. Accused looked at the statement and said, "Yes, alright". Among other things included in this statement read to accused, was the following:

"I remember starting off and going down the road. I also remember turning down the path which leads to the tent, but I don't remember getting to the tent. I remember firing the gun several times. I watched the flashes leave the barrel, but I don't remember where I was." (R.11)

Sgt. G.W. Mansfield testified that he was night ward master at the 80th British General Hospital, stationed at Deoghar, and on 26 January 1944, at about 21,30 hours, dhobi Cataya was brought in to the hospital bleeding from a head wound, and dhobi Munaswamy with a bullet wound in the right arm. Sgt. Mansfield went to the dhobi ghat and in the tent found Viraswamy wounded in the back. He observed four bullet holes in the wall of the tent, blood on the floor and two bullet holes in one of the blankets (R.13,14,15). Sgt. Mansfield identified "Prosecution Exhibits A. & B." as pictures of the tent where he found the wounded Viraswamy (R.14). There are the same pictures that Nichols identified as pictures of the tent visited by himself and accused (R.4).

Dhobi Mahadu testified that he was living in a tent near the hospital, near Deoghar, on the night of January 26, 1944, when an American sergeant came to his tent; that there was some firing; that Munaswamy was hurt on the arm, Viraswamy on the leg and Cataya on the head (R.15,16).

Dhobi Munaswamy testified that he was in the tent that night when an American came to the tent, that shots entered the tent and that he, Munaswamy, was wounded in the arm and that Cataya was hurt (R.18,19).

It was stipulated by and between the prosecution and defense that if Lt. Col. Charles N. Hunter were present, he would testify as stated in the deposition marked "Prosecution Exhibit D" (R.19). In this deposition, Colonel Hunter stated that on the night of January 26, 1944, together with Major Hancock, he visited the dhobi tent where the shooting took place; that in the path of a small bluff to the rear of the tent they found a live round of caliber .30 ammunition, and in the wash erosion of the bluff, six empty cartridge cases, and to the west of the path they found an empty M-1 cartridge clip.

4. Accused did not testify (R.29). Several witnesses testified for defense. Private Ring testified that there was an order to carry rifles when off duty, that live ammunition had been issued, that there was no recreation for the men except hunting, that the men would blow off steam by "popping off ammunition" all around the camp area and in the camp area;

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that he had seen bullets go through one of the tents one night (R.25,26).

5. Evidence tending to establish the fact that it was accused who fired the rifle that injured Cataya, Munaswamy and Viraswamy, is largely circumstantial. However, it would appear from the record that accused had a rifle when he went to the dhobi tent with Nichols to obtain liquor. It further appears that accused went behind the tent; that someone sounding like accused asked Nichols if the dhobi wallas had liquor. Then "bullets began to fly", coming down at an angle through the rear of the tent and hitting the front end of the tent. Accused called to Nichols telling him to get out of the tent. The shots were fired from the position where accused was standing, and the bullets entered the tent from the same direction. Nichols called to accused that he was likely to kill someone, and accused replied by asking Nichols to go back into the tent to see if there was liquor. Nichols did this, then advised accused that there was no liquor, whereupon accused called to him to get out as he was going to tear the place down. Nichols left the tent, after which there were three or four more shots from the direction where accused was standing. Nichols stated that he heard one groan. He was about 30 feet from the tent when the last shot was fired. Accused was about 25 to 40 yards away, although it was dark and Nichols could not see accused. After the last shot, Nichols heard accused going through the brush and followed him. Accused had his rifle with him. Nichols told accused that he had hit somebody, to which accused replied that he didn't care. There is evidence that accused made a statement to the Investigating Officer, after being properly warned. In his statement accused said that he remembered starting for the dhobi tent, remembered firing the gun several times and watching the flashes leave the barrel, but could not remember where he was. Pictures ("Prosecution Exhibits A. & B.") of the dhobi wallas' tent, which were introduced into evidence, were identified by Nichols as pictures of the tent to which he and accused went to buy liquor. Sgt. Mansfield identified "Prosecution Exhibits A. & B." as pictures of the tent, where he later found Viraswamy wounded in the back. Dhobi Mahadu testified that on the night of 26 January 1944, when an American sergeant came and asked for whisky, that he heard three shots fired and that Munaswamy was hurt on the arm, Cataya on the head and Viraswamy on the leg. Dhobi Munaswamy testified that on the night of 26 January 1944, he was in the tent near the river, close to 80th British General Hospital, when an American came and asked for whisky. Pandu Rang testified that he was in the tent on the night when he heard five shots and Cataya, Munaswamy and Viraswamy were injured. Sgt. Mansfield testified that dhobi Cataya and dhobi Munaswamy were brought into the 80th British Hospital on the night of 26 January 1944, both men being wounded. Sgt. Mansfield took stretchers and a lorry and proceeded to the dhobi ghat. In the tent he

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found Viraswamy wounded in the back. He observed four bullet holes in the wall of the tent, blood on the floor and two bullet holes in one of the blankets. The evidence of Lt. Col. Hunter was to the effect that on the night of 26 January 1944, he visited the dhobi tent where the shooting took place, found a live round of caliber .30 ammunition, 6 empty cartridge cases and an empty M-1 cartridge clip.

There was sufficient evidence upon which the Court might base an inference that it was the accused who had fired the shots which wounded the three dhobi wallas.

Accused could not see his victims; consequently the question arises as to whether or not the assault was specifically directed against each of the three dhobies. From the record it would appear that accused knew there were individuals in the tent, and directing the fire of the gun into the tent was such "reckless doing of an act likely to result in * * * injury" (par. 149 1, p. 178, MCM 1928) that the offense was complete.

"An indiscriminate assault on several persons is an assault on each and all of them." (State v. Merritt, 61 N.C.134)

There is a question concerning the capacity of accused to entertain the requisite specific intent due to the considerable evidence concerning the use of intoxicating liquor and marijuana. It is a recognized principle of law that while voluntary intoxication does not justify an assault, where a specific criminal intent is an essential element of the offense charged, the defendant may be permitted to show that at the time the crime was committed, he was intoxicated, to such an extent as to render him incapable of forming such intent (5 C.J. 787). In the present instance, however, there was testimony of Nichols that he did not think accused was drunk around supper time, or when going down to the dhobi tent. There is testimony that accused carried his rifle in accordance with orders; that he walked to the dhobi tent after asking Nichols to go with him; that accused went around to the back of the tent; that someone sounding like accused asked for liquor; that accused called to Nichols telling him to get out of the tent. Later, accused asked Nichols to go back into the tent to see if there was any liquor, and when accused was advised that there was no liquor, he called to Nichols to get out of the tent as he was going to tear the place down. After the last shot had been fired, accused went "straight back through the brush". Nichols caught up with accused, about 150 to 200 yards away from the dhobi tent. Accused was "just walking along" when Nichols caught up with him. Nichols advised accused that he, the accused, had hit somebody, to which accused replied that he didn't care. Accused had his rifle with him at the time. From all this evidence it was proper for the Court to infer that accused had such use of his faculties as to know what he was doing, and that he was not so intoxicated as to be incapable of entertaining the requisite

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specific intent. The determination of this question was one of fact, and there is substantial evidence in the record to support the Court's conclusion.

In addition to the question of intoxication as the result of the use of liquor, there is the additional factor injected into this case by evidence concerning the voluntary use of drugs by accused. However, it has been held that if a person becomes temporarily insane through the voluntary immoderate use of morphine, cocaine or other drugs not taken as a medicine, his responsibility would be the same as that of a person drunk from the voluntary use of intoxicating liquor. Among the decisions in accordance with this view are: Strickland v. State, 137 Ga. 115, 72 S.E. 922; Com. v. Detweiler, 229 Pa. 304, 78 A.271; Wilcox v. State, 94 Tenn. 106, 122, 28 S.W. 312, and Sharpe v. State, 164 Indiana 288, 68 N.E. 286.

The record of the trial recites that three-fourths of the members present at the time the vote was taken concurred in each finding of guilty and it likewise appears that three-fourths of the members present at the time the vote was taken concurred in the sentence. This Board has previously held in U.S. v. Joseph A. Dunn, CM. CBI. 71:

"Except as to convictions of offenses for which the death penalty is made mandatory by law * * * of the record should show only the concurrence of two-thirds of all the members present at the time the vote is taken (AW.43). This irregularity does not disclose the vote of any member and could not have prejudiced the accused in any substantial right. Even if the record improperly recited that all the members concurred in the findings, such a recital being improper as disclosing how each member of the court voted and thus violative of AW.19, nevertheless the validity of the proceedings and of the sentence would not thereby be affected (AW. LXXXIV C.2, Dig. Ops. J.A.G. 1912). The irregularity may be disregarded."

In like manner the irregularity in disclosing that three-fourths of the members present at the time the vote was taken concurring in the sentence may be disregarded, since the validity of the proceedings and of the sentence has not been affected.

6. Accused pleaded not guilty to Specification 1 of the Charge and to the Charge. To Specifications 2 and 3 of the Charge, the defense entered "No plea". The Court did not enter for the accused a plea of "Not guilty" to Specifications 2 and 3, consequently the question is presented whether or not an issue was before the Court insofar as these two specifications are concerned.

In view of the language of AW.21, the proceedings were proper. AW.21 provides that when an accused "fails or refuses to

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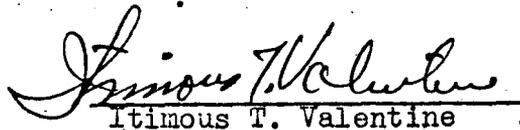
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plead, or answers foreign to the purpose * * * * the Court shall proceed to trial and judgment as if he had pleaded Not Guilty." (underlining supplied)

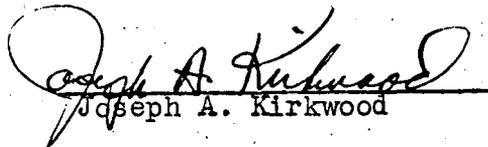
7. The Court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review therefore holds the record of trial to be legally sufficient to support the findings of guilty and the sentence.


Grenville Beardsley

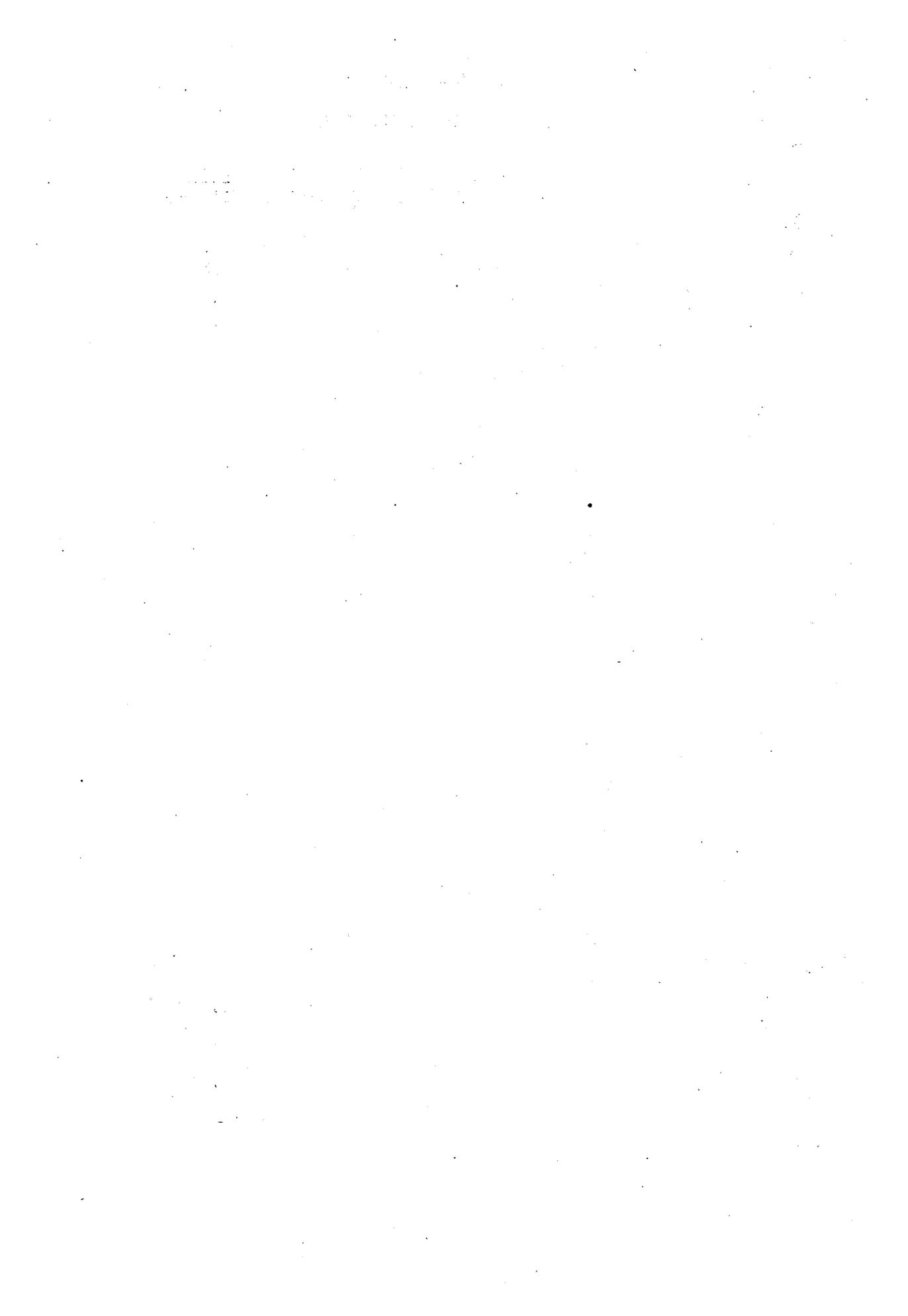
Judge Advocate.


Itimous T. Valentine

Judge Advocate.


Joseph A. Kirkwood

Judge Advocate.



APO 885,
1 May 1944.

Board of Review
CM CBI 114

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

SERVICES OF SUPPLY, USAF, CBI.

v.)

) Tried before G.C.M., convened
) at India, 6 January
) 1944.

Joseph C. Ranzinger (O-246206))
Capt., Inf., Headquarters,)
Gen. Depot No. 2)
and)

) Captain Joseph C. Ranzinger
) (O-246206) to be dismissed the
) service.

John H. Jones (12003093), Staff)
Sergeant, Company "A", 835th)
Signal Service Battalion.)

HOLDING of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and KIRKWOOD, Judge Advocates

1. The record of trial in the case of Captain Joseph C. Ranzinger, General Depot No.2, who is hereinafter referred to as "accused", has been examined by the Board of Review and the Board of Review submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office in China, Burma and India.

2. The accused was tried jointly with Staff Sergeant John H. Jones upon the following joint charges and specifications:-

Charge: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty)

Specification 2: In that Captain Joseph C. Ranzinger, Inf., General Depot No.2, and S/Sgt. John H. Jones, 835th Signal Service Battalion, Detachment, Company "A", acting jointly and pursuant to a common intent, did, at India, during the period from on or about 1 June 1943 to on or about 6 October 1943 wrongfully divert from their intended use and purpose, and sell or resell to civilians and British Military personnel, persons not authorized in their own right to procure said articles a large amount of Post Exchange supplies and merchandise; to wit, beer, cigarettes, Polaroid sun-glasses, lipsticks, candy and other articles of a value of more than \$50.00.

Specification 3: In that Captain Joseph C. Ranzinger, Inf., General Depot No.2, and S/Sgt. John H. Jones, 835th Signal Service Battalion, Detachment, Company "A", acting jointly and pursuant to a common intent, did, at

India, during the period from on or about 1 June 1943 to on or about 6 October 1943 wrongfully fail to post at any place in said Exchange price list of articles stocked for sale.

Specification 4: In that Captain Joseph C. Ranzinger, Inf., General Depot No.2, and S/Sgt. John H. Jones, 835th Signal Service Battalion, Detachment, Company "A", acting jointly and pursuant to a common intent, did, at India, during the period from on or about 1 June 1943 to on or about 6 October 1943 wrongfully charge a price for articles stocked for sale in excess of the authorized price.

The case as it relates to Staff Sergeant John H. Jones has been disposed of, leaving Captain Joseph C. Ranzinger as the only accused whose case is now being passed on by the Board of Review.

Accused pleaded not guilty to all the specifications of the charge and to the charge. He was found not guilty of specification 1; guilty of specification 2, except the words "and British Military personnel" and "Polaroid sun-glasses, lipsticks, candy and other articles", and of the excepted words not guilty; and guilty of specifications 3 and 4 and of the charge. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 5 years at such place as the reviewing authority may direct. The reviewing authority approved the findings as to accused with the exception of the words of specification 2: "or resell"; and with the exception of the words and figures of specification 3: "and S/Sgt. John H. Jones, 835th Signal Service Battalion, Detachment, Company "A", acting jointly and pursuant to a common intent". The reviewing authority approved only so much of the sentence as provides for the dismissal of accused. The record of trial was forwarded for action under AW. 48. The Commanding General, USAF, CBI, confirmed the sentence and withheld his order directing execution of the sentence pending action under AW 50½.

TESTIMONY ON BEHALF OF THE PROSECUTION.

3. The accused was appointed Post Exchange Officer of Post Exchange 886-18India, on 13 May 1943, and remained in that capacity until 26 October 1943. Sgt. Jones worked in the Exchange from 17 April 1943 to 28 September 1943 as selling clerk (R. 6). The authorized selling price from 1 June 1943 to 6 October 1943 of some of the items handled by the Exchange was as follows:-

Tootsie Rools.....	2 annas
Planters Peanuts	7 annas
Beer, per can	5 annas
Barbasol Shaving Cream	4 annas
Ipana Tooth Paste	9 annas
Granger Rough Cut Tobacco	3 annas
Sparkplug Chewing Tobacco.....	3 annas
Pal Razor Blades, small size ...	3 annas

(R.7)

It is a violation of Circular 62, Headquarters, Rear Echelon, 9 September 1943 to resell any article secured through Army Exchange service to persons not authorized to procure such in their own right. (R.8, Exhibit 1).

Accused believed that there was a shortage in the Exchange accounts of Rs. 2,200/- in June and approximately Rs. 200/- in each of July, August and September 1943. (Exh. 3, p.2). Accused and Sgt. Jones discussed the method by which shortage could be made up by a raise in Exchange prices and the sale of beer to outside sources. (Exh. 3, p.3) According to the audit and the testimony of the auditor, there was no shortage in the Exchange accounts in excess of the allowable percentage during these months. (R.42, 43). Accused, on a number of occasions, told Sgt. Jones that his accountability must be correct. Accused discussed with Mr. Frank Rice, a civilian employed in the Army Exchange warehouse, and Sgt. Jones, the matter of the Exchange shortage and that this shortage could be made up by the sale of beer to outside persons and at a greater price than that authorized. Accused stated in that conversation that he was principally interested in the accountability but due to his position he could not approve such a course. There was also talk between Sgt. Jones and accused of the sale of cigarettes to outside persons to raise funds to help relieve the deficit. (Exh. 3, p.3). Sgt. Jones sold cigarettes through Joseph Joseph, a civilian restaurant manager in , who is not in any way connected with the military service, to Althea Deefolts and to one Elias, also civilians, and to Captain Snell, a C.N.A.C. officer (R.12,13). Accused knew that Sgt. Jones was selling beer to outside sources. He had heard Sgt. Jones state on several occasions that he had made up some of the shortage in that manner. Sgt. Jones also told accused that he had made up an additional shortage by increasing Exchange prices. Accused also knew of at least one specific occasion on which Frank Rice sold a case of cigarettes obtained from the Exchange for about Rs. 500/-, which money he turned over to Sgt. Jones who, in turn, delivered it to accused as a part of the Exchange receipts. Accused admitted: "I also have every reason to believe that Sgt. Jones and Frank Rice have worked together on the sale of beer to outside sources on other occasions." (Exh.4,p.1) Accused first discovered a shortage in his Exchange accountability on 26 June 1943. The amount of this shortage was approximately Rs. 2,000/- (Exh. 4,p.2). Either at the time accused discovered a shortage or during the month of July 1943, accused was approached by Sgt. Jones and told of the shortage with the statement that he (Sgt. Jones) had a means of making up the Post Exchange shortage. Sgt. Jones suggested to accused that he could make up the deficit. Accused inquired how Sgt. Jones proposed to do it. Sgt. Jones stated that he had money and means of getting money, that beer and cigarettes could be sold at a profit. Accused said: "I told him that I could not approve of this but I wanted the shortage made up." Accused said that such a course would bring on an investigation which he did not want. Sgt. Jones wanted the chance to make up the shortage. At a later date Sgt. Jones told accused that he had made up some of the shortages. Accused expected Sgt. Jones to make up

the shortage "by having him produce the money." Accused told Sgt. Jones that he wanted the accountability straight and Jones said he would take care of it. Jones did not say how, but intimated that he would sell Post Exchange stuff as he had suggested. (Exh. 4, p.3). Upon discovering the fact that Sgt. Jones and Frank Rice had sold Post Exchange articles to unauthorized persons, accused did not take any action against them. He said: "I took no specific action and had uppermost in my mind the straightening out of the accountability records. I have personally made no profits from any of these transactions, nor have I made any profits from any other sources * * * ." When accused discussed with Major Jensen, Chief of Army Exchange Service and Colonel O'Dell, Commanding Officer, General Depot No.2, the matter of the reduction of accused's duties and responsibility, he did not discuss with either officer any irregularities of Sgt. Jones or Frank Rice. (Exh. 4, p.7) Accused had reason to suspect that Sgt. Jones was selling articles from Post Exchange at a price in excess of that established as a selling price. Sgt. Jones stated to accused at one time that he was making up the shortages. On the 26 September accused saw a handwritten receipt issued by Sgt. Jones for merchandise delivered at a price in excess of that authorized. (Exh. 6, p.3). The selling price of merchandise was not posted in the Branch of the Post Exchange at Accused had directed the placing of and on some occasions he personally had placed price tags on the shelves directly below some of the articles, instead of posting a price list. (Exh. 6, p.4). On 25 July 1943 Sgt. Jones asked Joseph if he could use some beer, and upon being told that he could, Sgt. Jones carried to Joseph a few cans of beer, but finally got in the hands of Joseph about 3 cases of beer to be put on cold storage. The amount of beer delivered to Joseph by Sgt. Jones during the first week after 25 July was 3 cases. The latter part of July Sgt. Jones asked Joseph if he could sell some beer for him. At that time Sgt. Jones stated that there was some shortage in the Post Exchange funds that accused was quite worried about this and that accused had some surplus stock which he wished to get cleared of in order to make good the deficit. Sgt. Jones stated to Joseph that he had accused's authority to sell the beer. As a result of these conversations, and within 10 days after 20 July, Sgt. Jones delivered about 14 or 15 cases of beer to Joseph. Of these cases of beer Joseph took one to Althea Deefolts, the civilian, and also delivered some to a Mr. Elias, who was not a member of the United States Army. (R.12). Some of the beer was also delivered by Joseph to Captain Snell, an officer in C.N.A.C. The beer was sold for about Rs. 120/- per case. Joseph delivered to Sgt. Jones the price of Rs. 120/- for the 14 or 15 cases of beer. When this money was delivered to Sgt. Jones he said that it was not enough to make up the deficit in the Post Exchange. In addition to the 14 or 15 cases of beer, Sgt. Jones carried 4 cases of beer to the home of Joseph at This beer was sold to Althea Deefolts at about the same price as the other and the money delivered to Sgt. Jones. For the services so rendered, Sgt. Jones paid Joseph about Rs. 100/- (R. 13). Sgt. Jones never mentioned Captain Ranzinger to Joseph after the sale of the beer had been completed. During the time the beer was being delivered and sold, Sgt. Jones

told Joseph that accused was in charge of the section and that he (Jones) could not do anything without permission or authority from accused. (R.14) Sgt. Jones, while the conversation was going on between him and Joseph concerning the sale of the beer, told Joseph that accused had approved the sale of the beer and cigarettes (R.14,16). Sgt. Jones also told Corporal Heitkamp that he was trying to make up the shortage in the Exchange by selling beer to outside sources (R.8) and Heitkamp helped Sgt. Jones deliver some of the beer. Sgt. Jones charged more than the authorized price for certain articles of merchandise in the Exchange (R.36). Prior to 28 September 1943 prices greater than those authorized were charged at the Post Exchange on numerous articles (R. 30,33,34,35,39,40, 41). Sgt. Jones told Corporal Gates about the time he (Gates) went to work in the Post Exchange on 29 September 1943 that he could make a killing if he could use his head (R.40). During the investigation accused said: "I guess the ghost is up", or something to that effect; "I never made any profit out of the Post Exchange transaction." (R.25). Immediately after being relieved from duty, accused stated: "Jones sold some beer and I knew about it, so I am relieved." Accused initialled Circular No. 62, Headquarters, Rear Echelon, when it was passed to him as a part of the "read file" prior to 25 September.

4. Accused did not make a statement, nor testify. Several witnesses were offered in his defence, among whom was Colonel Thomas G.M. Oliphant who testified that about the end of June accused came to him and requested that he be given 4 or 5 enlisted men to assist him with his work. This request was repeated in July and August. No help was available (R.47). Accused did not request a replacement for Sgt. Jones (R.48). Accused relieved Lt. C.W. Magner, A.G.D., about June 1 1943 (R.48). Sgt. Jones worked in the Post Exchange under Lt. Magner from 20 April until Lt. Magner was relieved by accused, during which time Lt. Magner had no information that Sgt. Jones was selling articles to persons other than those authorized to receive them, or that he was engaged in the practice of overcharging those who were entitled to make purchases from the Post Exchange. Captain L.P. Hines, Assistant Post Exchange Officer, could not recall having seen Circular No.62, Headquarters, Rear Echelon, dated 9 September 1943. It was not customary as a general rule for Post Exchanges to post price lists. Very few Post Exchanges do post such price lists (R. 50,51). A price list for Exchanges is prepared in (R.53).

5. Accused was duly appointed Exchange officer and as such had executive control of Exchange 886-18 and was responsible for the management and accounting, the performance of duty and discipline of the assistants and employees, and was the custodian of the property and funds of said Exchange. (Par. 18, AR. 210-65, March 19, 1943). Staff Sgt. John H. Jones was employed by accused as selling clerk in the Post Exchange 886-18 from the time accused was made Exchange officer up to the time he was relieved from such duties. Sgt. Jones and accused were under the impression that the accountability records of the Post Exchange showed a rather serious

deficit and that it was necessary that funds be raised with which to liquidate this deficit. Sgt. Jones discussed the matter with accused and said he could raise the money to cover the deficit by the sale of certain articles belonging to the Post Exchange if accused would give him authority to do so. Sgt. Jones proposed to sell beer and cigarettes and raise the prices on certain articles sold in the Exchange above the price authorized. Accused stated that he could not sanction such procedure but that he was expecting Sgt. Jones to raise the necessary funds with which to pay off the deficit. Sgt. Jones proceeded then to sell a number of cases of beer through a Mr. Joseph to persons not authorized to purchase from the Post Exchange at a price far in excess of that allowed by Post Exchange regulations. He also sold cigarettes and raised the prices on certain articles in the Post Exchange. The proceeds from all of which went into the hands of accused as Post Exchange officer and in the funds of the Post Exchange toward the liquidation of his deficit. While accused may not have given specific instructions and directions to Sgt. Jones with respect to these illegal and unauthorized sales, by implication he gave his approval to the plan and ratified the acts done by Sgt. Jones in connection with the sale of the beer and cigarettes and the raising of prices by accepting the revenues derived from that source.

Army regulations have the force of law and as such they are the law of the Army and those whom they may concern, and so far are binding and conclusive (Winthrope's Military Law & Precedents. P. 31-32).

The court was authorized to take judicial notice of Army regulations (par. 125, MCM 1928, p.135).

The pertinent parts of AR. 210-65, 19 March 1943, are as follows:

- "1. Applicability of regulations. - These regulations will govern the operation of all Exchanges established within the Army."
- "2. Definitions. - (a) An Army Exchange is a military organization established as a part of the Army which supplies merchandise and services to specified persons and organizations. *****"
- "3. Purposes. - Exchanges are established for the following purposes: (a) To Supply the persons to whom sales are authorized (par. 13) at the lowest possible prices with articles of necessity and convenience not supplied by the Government, except as provided in par. 10 b (5). * * *"
- "13. Sales. - (a) To whom made: Exchanges are authorized to sell to the following named persons and organizations only. Purchases by individuals will be limited as hereinafter set forth. (1) Personnel and organizations now or here-

after authorized by law and regulation to purchase subsistence stores or other quartermaster supplies as defined in par. 2 & 6, AR. 30-2290, may purchase at Exchanges. Dependent members of the families of persons so authorized may act as agents for such persons upon proper identification. (2) Civilians other than those above defined and who are regularly employed or serve at military posts, camps, stations or installations may purchase for their own consumption on the post upon proper identification, items of food, drink, tobacco products and no other merchandise of any kind. * * * "

- "18. Exchange Officer. - (a) The Exchange Officer is in executive control of the Exchange. He is responsible for its management and accounting, the performance of duty and discipline of assistants and employees, and is the custodian of the property and funds. * * * "
- "36. Posting of Selling Prices. - Price lists will be posted conspicuously in all activities of Exchanges, including those of concessionaires, and articles stocked for sale will be conspicuously priced. * * * "

Sales of merchandise from Post Exchanges to Joseph Joseph, Althea Deefolts or Captain Snell were unauthorized (AR. 20-3390).

In CM.CBI.109, this Board of Review held:

"In passing upon the sufficiency of evidence in the case of which the President is neither the reviewing nor the confirming authority, it is not the province of the Board of Review or The Judge Advocate General, and neither has the right to weigh the evidence."

It was further stated in that holding:

"In passing upon the sufficiency of the evidence in such case, it is their province merely to determine whether or not there is in the record any substantial evidence which, if uncontradicted, would be sufficient to warrant the findings of guilty. It is exclusively the province of the Court-Martial, including the reviewing and, if there be one, the confirming authority, to weigh evidence, to judge of its credibility and determine controverted questions of fact. CM. 145791 (1921) (Par. 408(2), Dig Ops. JAG. 1912-40, p. 259)."

There is substantial competent evidence in the record from which the court could, as it very properly did, find that accused wrongfully failed to post the required price lists of articles stocked for sale within the Post Exchange and that he wrongfully charged a price for articles stocked for sale in excess of the authorized price.

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Under specification 2 of the charge the court found the accused guilty of entering into a conspiracy with Sgt. Jones to sell to civilians, persons not authorized in their own right to procure articles from the Post Exchange, a large amount of Post Exchange supplies and merchandise consisting of beer and cigarettes of a value of more than \$50.00.

Par. 114 e, MCM 1928, p. 117, says of acts and statements of conspirators and accomplices:

"In cases where several persons join with a common design in committing an offense, all acts and statements of each made in furtherance of the common design are admissible against all of them. It is immaterial whether such acts or statements were done or made in the presence or hearing of the other parties. The acts and statements of a conspirator, however, done or made after the common design is accomplished or abandoned are not admissible against the others, except acts and statements in furtherance of an escape."

In 16 C.J., par. 99, it is said:

"A person is a party to an offense if he either actually commits the offense or does some act which forms a part thereof, or if he assists in the actual commission of the offense or any act which forms part thereof or directly or indirectly counsels or procures any person to commit the offense, or to do any act forming a part thereof."

Again in the same volume, par. 1309, this language appears:

"A conspiracy among several, of which accused is one, to commit a crime may be proved on his trial although no conspiracy is charged."

Par. 1309 of the same volume provides that in order that the acts or disclosures of a conspirator shall be admissible against a co-conspirator, it must have been made during the existence of the conspiracy.

In *Ferguson v. U.S.* (C.N.A.N.M. 1923) 293 F.361, this principle is laid down:

"It is no bar to the existence of a conspiracy that it is to be executed entirely by one conspirator."

In *Alaska S.S. Co. v. International Longshoremen's Assn.*, of Puget Sound (D.C. Wash. 1916) 236 F.964, the court in discussing a conspiracy used this language:

"A conspiracy is a combination of two or more persons by concerted action to do an unlawful thing or to do a lawful thing in an unlawful manner; and no further agreement is necessary, a tacit understanding being sufficient;

and it is not essential that each conspirator have knowledge of the details, the means to be used, or that the agreement be enforceable."

"When an act to effect the object of conspiracy is done, all the parties to such conspiracy become liable." McGuinness v. U.S. (C.C.A.N.M. 1919) 256 F.261.

"The act of one conspirator in furtherance of a common design is the act of all." U.S. v. Olmstead (D.C. Wash. 1925) 5 F.(2nd) 712.

There was abundant competent evidence from which the court was justified in finding that accused and Sgt. Jones both believed that there was a deficit in the Post Exchange accounts and that they could raise the money with which to liquidate this deficit by the unlawful and unauthorized sale of beer and cigarettes and by raising the prices of other articles to be sold in the Post Exchange. Accused may not have said in so many words that he was agreeing to that kind of an arrangement. He certainly counselled Sgt. Jones in the perpetration of the crime when he did not rebuke and restrain Sgt. Jones from going further with this unlawful scheme, but instead said that he was looking to the Sergeant to raise the money to cover the deficit. Even if there had been no definite understanding between the two there was such a tacit agreement that Sgt. Jones went ahead with the delivery to Joseph of cigarettes and beer to be sold and which were sold by Joseph and the money paid through Jones into the hands of accused, and in this manner, whether there was an original agreement or not there was a ratification of the conduct of Sgt. Jones, which was just as binding upon accused as if they had entered into a contract with full formalities.

The court was justified in finding that accused took part in the unlawful conspiracy and received personal benefit from the unlawful sales, made pursuant to this conspiracy, by the elimination of the shortages for which he might have been held accountable.

Colonel Thomas G.M. Oliphant, F.A., served throughout the trial as a member and as president of the court. During the examination of 1st. Lt. William B. O'Hanley, a witness for the prosecution, the following occurred:

RE-DIRECT EXAMINATION

"Questions by prosecution:

Q. That he didn't have enough enlisted personnel?

A. Yes.

President: I can answer that question as a witness for the benefit of the defense if the defense wishes." (R.19)

The first witness called to testify for the defense was Colonel Oliphant (R.47), who testified that accused had asked him

as Base Section Executive Officer to provide additional military personnel for his activities because he was very short handed, could not trust the natives that he had hired, and wanted army personnel "over whom he would have disciplinary action." On cross examination, this witness testified that accused had neither requested additional civilian personnel nor requested the replacement of Staff Sergeant Jones (R.38). The scope of the cross examination was entirely germane to the testimony of the witness on direct examination. After testifying, Colonel Oliphant resumed his place as president. Par. 59, MCM 1928, p. 47, is in the following language:

"If at any stage of the proceedings any member of the court be called as a witness for the prosecution, he shall, before qualifying as a witness, be excused from further duty as a member in the case. Whether a member called as a witness for the court is to be considered as a witness for the prosecution depends on the character of his testimony. In case of doubt he should be excused as a member. Where a witness called by the defense testifies adversely to the defense, he does not thereby become a 'witness for the prosecution'".

No suggestions was made by either the prosecution or the defense that, by becoming a witness, Colonel Oliphant had disqualified himself from further participation in the trial as president of the court. It is clear that he did not become disqualified, despite the nature of his testimony on cross examination.

In the consideration of this record of trial, the Board of Review considered of the conduct and statements of Sergeant Jones only such as transpired during and in furtherance of the conspiracy.

6. Upon all the evidence in this record, we cannot escape the conclusion that the record of trial discloses substantial evidence upon which the court was justified in basing its findings and sentence.

7. The court was legally constituted and had jurisdiction of the person and offense. No error unjustly affecting the substantial rights of the accused were committed during the trial. The punishment is authorized under the 96th Article of War. The Board of Review is of the opinion that there was sufficient evidence to sustain so much of the findings and to support so much of the sentence of the court as was approved by the reviewing authority and as confirmed by the Commanding General, USAF, CBI.

/s/ Grenville Beardsley, Judge Advocate
/t/ GRENVILLE BEARDSLEY

/s/ Itimous T. Valentine, Judge Advocate
/t/ ITIMOUS T. VALENTINE

/s/ Joseph A. Kirkwood, Judge Advocate
/t/ JOSEPH A. KIRKWOOD

CM CBI #114 (Ranzinger, Joseph C.) 1st Ind.
(Jones, John H.)

Branch Office of The Judge Advocate General with USAF, CBI,
APO 885, 4 May 1944.

To: The Commanding General, USAF, CBI, APO 885, U. S. Army.

1. In the case of Joseph C. Ranzinger, O-246206, Capt. Inf., Headquarters, Gen. Depot #2, SOS, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order, as follows: (CM CBI 114).

H. J. SEMAN,
Colonel, J. A.G.D.,
Acting Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 5, CHI, 8 May 1944)

APO 885,
9 May 1944.

Board of Review
CM CBI 120.

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

v.

Private RAY E. HERNANDEZ;
39291840, 252nd Port Company,
TC.

) SERVICES OF SUPPLY, USAF, CBI.

) Trial by G.C.M., convened at
) India, 10 April 1944,
) Dishonorable discharge, total for-
) feitures and confinement at hard
) labor for 5 years.

HOLDING of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and KIRKWOOD, Judge Advocates

1. The record of trial in the case of the enlisted man named above has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Ray E. Hernandez, 252nd Port Company Transportation Corps, did, at India, on or about 10 March 1944, strike Captain George A. Labrecque, his superior officer, who was then in the execution of his office in the face with his fist.

Accused originally pleaded guilty (R.6) but later changed his plea to not guilty (R.23). He was found guilty of the charge and specification. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 5 years. The reviewing authority approved the sentence but withheld execution pursuant to AW 50½, and forwarded the record of trial to The Judge Advocate General's Branch Office for China, Burma and India.

3. The evidence of the prosecution discloses that Captain George A. Labrecque, Headquarters 10th U.S. Army Air Forces, was riding south on in a rickshaw on March 10th at about 2245 hours, when he heard a truck travelling in the same direction at a speed of approximately 40 miles per hour. He turned around, saw that the truck had no lights burning; so he shouted to the driver of the truck to slow down and to show lights. It was quite dark at the time. The truck stopped about 100 feet ahead of the rickshaw. The captain instructed the rickshaw driver

to stop and the captain alighted. Accused was fiddling with the dashboard buttons. The blackout lights were on when the captain arrived at the truck. Accused alighted from the truck and the captain asked to see his pass or trip ticket. Accused started to argue, using profane and obscene language, saying among other things: "You are not going to stick me with this * * *", then referred to the captain as "Lieutenant". Accused backed off and swung at the captain while saying this. The captain testified: "He knocked off my hat * * *". Accused ran and the captain ran after and overtook him. He endeavored to hold him until an M.P. should come along. Accused swore at the captain and another struggle ensued. Accused broke loose and ran away again and the captain chased and caught him, and another scuffle followed. A third time accused managed to break away. He crouched in a boxer's position and declared that this was his style. The captain waited and the accused came at him. While the two men struggled, the captain called for assistance. Lt. Col. J. Good, a British chaplain, separated the captain and accused. An M.P. jeep came north on at about this time and the captain flagged it down. The driver of the M.P. car and Corporal Chenoweth took the accused to the M.P. station. Captain Labrecque was taken to the dispensary to have bruises on his nose attended to which had been inflicted during the scuffle. His thumb was sprained in the fray (R.7).

The captain did not advise accused that he was an officer because accused had previously called him Lieutenant (R.9). The captain was wearing his insignia (R.10). Captain Labrecque testified: "There was a bit of a moon that night and there was an arc lamp not far from the place where we stopped." On the question of whether or not accused struck the captain on the nose with his fist, Captain Labrecque testified: "I believe I had the accused round the neck. His right arm was behind his back and he was swinging with his left, and that may have been the moment at which I received a blow on the nose. It may have been a few moments later when he charged me, after assuming the position of a boxer * * * I will not say that the blow was given by the fist of the accused * * * it may have been his hand - it may have been his elbow * * * I believe that the blow was struck at the time he was attempting to break from me and run away." (R.9,10,11) The first physical contact between accused and the captain was when accused swung at the captain after the captain had asked for accused's pass. The second physical contact apparently was when the captain "got hold of" the accused (R.11).

Corporal Martin E. Chenoweth, Company "C", 782nd M.P. Bn., APO 465, testified that accused gave his name at the M.P. station as Private Woodridge (R.12); that it was dark at the point where he first met accused; that accused addressed Captain Labrecque as Lieutenant just before they went to the M.P. Headquarters.

There was considerable testimony that the accused had been drinking PX beer before he left camp at 5:30 on the evening of

March 10th and that accused had had a number of drinks "mostly Tom Collins, some Indian whisky" after getting into town. Evidence of whether or not accused was drunk was conflicting.

4. The only evidence offered on behalf of the defense was the testimony of accused himself who took the stand as a witness. The defense counsel announced that, "the rights of the accused as a witness has been explained to him and he wishes to take the stand as a witness". Accused was sworn and testified that he had gone to town on the night of March 10th to drink and had had between 12 and 15 drinks. He left Firpo's by truck and headed toward camp. He heard someone shout "Put on your lights". He pulled over, could not see the lights, so "I went in front and saw that they were out". He was asked when he first realized that the man who stopped him was an officer in the Army. His response was: "When the M.P. came up to me and started telling me. I thought he was a Lieutenant then". It was dark and he, the accused, was pretty drunk. When asked why he denied the fact that he was driving the truck when he was stopped, the accused replied: "Because I stole the truck." (R.21). Accused admitted striking the man who shouted to him to stop the truck. In response to the question how he struck him, accused responded: "I was trying to get away." (R.22)

5. Accused based his defense on three propositions:
 (1) self-defense, (2) ignorance of identity of superior officer,
 (3) lack of intent to commit the offense due to voluntary drunkenness.

(1) Self-defense: It is the contention of the defense that accused struck the blows as the result of an attempt to free himself from the individual who was restraining him and that the blows struck were in self-defense. There is, however, uncontroverted evidence that accused swung at the Captain when the latter first questioned accused. As a result of that blow the Captain's hat was knocked off. The assault and battery was complete at that moment, and there is no evidence in the record to support the contention that the first blow struck by accused was in self-defense. Whether any part of the body of the captain was touched as a result of this particular blow is immaterial.

"Actual injury to the person of the prosecutor is not necessary, the slightest wrongful touching or violation of the person being sufficient. The contact may have been with the clothes of the prosecutor or with something carried by him." (5 C.J. 727, par. 192)

The direct evidence is not positive that the blow was accomplished by the use of accused's fist, as alleged in the specification. It is generally held that where the means and details of the assault and battery are set out in the specification, the proof must substantially conform thereto. However

" * * * precise conformity in every particular as to the means and details of the assault is not required; it is sufficient if the proof conforms in general character and operation with the averments of the indictment." (Par. 296, 5 C.J. 775)

This view is expressed in *Shelton v. State* 50 Tex. Cr. 627, 100 S.W. 955; *Allen v. State* 36 Tex. Cr. 436, 37 S.W. 738, where the indictment charged the use of an open hand in the commission of the battery, while the proof disclosed the use of a fist.

In like manner, the question of whether the blow landed on the face, head or hat would seem to be immaterial in light of the above reasoning and also in view of AW 37, since the act upon which accused has been tried constitutes an offense denounced and made punishable by one of the Articles of War, and the irregularity has not injuriously affected his substantial rights. The accused was fully apprised of the offense with which he was charged and there is no question but that he could successfully plead former jeopardy in bar of trial should he be placed on trial a second time for this same offense.

(2) Ignorance of identity of superior officer: The second defense urged by counsel for accused concerned the ignorance of the identity of the captain whom accused struck. To support this contention, evidence of drunkenness was introduced in addition to the fact that it was night time and the place was dark where the assault and battery occurred, and, further, that the Captain did not identify himself to the accused as a commissioned officer.

There is, however, evidence in the record that the moon was shining and that there was an arc lamp not far from the place where the battery occurred, that the Captain was wearing his insignia, and that he did not advise accused that he was a commissioned officer because accused had, previous to the battery, called the Captain "Lieutenant". This evidence was sufficient for the court to find that at the time of the battery accused knew the person talking to him was a commissioned officer. The mistake of accused in identifying the Captain as a Lieutenant is immaterial in view of the fact that a lieutenant is a commissioned officer and superior in rank to accused. While the court may have taken into consideration the physical condition of accused insofar as his condition had been affected by intoxicating liquor, there was sufficient evidence in the record for the court to find that accused was not so intoxicated as to be unaware that he was being questioned by a commissioned officer.

(3) Lack of intent to commit the offense due to voluntary drunkenness: The third contention of the defense concerns the question of intent. While it is true that a general intent to injure is ordinarily essential to the offense of battery, it is likewise true that a specific intent is not essential. A general criminal intent may be inferred from the act, the manner of its performance,

and the result, or from all the material facts and circumstances. The evidence in the present instance is sufficient to have warranted the court in finding that a general criminal intent existed. The question of drunkenness, which might have negated a specific intent, need not be considered in the present case.

" * * * In a criminal prosecution for an assault and battery or an assault, the fact that the defendant was voluntarily drunk at the time and was, on that account, incapable of forming or entertaining an intent to injure is no defense to such prosecution. The reason for this rule is so well established and so well known that we will not discuss it." (McGre v. State 4 Ala. A. 54, 58, 58 S 1008)

There was some hearsay evidence improperly introduced on page 8 of the record, when Captain Labrecque testified: "I spoke to the First Sergeant of that organization and he informed me that the owner of the pass was not the man I held." These facts were subsequently established by competent evidence properly introduced. The error was not a material one that injuriously affected the substantial rights of the accused.

The reviewing authority in his order designated "The Disciplinary Barracks nearest the port of debarkation" as the place of confinement. It is customary to designate "The United States Disciplinary Barracks nearest the port of debarkation". This irregularity does not injuriously affect the substantial rights of accused nor in any way affect the findings or sentence of the court. The irregularity is not a material one in view of the fact that the reviewing authority indicates in the latter part of his order that accused is to be returned to the United States and it can be inferred that the reviewing authority intended a port of debarkation in the United States and the United States Disciplinary Barracks nearest that port of debarkation.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial was legally sufficient to support the finding of guilty and the sentence. For violation of AW 64 death or such other punishment as the Court Martial may direct is authorized.

(S) Grenville Beardsley, Judge Advocate
(T) GRENVILLE BEARDSLEY

(S) Itimous T. Valentine, Judge Advocate
(T) ITIMOUS T. VALENTINE

(S) Joseph A. Kirkwood, Judge Advocate
(T) JOSEPH A. KIRKWOOD



APO 885,
19 May 1944.

Board of review
CM CBI #122

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

SERVICES OF SUPPLY, USAF, CBI.

v.)

Trial by G.C.M., convened at
..... 10 April 1944. Dishonorable
discharge, total forfeitures and
confinement at hard labor for 5 years.
United States Disciplinary Barracks
nearest the port of debarkation.

Private ROGER S. NAPPIER,
31234745, 3468th Q.M. Truck
Company.)

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and KIRKWOOD, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. Accused was tried upon the following charge and specification:-

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Roger S. Nappier, 3468th QM Trk. Co., 68th QM Bn., Mobile, did, near on or about 24 February 1944, strike 1st Lt. John P. Burns, his superior officer, who was then in the execution of his office on the head with his fist.

Accused pleaded not guilty to and was found guilty of the specification and the charge. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due and to become due and to be confined at hard labor for 5 years. The reviewing authority approved the sentence, but withheld execution pursuant to AW 50½, and forwarded the record of trial to The Judge Advocate General's Branch Office for China, Burma and India. The United States Disciplinary Barracks nearest the port of debarkation was designated as the place of confinement.

3. The evidence for the prosecution discloses that 1st Lt. John P. Burns, commanding 3468th Q.M. Truck Company, sent for accused on 24 February 1944 after Lt. Wuori, the mess officer and Sgt. Marchand, the mess sergeant, had complained about trouble with accused. Lt. Burns testified that accused and the mess sergeant

(124)

came to the Orderly Room. Accused entered with his hat on. For this witness reprimanded him and then read the Article of War relating to disrespect for and insubordination to non-commissioned officers. Accused continually interrupted with remarks such as, "Those are little potatoes", "I do not like K.P.", and "I would rather go to the guardhouse than do K.P." (R.7). Witness tried to talk, but accused "just kept right on talking", saying that witness was making a slave of him and picking on him. Witness told accused that this was not true, but accused continued to talk and began to raise his voice. Witness then said, "Shut up Nappier" and stood up and banged on the desk. Accused shouted that he would rather go to the guardhouse (R.8). According to witness, "he seemed to have lost complete control of himself, so I reached out and got a hold of the lapel of his fatigue coat". Accused raised both fists and struck Lt. Burns on the side of the head two or three times. Witness lost his balance and fell in the corner. Accused got on top of him and continued to beat him about the head and the body. Sgt. Marchand sought to pull Nappier away. Lt. Wuori with several enlisted men came into the office and pulled accused away from witness. Accused struck him at least ten times (R.8). On cross-examination Lt. Burns stated that he grabbed accused by the lapel of his fatigue coat because it seemed to be the only way "to bring him back to his senses. I tried to quiet him, but Nappier seemed to have lost complete control of himself". (R.9). Witness denied that he lost his temper and stated that he pounded the table to bring the room to order, (R.10), and to get Nappier's attention. For the same reason he grasped the lapel of accused's coat, without malice. (R.11). Upon examination by the court, witness testified that he had been accused's commanding officer for 9 months and had read the Articles of War to the company when accused was present in December 1943. The company operated with a permanent K.P. detail, of which accused was a member because the doctor at the dispensary stated that Nappier should be given light duty as he had bad feet. The only job sitting down was on K.P. The taking hold of the coat lapel by witness and the first blow by accused happened simultaneously. (R.12). Staff Sgt. Benjamin Marchand, 3468th Q.M. Truck Company testified that on 24 February 1944 (R.13) he told Lt. Burns that accused had refused to clean some G.I. can tops. Lt. Burns told witness to bring accused over. This he did. Lt. Burns talked to him and read the Articles of War concerning insubordination. Accused stated he wanted to go to the guardhouse and insisted on talking, despite the efforts of the company commander to calm him. Lt. Burns pounded on the table and then raised up out of his chair, whereupon accused jumped on him, got on top of him and started punching him. Witness pulled accused off. Accused struck Lt. Burns about six times. (R.14) Witness would not say that Lt. Burns lost his temper. (R.15) 2nd Lt, Frederick A. Wuori testified that he was mess officer and was in the orderly room just before noon on 24 February, 1944. (R.17) The mess sergeant came in and said he was having trouble with accused. Witness asked Lt. Burns to talk to accused. When he came in accused did not remove his hat. Lt. Burns told him to remove it when in the presence of an officer. There was a partition between witness and Lt. Burns' desk so that he could not see "them", but he heard Lt.

Burns tell accused that he had been negligent in his K.P. duties and that he should cooperate with the non-commissioned officers. Accused became excited and started to talk back. Lt. Burns told him to stop talking. Accused said he would rather go to the guardhouse than do K.P. Then witness heard some scuffling, and went in the other room. Lt. Burns was on the floor. Accused was on top of him. Some enlisted men broke up the fight. Witness saw no blows struck (R.18) and heard no profane language used. In witness' opinion both Lt. Burns and accused must have been excited as "they were both yelling at each other". Private First Class Charles E. Francis testified that he heard a scuffle in Lt. Burns' office and ran in. (R.19). Lt. Burns was on his back on the floor and accused was on top of him trying to hit him. Sft. Marchand was on top of accused trying to prevent him from so doing. Witness told accused to stop and not to lose his head. Accused got to his feet and witness asked, "Why did you lose your head?" Accused answered, "He grabbed me".

4. For the defense, Corporal Murrell Gavin testified (R.20) that he was called to Lt. Burns' office about hours 1150 on 24 February 1944 by the first sergeant for duty as an armed guard. Lt. Burns told witness to shoot accused "if he as much as opened his mouth before he finished speaking". Lt. Burns was sitting behind his desk and accused was standing in front of him. The lieutenant then got up and took accused by the collar and said that "he could take ahold of his lapel, that that was the way he did it, and that he would tell the court just that". (R.21). Witness did not remember hearing any profanity. He was not in the room at the time of the fight but came in as a guard and was there for about five minutes. Lt. Burns was going through the thing, showing how it happened and how he did it. (R.22). Tech. 5th Gr. James C. Hill testified that he was near the orderly room about hours 1150 on 24 February 1944 and heard someone yell, "Nappier, God damn it, shut up". (R.23). Witness looked around and at the window saw Lt. Burns stand up. "There was a little 'pass'". Lt. Burns went down still holding to accused. Then they were out of sight. (R.24). The defense counsel stated that accused had been advised of his rights and wanted to remain silent, but that he would like to ask the law member to instruct the court that there was no presumption of guilt and no inference of guilt to be drawn from the fact of his silence. (R.26). The law member so advised the court.

5. It would seem that the facts were not seriously in dispute. It appears that accused has been summoned by his company commander to the orderly room for advice about his duties as K.P. and instruction in the provisions of the Articles of War in respect of his duties toward non-commissioned officers. Accused appears to have become excited and to have persistently interrupted Lt. Burns. In an effort to check the onrush of words about the accused's desire to be in the guardhouse rather than on K.P., Lt. Burns first pounded on the desk and then stood up and took hold of the lapel of accused's coat. Accused then knocked the officer down, leaped on to this

prostrate body and inflicted upon him from 5 to 9 more blows. The striking of a military superior by an inferior usually cannot be justified under any circumstances or by any provocation. The person of an officer should be sacred to a soldier, even if in an extreme case a soldier may be warranted in using force when acting in self-defense against illegal violence (CBI 39). It is also true that the person of a soldier should be sacred to an officer. The conduct of Lt. Burns in grasping the lapel of accused's fatigue jacket, technically at least, constituted an assault and battery. The vital question which confronted the court was whether the striking of Lt. Burns by the accused was in necessary self-defense. Lt. Burns testified that his intent was to calm the accused and to stem the flow of loud language from his lips. Of course he had no right, either by the least touching, or by the slightest assault upon, the body of accused, to punish him for any offense or dereliction of duty of which he was guilty. It may be assumed that Lt. Burns' conduct constituted an offense against military law, for which charges might have been preferred under either AW 95 or AW 96 (par. 453(3), Dig.Ops. JAG. 1912-40, p. 341), but this assumption cannot avail accused to escape the consequences of his conduct, unless striking Lt. Burns was necessary or apparently necessary to defend accused from injury. The essential element to justify an assault on the ground of self-defense, is actual or apparent necessity for the use of force in self protection. If a person uses force against another where it is not necessary, or at least where he has no reasonable grounds for believing it to be necessary for his own protection, he becomes the aggressor. The situation must be such as to cause him reasonably to believe that injury to himself can be prevented only by infliction of injury upon another. To justify an assault and battery on the ground of self-defense, the evidence must establish an overt act or a hostile demonstration of such a character and nature as to give reasonable ground for fear of imminent danger. Unless the circumstances are such that a reasonably prudent man would conclude that he was in danger of bodily harm, the right of self-defense cannot be invoked to justify an assault (4 A.J. pp. 147-8). If to exact private vengeance for what he deemed an outrage to his person, the accused struck and chastised Lt. Burns, when such beating was not necessary to prevent injury or further indignity, then accused became the aggressor and did not strike in necessary self-defense.

6. We cannot say, as a matter of law, that the improper conduct of Lt. Burns was such as to justify the wrongful conduct of the accused. Accused had an adequate remedy for the wrong done him. He could have made application for redress and, if redress were not forthcoming, might then have complained to the Commanding General, under AW 121. He could have preferred charges under AW 95 or under AW 96, or under both such Articles. Instead, it may be inferred that accused took the law into his own hands and constituted himself both judge and executioner. His mistake was grievous. Two wrongs never add up to make a right. Evil multiplied does not become a virtue. The commission of a trivial wrong confers no license upon another to commit a major offense. Because Lt. Burns was wrong in rudely

touching the accused it does not follow that the latter was right in striking him not once but several times, in knocking him down, and in continuing to strike and beat him as he lay prostrate and helpless upon the floor. The circumstances in evidence were such as to warrant the court in concluding that one slightly aggrieved became the aggressor. Whether the evidence indicates that an assault is in necessary self-defense, or is such as on that ground to raise a reasonable doubt of guilt, is a mixed question of law and fact. The determination of the court on this point is supported by substantial evidence. The evidence is not such that all reasonable minds would agree that even the first blow struck by accused was in necessary self-defense. Both the trial judge advocate (R.6, R.29) and counsel for the accused (R.6, R.28) presented a wealth of quotations from, and references to, legal authorities in respect to the vital question of what facts and circumstances are such as to justify the infliction of blows, on the ground of necessary self-defense. From the violence of the attack, and the persistence and determination with which accused continued the infliction of blows upon the prostrate body of his victim, it was not unreasonable for the court to conclude that the accused repeatedly struck Lt. Burns not to defend himself from imminent danger or further indignity, but in a malicious spirit in order to obtain revenge and to gratify his hate and anger.

7. The court was legally constituted. It had jurisdiction of the subject matter of the offense and of the person of the accused. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For a violation of AW 64, death or such other punishment as the court-martial may direct is authorized. The Board of Review is of the opinion, and accordingly holds that the record of trial is legally sufficient to support the findings of guilty and the sentence.

/s/ Grenville Beardsley, Judge Advocate.
/t/ GRENVILLE BEARDSLEY

/s/ Itimous T. Valentine, Judge Advocate.
/t/ ITIMOUS T. VALENTINE

/s/ Joseph A. Kirkwood, Judge Advocate.
/t/ JOSEPH A. KIRKWOOD



APO 885,
30 May 1944.

Board of Review
CM CBI # 132.

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

v.)

Private ALBERT J. PRITCHARD,
33100677, 3303rd Quartermaster
Truck Company, CBI.)

SERVICES OF SUPPLY, USAF, CBI.

) Trial by G.C.M., convened at
) Headquarters Advance Section No.2,
) S.O.S., APO 629 on 23 April 1944.
) Dishonorable discharge, total
) forfeiture and confinement at
) hard labor for 3 years. The U.S.
) Disciplinary Barracks nearest
) the port of debarkation in the
) United States.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and KIRKWOOD, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

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

CHARGE I: Violation of the 63rd Article of War.

Specification 1: In that Private Albert J. Pritchard, 3303rd Quartermaster Truck Company, did, at the Motor Shop of the 3303rd Quartermaster Truck Company, India on or about 0930 hours 25 March 1944 behave himself with disrespect toward 1st Lt. Robert I. Barnes, his superior officer, by muttering, "You ain't scaring nobody" contemptuously turning from and leaving him and by constantly interrupting the said 1st Lt. Robert I. Barnes, while he was reprimanding him the said Private Albert J. Pritchard.

Specification 2: In that Private Albert J. Pritchard, 3303rd Quartermaster Truck Company, did, at the

Camp site of the 3303rd Quartermaster Truck Company, Dibrugarh, India, on or about 0945 hours 25 March 1944 behave himself with disrespect toward 1st Lt. Edwin W. Bingenheimer, his superior officer, by saying to him "Can't I satisfy you God-damn People?", and "I don't give a damn who I'm talking to", or words to that effect.

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

Specification 1: In that Private Albert J. Pritchard, 3303rd Quartermaster Truck Company, having received a lawful command from 1st Lt. Robert I. Barnes, his superior officer, to "Shut up and keep quiet while I am talking to you", did at the motor shop of the 3303rd Quartermaster Truck Company, Dibrugarh, India, on or about 0930 hours 25 March 1944, willfully disobey the same.

Specification 2: In that Private Albert J. Pritchard, 3303rd Quartermaster Truck Company, having received a lawful command from 1st Lt. Edwin W. Bingenheimer, his superior officer, to "Go with Sergeant Brown", did at the Orderly Tent of the 3303rd Quartermaster Truck Company, Dibrugarh, India, on or about 1000 hours 25 March 1944, willfully disobey the same.

Accused pleaded guilty to and was found guilty of all the Charges and Specifications. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 3 years. The reviewing authority approved the sentence but withheld execution pursuant to AW 50½ and forwarded the record of trial to The Judge Advocate General's Branch Office for China, Burma and India. The United States Disciplinary Barracks nearest the port of debarkation was designated as the place of confinement.

EVIDENCE FOR THE PROSECUTION

3. The evidence for the prosecution succinctly stated disclosed that on May 25th, 1944, at about 9:30 a.m., 1st Lt. Robert I. Barnes (Commanding Officer of 3303rd Quartermaster Truck Company) was in the company's garage supervising work on a Ford V-9 motor. Those engaged in the task of taking down the motor ran into some difficulty with respect to the removal of some of the valves. An enlisted man was dispatched to obtain a technical maintenance manual from accused, who was not then at the garage. The soldier returned but did not bring the manual. About 10 minutes later accused came into the garage, whereupon Lt. Barnes asked accused where the manual was. To this accused replied, "What manual?". Witness then said, "The one I sent after".

Accused replied, "I just put all my stuff away for inspection and did not want to mess it up. I could not find out what you wanted it for". Lt. Barnes then ordered accused to go and get the book and bring it to him. Accused walked away mumbling and said, "You ain't scaring nobody". Lt. Barnes then called accused back and reprimanded him and again ordered him to get the book. This time the accused replied, "But I don't know what you want it for". Lt. Barnes then ordered accused to "shut up". Accused continued to say, "I don't know what you want it for". Lt. Barnes then told accused he was under arrest (R.4). 1st Lt. Edwin W. Bingenheimer, 3303rd QM Truck Company heard most of the conversation between Lt. Barnes and accused, and as Lt. Bingenheimer was walking away from the garage accused stopped him and said, "Lieutenant, what's the matter? Can't I please any of you goddamn people?" Lt. Bingenheimer then replied to accused, "Don't you realize you are talking to an officer?" To this accused said, "I don't give a goddamn who I'm talking to". Lt. Bingenheimer then told accused to go to his tent and pack his clothes, that he would be taken to the stockade. Lt. Bingenheimer then went to the orderly room and wrote out a confinement order and gave it to Staff Sgt. Robert C. Brown of the same company, with instructions to take accused to the stockade. The sergeant reported to Lt. Bingenheimer that accused had refused to go to the stockade until he first talked to the Lieutenant. Accused then came into the orderly room and asked Lt. Bingenheimer if he had any use for the book. Bingenheimer then said, "I don't know anything about the book and have no use for it whatever". Accused was then directed to report to Sgt. Brown, to which accused replied, "I don't know why I have to go to jail because of a book". Lt. Bingenheimer then told accused, "You are going to jail for disobeying orders". Accused then opined, "It just don't make sense", and just stood there. Lt. Bingenheimer then gave accused a direct order to proceed with Sgt. Brown to the stockade. Accused refused to go but continued to stand there saying, "I don't think I'm getting a fair deal". Lt. Bingenheimer then sent for the Military Police and had accused taken to the stockade. Accused is in the military service of the United States (R. 6,8).

EVIDENCE FOR THE DEFENSE

4. Accused was sworn and testified as a witness. Among other things he said that on the 24 March 1944 there was a rumour of a general inspection, following which the first sergeant called the men together and told them to get ready for the inspection (R.8). Accused had fixed his things up for inspection Friday night, the 24th and put on the finishing touches Saturday morning, the 25th. After accused had made preparation for the inspection he went to the mess hall for a drink of water, where Private Provost came up and said, "Sgt. Spencer wants the book"; accused replied, "I don't know where the book is". Accused did not want to "mess up his stuff for the inspection". Accused then went to the motor shop to see Lt. Barnes, where inquiry was made of accused concerning

the book. After or during the altercation Lt. Barnes told accused he was under arrest, and among other things accused said he "didn't scare anybody". Accused then went for the book and met Lt. Bingenheimer enroute and after extending to Lt. Bingenheimer the military courtesies, tried but "could not get any talk out of him either". Accused then "exploded" and said "disrespectful words" and was thereafter put under arrest (R.9). Accused then gave a narrative of a large number of court-martial trials in which he contended he had received unfair treatment from his officers and non-commissioned officers (R. 10,11,12).

Corporal Robert L. Edwards, 3303rd QM Truck Company was present in the garage when the altercation occurred between accused and Lt. Barnes. Corporal Edwards was the man in charge of the tearing down of the motor and needed the book in question to enable him to remove certain valves. When accused came into the shop Edwards asked him about the book. Accused countered with the question, "Do you need it immediately?" Edwards expressed a desire for the book as soon as possible. Edwards and accused came to an agreement concerning the book and Edwards understood the book would be forthcoming (R. 13). Accused's attitude toward Lt. Barnes was "belligerent" in the opinion of Edwards, looking at the situation from the view point of an officer. From the angle of an enlisted man it was different (R.14).

5. Only two questions of any significance arise from an examination of this record. First, was the trial judge advocate entitled to go fully into previous convictions, including speeding and breach of arrest, on cross-examination of the accused? (R. 10).

"Evidence of conviction of any crime is admissible for the purpose of impeachment where such crime either involves moral turpitude or is such as to affect the credibility of the witness. * * * *
* * * * * Evidence relating to an offense not involving moral turpitude or affecting the credibility of the witness should be excluded."
(MCM, 1928, par. 124b, page 133).

Moral turpitude is aptly defined:

"Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law. It must not merely be mala prohibita, but the act itself must be inherently immoral. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude." (41 C.J., p. 212).

On the question of cross-examination to impair the credibility of a witness, it has been said:

"As a general rule it may be said that anything having

a legitimate tendency to throw light upon the accuracy, truthfulness, and sincerity of a witness including the surrounding facts and circumstances, is proper to be shown and considered in determining the credit to be accorded his testimony, while on the other hand, it is not proper for the triers of fact to consider matters which, even if true, would not have any legitimate tendency to lessen the credibility of the witness." (C.J. par. 916, p. 760).

Again in the same volume, in par. 1097, p. 891:

" * * * * * But a witness cannot be interrogated as to his conviction of an offense which is not of such a grade as is required to affect his credibility. Accordingly, it has been held, dependent in each case on the nature or grade of offense necessary in the particular jurisdiction, improper for a witness to be asked as to his conviction of a mere misdemeanor or of an offense which is not infamous in its nature, or does not involve moral turpitude, or does not amount to a felony. Similarly, no inquiry may be made into the witness' conviction for violation of a local ordinance."

When the trial judge advocate sought to bring out on cross-examination of the accused a long list of his transgressions, among which was "breach of arrest" (R.10), "Speeding" (R.11), he exceeded the limits of proper cross-examination, as fixed by paragraph 124b, MCM. Certainly neither breach of arrest, nor speeding, nor any of the other crimes about which accused was being cross-examined, involves moral turpitude, nor do they go to the credibility of the witness. It follows, therefore, that the objection of the defense counsel should have been sustained and the trial judge advocate should have been held strictly to the terms of the Manual. The accused voluntarily, however, told at length of his court-martial experiences and if given sufficient time and opportunity would have in all probability covered all of them including those about which he was being asked on cross-examination. In view of accused voluntarily preferring complete information about his previous conviction, together with his plea of guilty and the wealth of substantially uncontradicted evidence on behalf of the prosecution it cannot be said that his substantial rights were affected by this incorrect ruling of the court. The admission of this evidence did not affect the punishment meted out by the court since evidence of such previous convictions as come within the rule is always competent after conviction.

The second question is presented by the fact that the record recites as to the findings and as to the sentence: "three-fourths of the members present at the time the vote was taken

concurring" (R.15). The accused cannot complain nor was a substantial right of his adversely affected by this vote. Only the concurrence of two-thirds of the members present at the time the vote was taken was necessary to convict the accused upon the charges and specification upon which he was arraigned. The vote as recorded does not disclose how any member voted. The irregularity is harmless. (CM CBI 71, CM CBI 111).

6. The court was legally constituted. It had jurisdiction of the subject matter of the offense and of the person of the accused. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The punishment adjudged is within the authorized limits. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the sentence.

/s/ Grenville Beardsley, Judge Advocate.
/t/ GRENVILLE BEARDSLEY

/s/ Itimous T. Valentine, Judge Advocate.
/t/ ITIMOUS T. VALENTINE

/s/ Joseph A. Kirkwood, Judge Advocate.
/t/ JOSEPH A. KIRKWOOD

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

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APO 885
17 June 1944

Board of Review
CM CBI 140.

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

v.

Private JOE BATTLE, 34112655,
Company A, 45th Engineer
Regiment (GS).

SERVICES OF SUPPLY, USAF, CBI.

) Trial by GCM convened at APO 689,
) 7/8 Postmaster, New York, N.Y.,
) 8 May 1944. Dishonorable dis-
) charge, total forfeitures and
) confinement at hard labor for 4
) years. U.S. Disciplinary Barracks
) nearest the port of debarkation.

HOLDING of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. Accused was tried on a single charge, violation of the 93rd Article of War, and one specification thereunder, alleging an assault with intent to do him bodily harm upon Sgt. Willie Williams by cutting him on the back with a dangerous weapon, a knife. To the specification, accused pleaded guilty except to the words "with intent to do him bodily harm, commit an assault upon Sergeant Willie Williams by cutting him on the back with a dangerous weapon", substituting the words "wrongfully commit an assault and battery upon Sergeant Willie Williams", of the excepted words not guilty, and of the substituted words guilty, and to the charge he pleaded not guilty, but guilty of violation of the 96th Article of War. He was found guilty of the specification and the charge, and sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and to confinement at hard labor for four (4) years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks nearest the port of debarkation as the place of confinement, but withheld execution and forwarded the record of trial to The Judge Advocate General's Branch Office in accordance with the provisions of Article of War 50½.

3. The evidence on behalf of the prosecution is uncontradicted. No evidence was offered on behalf of the accused. As to the

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evidence, it is sufficient to state that the guilt of the accused of the offense as charged is so clearly shown not only by the testimony of apparently disinterested eye witnesses but also in part by his own voluntary statement to the officer who investigated the charges under the 70th Article of War (Pros. Ex. 1), that the court could not reasonably have made findings other than findings of guilty of the specification and the charge.

4. After making the findings of guilty, the court was opened and a duly certified extract copy of the service record of the accused was received, the language of which so far as material to this opinion is as follows:

"Record of trial by court-martial.

Tried under the 96th Article of War and found guilty of disobeying a lawful order from his superior, a commissioned officer. Sentenced to forfeit \$5.00 of his pay. Approved September 8, 1943".

After this evidence of a previous conviction had been read the following (R.24,25) occurred:

"Prosecution: I will say this, it does not state when the sentence was given, it says it was approved on September 8, 1943. It does not show the date the sentence was invoked.

"The Law Member: That offense was committed within one year prior to the commission of this offense?"

"Prosecution: The sentence was approved within one year of this offense."

Thereupon after receiving data as to the pay and service of the accused, the court was closed. The foregoing suggestions by the prosecution would seem to miss the point upon which hinged the propriety of the consideration of the proffered evidence of a previous conviction. As the law member correctly implied in the case of an enlisted man a previous conviction may be considered only if the offense therein involved was committed within one year of the date of the commission of the subsequent offense for which the accused is tried. The applicable rule can not be stated more clearly than in the language of MCM 1928, par. 79c:

" * * * Such evidence must * * * however relate
to offenses committed during a current enlistment

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* * *, and in the case of an enlisted man during the one year * * * next preceding the commission of any offense charged."

The offense for which accused was on trial was committed on 6 March 1944. The previous conviction was approved within one year next preceding that date, but there is nothing in the language of the extract copy of accused's service record to show when the offense referred to was actually committed. It may and probably did precede by only a few days or at most a few weeks the date of the approval of the sentence noted in the service record, but this is only a probability and is by no means a certainty. It is important that the rule laid down in MCM 1928, par. 79b, be strictly complied with, since the consideration of a previous conviction of an offense committed outside the period of one year next preceding the commission of the offense for which the accused is on trial might be highly prejudicial to his substantial rights. The last sentence of MCM 1928, par. 79b, is in the following language:

"In the absence of objection an offense may be regarded as having been committed during the required periods unless the contrary appears."

The contrary does not here appear and, since no objection was made by or on behalf of the accused, the court properly regarded the former offense as having been committed within the one year next preceding the commission of the offense charged and properly considered the evidence of such previous conviction.

5. The sentence is within the authorized limits. The court was legally constituted. It had jurisdiction of the subject matter and of the person of the accused. No errors injuriously affecting the substantial rights of the accused occurred upon the trial. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the sentence.

/s/ Grenville Beardsley, Judge Advocate
/t/ GRENVILLE BEARDSLEY

/s/ Itimous T. Valentine, Judge Advocate
/t/ ITIMOUS T. VALENTINE

/s/ Robert C. Van Ness, Judge Advocate
/t/ ROBERT C. VAN NESS



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APO 885,
9 June 1944.

Board of Review
CM CBI #141.

U N I T E D S T A T E S)	SERVICES OF SUPPLY, USAF, CBI.
v.	)	Trial by G.C.M., convened at
	)	----- 5 May, 1944.
Pvt. Stanley J. Jackson,	)	Dishonorable discharge, total
32600084, 3509th QM Truck	)	forfeitures and confinement at
Company.	)	hard labor for 20 years. U.S.
	)	Disciplinary Barracks nearest
	)	the port of debarkation.

HOLDING of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. Accused was tried on the following charges and specifications:

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

Specification: In that Private Stanley J. Jackson, 3509th Quartermaster Truck Company, did at ----- on or about 0500, 23 January 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at ----- on or about 0145, 10 March 1944.

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

Specification: In that Private Stanley J. Jackson, 3509th Quartermaster Truck Company, having been duly placed in confinement in the ----- guard house, on or about 1300, 15 January 1944, did, at ----- on or about 0500, 23 January 1944, escape from confinement before he was set at liberty by proper authority.

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

Specification: In that Private Stanley J. Jackson, 3509th Quartermaster Truck Company, did at -----

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----- on or about 24 January 1944, feloniously take, steal and carry away three (3) Carbines, Caliber 30, M-1, value about \$209.10, the property of the United States Government.

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

Specification: In that Private Stanley J. Jackson, 3509th Quartermaster Truck Company, did at ----- on or about 10 March 1944, knowingly and willfully apply to his own use one United States Government truck No. W4365125, of the value of about \$2,000.00, property of the United States furnished and intended for the military service thereof.

Accused pleaded not guilty to and was found guilty of Charge I and its specification; Charge II and its specification; Charge III and its specification, excepting the figures "\$209.10", substituting therefor the figures "\$162.00", of the excepted words, not guilty, of the substituted words, guilty; and Charge IV and its specification, excepting the figures "\$2,000.00", substituting therefor the figures "\$5908.00", of the excepted words, not guilty, of the substituted words, guilty. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 20 years. The reviewing authority approved the sentence but withheld execution pursuant to AW 50 $\frac{1}{2}$ and forwarded the record of trial to The Judge Advocate General's Branch Office for China, Burma and India. The U.S. Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement.

EVIDENCE FOR THE PROSECUTION

3. Accused, Private Stanley J. Jackson, 3509th ~~QM~~ Truck Company, ----- (Pros. Ex. 6) is in the military service of the United States (R.11,13,15) and on 23 January 1944 was attached to 3504th QM Truck Company, of which 1st Lt. Verne Ovens was commanding officer (R.6,7). At that time 1st Lt. Roy C. Whitelaw, 3502nd QM Truck Company was Provost Marshal at ----- and as such had charge of the stockade at ----- On 23 January 1944 accused was in confinement in the stockade at ----- from which he escaped on that day by spreading the bars in a rear window of the building in which he was confined (R.7,8,9, 10) (Pros. Ex. 3). Accused did not voluntarily return to confinement but on the morning of March 10th at approximately 1.45 or 2.00 o'clock he was apprehended, after an absence of about 4 weeks (R.7, R.10).

On the evening of 9 March 1944, about 5 or 6 o'clock, Lt. Ovens, in company with Lt. Jamar, as a consequence of information by them received, went to a warehouse in the vicinity of ----- in an effort to locate and apprehend accused. They were accompanied

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by T/5 Robert B. Fullerton, Company "C", 782nd Military Police, ----- They parked their jeep in the warehouse and waited for accused to come. About 1.45 AM they heard the roar of a vehicle at the motor pool. The vehicle was then driven past them and it was discovered that the vehicle was a tractor for a 4-ton trailer and was driven by accused who was accompanied by a civilian. Lt. Ovens, Lt. Jamar and Corporal Fullerton got into the jeep and pursued accused and the truck. It was necessary for witness and his companions to travel at a rate of speed of about 50 to 60 miles per hour in order to overtake the truck, and when within about 100 yards of it they stopped the jeep. They immediately went up to the tractor where accused and the civilian were and took both of them back to the jeep. Lt. Jamar drove the tractor to the MP station and the Corporal Fullerton and Lt. Ovens drove accused and the civilian. The motor vehicle driven by accused bore the number W4365125. Accused was driving this vehicle (R.8,10; Pros. Ex. 6). About the time accused escaped from confinement the following weapons were stolen from the company to which he was attached: 30 M-1 carbine, serial number 1615579, 30 M-1 carbine, serial number 1606745 and 30 M-1 carbine, serial number 1594316 (R.8; Pros. Ex. 6). Accused, at the time of his escape, was not authorized to have arms (R.8). The three rifles or carbines referred to were the property of the United States, intended for the military use thereof (R.9). The civilian with accused at the time of his arrest was Gerald P. Pereira.

Accused and his companion were taken to Military Police Headquarters at 6 Lindsay Street. When arrested, accused was dressed in civilian clothes (R.8). During March 9th and 10th, 1944, 2nd Lt. Marvin D. Engle, 3504th QM Truck Company was in charge of the -----sub-motor pool and did not authorize accused to drive any vehicle, and if accused drove a vehicle it was without permission (R.11). The list price of a carbine, caliber 30 M-1, is \$54.00 and the list price of a United States Government truck 4-5 ton, 4 x 4 tractor, is \$5908.00 (R.11). 2nd Lt. Lewis F. Foushee, TC, Headquarters Base Section #2, on or about 11 March 1944 was RTO at ----- Station. A United States Army foot locker was turned over to him at ----- When Lt. Foushee saw the locker it had been opened by the Police. In this locker were two carbine rifles and some miscellaneous articles, including three letters, one of which was open and Lt. Foushee read it. All three letters were signed by "Jackson" (R.12,13). The letter read by Lt. Foushee was written by accused (Pros. Ex. 4 & 6). The foot locker was turned over to 1st Lt. Harold I. Funk, CMP, 782nd MP Bn. (R.12,13). The serial numbers of the rifles in the foot locker were 1594316 and 1615579. These rifles or carbines were the property of the United States and intended for military use (R.13). It was stipulated between the prosecution and accused and his counsel that vehicle No. 4365125 is the property of the United States intended for military use thereof and that it is a Federal tractor 4 x 4, 4 to 5 ton capacity.

S/Sgt. Jack Blask, Theater Provost Marshal's office, in

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company with a soldier, Morris Kotofsky, also of the Theater Provost Marshal's office, while investigating the crimes alleged to have been committed by accused, saw accused on March 20th in ward 13 of 112th Station Hospital, at which time accused recovered in the presence of Sgt. Blask and Kotofsky a disassembled carbine which bore the number 1606754. This carbine was turned over by accused to Sgt. Blask at that time. The parts of this carbine were hidden in ward 13. At this time accused, after having been warned of his rights, voluntarily made a statement which was taken down in shorthand by Kotofsky (R.15). This statement is Pros. Ex. 6 (R.15). Accused was confined on January 10th, 1944, by order of Lt. Ovens, his commanding officer, and remained in confinement until his escape (R.16,17).

In his statement accused admitted getting out of the stockade in which he was incarcerated and failing to return after he had become frightened over sleeping too late (Pros. Ex. 6). He admitted staying away for about three weeks, during which he visited the warehouse where Pereira worked nightly. He obtained civilian clothes so that he could sneak back to camp, during one of which sneaking visits he took three carbines, one of which he dismantled and after concealing it in ward 13 of the 112th Station Hospital, he delivered to Sgt. Blask. The other two were left in his shack when he was picked up. Accused contended that he took the carbines in order that he might redeem his previous off colour record by going into action single-handed with these three carbines, neither one of which was equipped with bayonet. He had no bullets.

4. Accused neither testified nor made an unsworn statement. No evidence was offered in his behalf.

5. Pros. Ex. 6 could hardly be described as a confession since accused undertook to exculpate himself by explanation of each wrongful act detailed in his statement. For instance, the admission of the taking of the three carbines was explained by accused in this incredible and fantastic manner:

"The week before I got civilian clothes I had sneaked back to camp and taken three carbines with the intention of going out in the hills to see if I could go into action by myself against the enemy, and in that manner try to redeem myself so that if word came back to my outfit I might be taken back and given another chance."

Pros. Ex. 6 is competent whether it be regarded as a series of admissions or a confession since it appears to have been voluntarily made, and since there is sufficient evidence of the corpus delicti as to each of the crimes charged, outside the

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confession. If the exhibit be regarded as an admission, MCM 1928, par. 114b, is appropriate authority for its reception in evidence. If it is regarded as a confession, it is competent if voluntarily made, provided there is other evidence in the record of the corpus delicti.

"A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself. * * * * * This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense." MCM 1928, par. 114a.

There is evidence of the crime charged in each specification outside the statement of the accused and this evidence is abundantly sufficient to meet the requirements of the rule. The court had before it the witnesses and the statement of accused and it was its province to examine each part and parcel of the statement in the light of the other testimony, and in doing this it was at liberty to accept and believe parts of the statement of accused and reject such other parts as appeared unreasonable and unreliable, and with its conclusion this Board of Review has no right to interfere since it is not authorized to weigh evidence in such cases. (CM CBI #114).

The specification of Charge III alleges that the three carbines alleged to have been stolen were of the value of \$209.10 and the specification of Charge IV places the value of the truck alleged to have been stolen at \$2,000.00. When it appeared (R.11) that the actual value of the three carbines was \$162.00, and the value of the truck was \$5,908.00, the trial judge advocate moved to amend the specifications of Charges III and IV so that each might speak the truth with respect to the value of the property therein referred to. This motion was allowed and the specifications accordingly amended. On this subject, this language is appropriate:

"If a specification, while defective, is nevertheless sufficient fairly to apprise the accused of the offense intended to be charged, the court upon the defect being brought to its attention will, according to circumstances, direct the specification to be stricken out and disregarded, or continue the case to allow the trial judge advocate to apply to the convening authority for directions as to further proceedings in the case, or permit the specification to be so amended as to cure such defect, and continue the

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case for such time as in the opinion of the court may suffice to enable the accused properly to prepare his defense in view of the amendment. The court may proceed immediately with the trial upon such amendment being made, if it clearly appears from all the circumstances before the court that the accused has not in fact been misled in the preparation of his defense and that a continuance is not necessary for the protection of his substantial rights." MCM 1928, par. 73.

Accused made no complaint and made no request for a continuance of the case. Further authority for the procedure here adopted by the court is to be found in Dig. Op. JAG 1912-40, see 452(18), where it is said:

"Accused was found guilty of the larceny of a motor cycle of the value of \$425.54, while the highest value shown by the evidence is \$350.00. The difference is comparatively so slight as to make the error in the findings immaterial."

The amendment allowed in this case did not expose the accused to any greater punishment since the value of the property so alleged in each specification is greater than \$50.00 and in no other way was a substantial right of accused adversely affected by the amendments. It follows, therefore, that the court was within its rights in allowing the amendments.

Minor Irregularities:

In the morning report, which was duly received in evidence (R.7) as Pros. Ex. 3, shows Jackson, Stanley (NMI), 38600034, as a private in 3504th QM Truck Company. The certificate of the commanding officer of the 3504th QM Truck Company to the extract copy of morning report shows Jackson, Stanley, 32600084, 3509th QM Truck Company. The specification carries the name of accused as Stanley J. Jackson. Apparently there is an error in the serial number as carried on the extract copy of the morning report. This, however, is immaterial, since the initial absence without leave of accused was abundantly proven by the company commander and the officer in charge of ----- stockade. The number of the truck involved is carried in the specification as W4356125 and in the testimony of Lt. Ovens shows the truck number to be W4365125. The number of the truck in question is carried in the stipulation (R.14) as W4365125. All other references to the truck in the testimony carries substantially the same description and the transposition of the figures 5 and 6 in the number is apparently a typographic error. The testimony shows the respective number of all the carbines and on one in another place it is carried as 1606754. This likewise appears to be a typographic error and of no consequence.

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There was abundant competent evidence in the record to justify the court in its findings and to sustain its sentence, and the punishment is authorized.

6. The court was legally constituted. It had jurisdiction of the subject matter of the offense and of the person of the accused. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the findings of guilty and the sentence.

/s/ Grenville Beardsley Judge Advocate
/t/ Grenville Beardsley,

/s/ Itimous T. Valentine Judge Advocate
/t/ Itimous T. Valentine,

/s/ Robert C. Van Ness Judge Advocate
/t/ Robert C. Van Ness,



WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
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UNITED STATES ARMY FORCES CHINA BURMA INDIA

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APO 885
25 June 1944

Board of Review
CM CBI # 144.

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

v.

Private CLARENCE A. BARNES,
34280865, 73rd Ordnance Co.,
(D) Services of Supply.

SERVICES OF SUPPLY, USAF, CBI.

Trial by GCM; convened at Calcutta,
India, 23 May 1944. Dishonorable
discharge, total forfeitures and
confinement at hard labor for 5
years. U.S. Disciplinary Barracks
nearest the port of debarkation.

HOLDING of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China Burma and India.

2. Accused was tried on the following charges and specifications:

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

Specification: In that Private Clarence A. Barnes, Seventy-Third Ordnance Company (Depot) did, without proper leave, absent himself from his station at Calcutta, India, from about 13 April 1944 to about 14 April 1944.

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

Specification 1: In that Private Clarence A. Barnes, Seventy-Third Ordnance Company (Depot), having been restricted to the limits of his camp, did, at Calcutta, India, on or about 13 April 1944, break said restriction by going to Alla Bazar, Calcutta, India.

Specification 2: In that Private Clarence A. Barnes, Seventy-Third Ordnance Company (Depot), was, at Calcutta, India, on or about 13 April 1944, drunk in uniform in a public place, to wit, Alla Bazar, Calcutta, India.

Specification 3: In that Private Clarence A. Barnes, Seventy-Third Ordnance Company (Depot), did, at Calcutta,

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India, on or about 13 April 1944, wrongfully take and use without consent of the owner, a certain automobile, to wit, a 2½-ton GMC Motor Truck, USA Registration No. 470534, of a value of more than \$50.00, the property of the United States.

Accused pleaded not guilty to all Charges and specifications. He was found guilty of all the Charges and of all the specifications, except specification 2 of Charge II, under which specification by appropriate exceptions and substitutions, he was found guilty of being "drunk in uniform at Alla Bazar". He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentence, but reduced the confinement to five years, withheld execution pursuant to AW 50½, and forwarded the record of trial to The Judge Advocate General's Branch Office for China, Burma and India. The United States Disciplinary Barracks nearest to the port of debarkation in the United States was designated as the place of confinement.

EVIDENCE

3. Accused was a member of the 73rd Ordnance Co. (Depot). On 13 April 1944 he was under restriction to the limits of the camp (R.1) when not on duty. He was on duty between the hours of 0800 and 1730 of that day (R. 1, 9), but he was not authorized to be out after hours 1730 (R. 2). He was boom truck operator on the open storage lot at Cossipore (R.10). Usually accused had a trip ticket, but on this day he did not (R.10,11,16,17). The standing orders were that after hours 1700 all vehicles not dispatched for transporting personnel from the company to town must be returned to the motor pool, but these were only generally known and not published (R. 1). Trucks could only be used after hours 1730 on orders from the dispatcher (R.11). On the day in question, about hours 0800, accused was instructed to take the truck and report at the open storage lot (R.11). He was not told what his hours were but everybody else was working from 0800 to 1730 (R.11) and he was not given authority to have the truck out after 1730 (R.12). The motor sergeant had drawn up and posted orders requiring that each driver, when reporting to work in the morning, go to the motor pool and turn in the dispatch ticket from the previous day and receive a new one. When a driver had completed his assignment he was required to report back to the dispatcher at the pool (R.12). Accused did not have permission to take the truck to Alla Bazar (R. 13). Accused quit work sometime between 1645 and 1715 hours (R. 10, 14). During that time he and the truck could not be found in the open storage lot or the Ordnance compound (R.10, 14). The truck was not returned to the motor pool until the following morning when it, or one like it, was picked up at the MP station (R. 2,16,17). The following morning accused was not present for reveille (R. 12).

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Major Charles M. Kennedy was at the Barnagore Jute Mill compound on the evening of 13 April 1944, at about 1900 hours. An American soldier was sleeping near a swimming pool within the compound. (R. 3). At about 150 feet north of the Jute Mill gate was a U.S. Government vehicle 6 x 6 with a 15 ft. boom in front of it. Major Kennedy assisted in moving the truck inside the compound (R. 3). It was Major Kennedy's opinion that the soldier was drunk. His recollection was that accused wore fatigue clothes (R. 4). (At this point hearsay evidence was admitted that the soldier was carried from beside the truck to the pool inside the compound (R. 3, 5).) In response to a call the MPs went to the Jute Mill and found the accused apparently asleep on the ground within the compound, a private place (R. 5, 6). His uniform was dirty (R. 5) and he smelled of whisky (R. 7). It was an MP's recollection he was in khakie (R. 8) and the company commander's belief he was in dirty sun-tans, that is, khakis (R. 8). In the truck cab was an empty bottle, which smelled of whisky, and a dispatch ticket badly smeared (R. 6, 8) by liquor (R. 6). The accused and the truck were taken to MP Headquarters (R. 7, 8), where he walked in "like a man half asleep and half drunk". (R. 8). The vehicle was returned to the motor pool from MP Headquarters the next morning (R. 20). The truck, a GMC 2½ ton, 6 x 6, is worth more than \$50.00 (R. 12) and without the boom is worth about \$3,252.00 (R. 17). The truck, No. 470534, picked up by the MPs and returned to the 73rd Ordnance Company might belong to that or some other organization (R. 17).

An extract copy of the Morning Report for 14 April 1944, introduced in evidence, reveals, "Pvt. Barnes fr dy to conf at APO 465 at 2315 hrs 13 Apr/44."

No evidence was offered on behalf of the accused and he, having been advised of his legal rights, elected to remain silent (R. 19).

4. Defense Counsel moved for a finding of not guilty as to specifications 2 and 3 of Charge II on the grounds of insufficient evidence to prove guilt. This was overruled. No such motion was offered as to the other specifications and the charges.

5. The evidence is undisputed and clear that on 13 April 1944, accused was under restriction to the limits of the camp and was required to be on duty at the open storage lot at Cossipore as boom truck operator from 0800 to 1730. About 1900 hours that evening, he was found lying on the ground in the compound of the Barnagore Jute Mill. He had no authority to be out after 1730. These facts are sufficient for the court's finding that he was guilty of the specification of Charge I and Charge I, and specifications of Charge II and Charge II. Though he is alleged to have been absent without leave from about 13 April 1944 to about 14 April 1944, and the proof shows he was confined at 9.30 AM, 13

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April 1944, such variance in the time element as alleged and proved is immaterial.

6. The court had before it substantial evidence to support its finding by exceptions and substitutions under specification 2 of Charge II. Although the evidence that accused was found outside the compound and carried within by the manager of the mill is hearsay, the uncontradicted evidence in the record is that accused was the driver of an unusual type of truck, a boom truck. Such a truck without a driver was found outside the compound at Alla Bazar. It was later moved within by Major Kennedy and others. The testimony also disclosed that accused and the truck he was operating had disappeared from his place of work and that neither he nor it had returned to the motor pool at the regular hour. This, together with the proof that accused was on the ground within the compound a short distance from the place where the truck was found, were circumstances sufficient to justify the court in inferring that accused had been in Alla Bazar and that the truck was the same one to which he had been assigned. Where the evidence is circumstantial the circumstances must not only be consistent with guilt, but inconsistent with innocence. (Dig. Ops. JAG 1912-40, Sec. 395(9); CM CBI # 65). The finding of a truck of an unusual nature and identical with the one used by accused that day warranted the inference that it was the same truck.

There was testimony that an empty bottle smelling of liquor was found inside the truck cab and that the accused was drunk. The evidence is conflicting as to whether accused was in uniform or in fatigue clothes. By its finding the court clearly believed that the testimony that accused was in uniform was the more convincing. From all the facts and circumstances, the court could properly infer that accused was drunk in uniform at Alla Bazar. It is not within the province of the Board of Review of The Judge Advocate General's Branch Office to weigh evidence and substituted its opinion for that of the court, as it is limited to a determination of whether there was substantial evidence to support the court's findings. (P. 6, Dig. Ops., JAGBO, CBI Jan. 43, May 44, p. 11 id.)

There is no direct evidence in the record that the truck found outside the compound of the Jute Mill was equipment of the 73rd Ordnance Company and the truck driven that day by accused. The truck was a 2½-ton GMC motor truck, USA No. 470534, and was equipped with a boom at the front of it. The vehicle was of an unusual nature. Its description corresponded to that of the truck driven by accused that day. This, together with the other circumstances, warranted the court in inferring that it was the truck which accused was assigned to drive that day. Identity may be established by proof of any peculiarity of, or mark upon, the thing

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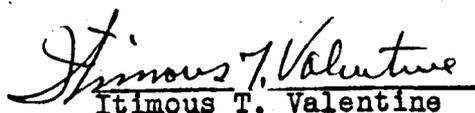
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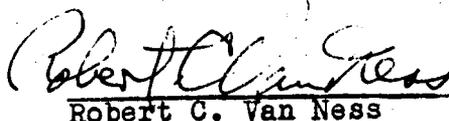
to be identified, serving to distinguish it from other things of the same sort. (36 C.J. 906; CM CBI # 65).

The fact that accused was to return from work at 1730, and the fact that at about hours 1900 he was found at the Jute Mill, and that he had no authority to use the vehicle after working hours away from the job he had been performing, were sufficient to justify a finding of wrongful taking and using. Where a servant receives goods from his master to use for a specific purpose in his service, he has the custody only, as distinguished from possession, and a wrongful taking and using, by appropriating, without consent, such property for his own personal use and benefit is an offense under AW 96.

7. The court was legally constituted. It had jurisdiction of the subject matter of the offense and of the person of the accused. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the findings of guilty and the sentence.


Grenville Beardsley, Judge Advocate


Itimous T. Valentine, Judge Advocate


Robert C. Van Ness, Judge Advocate



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APO 885
4 July 1944

Board of Review
CM CBI # 159

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

v.

Private Clifton Williams,
32186126, 3464th QM Truck
Company.

Private Ernest Braswell,
32918177, 455th QM Laundry
Co., Semi-Mobile,
and

Private Kenneth E. Campbell,
37523837, 455th QM Laundry
Co., Semi-Mobile

) SERVICES OF SUPPLY, USAF, CBI.

) Trial by GCM, convened at APO 689,
) c/o Postmaster, New York, N.Y.,
) 29 May 1944. As to Williams and
) Braswell, dishonorable discharge,
) total forfeitures and confinement
) at hard labor for life. U.S.
) Penitentiary nearest port of debar-
) kation; as to Campbell: D.D.,
) T.F. and C.H.L. for ten years,
) U.S. Disciplinary Barracks nearest
) the port of debarkation.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review, and the Board submits this, its holding, to the Acting Assistant Judge Advocate General's Branch Office for China, Burma and India.

2. The three accused were tried on the following charges and specifications:

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

Specification: In that Private Clifton (NMI) Williams, 2464th Quartermaster Truck Company, 45th Quartermaster Battalion Mobile, Private Ernest (NMI) Braswell, and Private Kenneth E. Campbell, both of the 455th Quartermaster Laundry Company, Semi-Mobile, acting jointly, and in pursuance of a common intent, did, at Alubri # 2, Assam, on or about 28 February 1944, forcibly and feloniously, against her will, have carnal knowledge of Ranga Devi, Indian woman.

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

Specification 1: In that Private Clifton (NMI) Williams, 3464th Quartermaster Truck Company, 45th Quartermaster Battalion Mobile, Private Ernest (NMI) Braswell, and Private Kenneth E. Campbell, both of the 455th Quartermaster

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Laundry Company, Semi-Mobile, acting jointly, and in pursuance of a common intent, did, at Alubri # 2, Assam, on or about 28 February 1944, with intent to commit a felony, viz: rape, commit an assault upon Ranga Devi, Indian woman, by willfully and feloniously attacking the said Ranga Devi while on a bamboo, charpoy type, bed.

Specification 2: In that Private Clifton (NMI) Williams, 3464th Quartermaster Truck Company, 45th Quartermaster Battalion Mobile, Private Ernest (NMI) Braswell, and Private Kenneth E. Campbell, both of the 455th Quartermaster Laundry Company, Semi-Mobile, acting jointly, and in pursuance of a common intent, did, at Alubri #2, Assam, on or about 28 February 1944, with intent to do him bodily harm commit an assault upon Sahadeo Nunia, by willfully and feloniously shooting at the said Sahadeo Nunia with a .30 Cal. carbine, a dangerous weapon.

Specification 3: In that Private Clifton (NMI) Williams, 3464th Quartermaster Truck Company, 45th Quartermaster Battalion Mobile, Private Ernest (NMI) Braswell and Private Kenneth E. Campbell, both of the 455th Quartermaster Laundry Company, Semi-Mobile, acting jointly and in pursuance of a common intent, did, at Alubri #2, Assam, on or about 28 February 1944, unlawfully enter the dwelling of Nagendra Chandra Dey, with intent to commit a criminal offense, viz: rape, therein.

Each of the accused pleaded not guilty to all the charges and specifications. The court found each accused guilty of all the charges and specifications and sentenced each accused to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence as to each accused, but as to Private Campbell the period of confinement was reduced to 10 years. The order of execution was withheld pursuant to AW 50 $\frac{1}{2}$, and the record of trial was forwarded to The Judge Advocate General's Branch Office for China, Burma and India. The U.S. Penitentiary nearest the port of debarkation in the United States was designated as the place of confinement of Private Williams and Braswell, and the U.S. Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement of Private Campbell.

3. The three accused, who hereinafter will be designated respectively by their last names, after inspection on the morning of February 28, 1944, decided to go hunting in the jungle. Williams carried a rifle, model 1903 and Campbell and Braswell carried carbines. After walking about an hour they came to a small village, Alubri #2, Assam. A map of the village is attached

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to the record as Pros. Ex. 2. From the testimony of the witnesses for the prosecution, it appears that they stopped at the home of Gobin Chandra Gogi, where Williams pointed a rifle at Gogi and demanded that he be given "bibi". "Bibi" is a Bengali word, which literally translated means "wife". In present day soldiers' slang in India it has come to have a considerably broader connotation. Gogi drew a knife and indicated that if there was trouble he would "cut them into pieces". Accused left and went in the direction of the house of Nagendra Chandra Dey (R. 28). About noon the three accused appeared at Nagendra Chandra Dey's home. In addition to Nagendra in this house there also lived Gonesh Chandra Dey (R. 32), Boloram Dey (R. 36) and Ranga Devi, a widow about 30 years of age. Ranga Devi was alone in the house at that time. Gonesh Chandra Dey and Nagendra Chandra Dey were bathing in the nearby river (R. 29), when a boy, Boloram Dey, came and said that three Negro soldiers had come to the village (R. 29). Gonesh and Nagendra went from the river to the house. As they approached it, a soldier pointed a rifle at them. Then the three accused took them into the court yard, where one of the soldiers guarded them with a rifle. Another soldier entered the house after pushing in the door, which was fastened with rope. The third soldier stood at the door. While the soldier was in the house, Ranga Devi was heard to cry: "Mother, mother, I am dying". Other villagers came to the scene. The soldier guarding Gonesh and Nagendra opened fire on them, and these other villagers came no closer, but watched from the bushes. After about an half hour, the first soldier came out and stood at the door while another soldier went into the house, when he remained about 20 minutes. When he came out, all three soldiers went away.

4. Gonesh Chandra Dey identified Williams and Campbell as two of the soldiers. He testified that Williams was the first soldier to enter the house and that he stayed inside about half an hour. He identified a Herringbone Twill Fatigue uniform as the color of the uniform that Williams was wearing on the day in question and stated that he wore an iron helmet (R. 31) and indicated a helmet liner as the type of headgear (R. 32).

5. Boloram Dey, a boy about 10 or 11 years old (R. 35), when examined on his voir dire, stated that he knew the difference between telling the truth and not telling the truth and that he would be punished for not telling the truth. He was then sworn as a witness. He testified that about noon, 28 February 1944, three colored soldiers appeared at the house where he lived in Alubri #2. Nagendra Chandra Dey and Gonesh Chandra Dey were bathing in the river. Boloram ran to inform them that three colored soldiers "are coming to our house" (R. 36). Nagendra and Gonesh came to the house "the front way". A soldier pointed a gun at Nagendra. One of the soldiers "guarded as in the court yard and another soldier entered into the house by tearing the

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door", Nagendra sought to follow, but was pushed away. While one soldier was in the house another stood in front of the door and the third guarded "us" in the court yard. After a time the first soldier came out and the second who had stood in front of the door entered the house (R. 37). When he came out all three talked together "something to us but we can't follow them but they showed like this", folding his hands in front of his face and bowing his head. Then they went away. Witness identified Williams as the soldier who entered the house by tearing the rope. While he was in the house Boloram heard Ranga Devi crying: "Mother, mother, I am dying".

6. Kartrick Chandra Dey on 28 February 1944 heard a boy, Boloram Dey, saying that Negro soldiers had come to his house (R. 32). He closed the door of his house and went out the back, where he saw Boloram and Nagendra Chandra Dey come from the river. One soldier "guarded us" in one place in the court yard, another soldier entered the house, and a soldier stood in front of the door. When the soldier entered the house Ranga Devi, who was inside, was crying. Other villagers heard the cries and came. The soldier who was guarding the three in the court yard fired at the villagers, who fled. When the soldiers went away Ranga Devi was unconscious. Kartrick and Nagendra poured water on her head and she revived. They took her in a boat to the house of the Inspector in Margherita (R. 33). Kartrick identified Williams as the soldier who tore away the rope fastening and entered the house (R. 34). He stayed inside about half an hour. He identified Campbell as the soldier who went in after Williams came out and Braswell as the soldier who stayed outside and fired the weapon.

7. Nagendra Chandra Dey testified that he was bathing with Gonesh Chandra Dey when Boloram Dey told them that three colored soldiers had come to their house and that when he and Gonesh approached the house one of the soldiers prevented them from going any further by pointing a rifle at them (R. 21). One soldier then entered the house, where he remained about one half hour. When he came out another soldier entered and stayed in the house about 20 minutes. After the three soldiers departed, he entered the house and found Ranga Devi naked and unconscious, covered with a quilt. While the first soldier was in the house he heard Ranga Devi crying: "Mother, mother, I am dying" (R. 42). When Ranga Devi became conscious they took her to the Inspector's house and then to Digboi. At Digboi she was given a physical examination by the lady doctor the following morning at the police station. Nagendra identified Williams as the soldier who first entered the house but was unable to identify the other two participants (R. 43).

8. Ranga Devi testified that about noon on 28 February 1944 three colored soldiers came to her home and one of them entered it by tearing the fastening which secured the door; that she tried to protect herself with a piece of wood which the soldier

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took from her; that she tried to escape and failed. The soldier forcibly removed her cloth and carried her to the charpoy (native string bed) and ravished her, with the result that she suffered such pain that she became unconscious. After she regained consciousness Nagendra took her to the Inspector's house and then to Digboi where she was given a physical examination by a lady there. When asked to identify the soldier who had assaulted her, the witness identified the colored military policeman who was guarding the accused in the court room. She then testified that at the Ledo stockade on 7 March 1944 she had identified the soldier who attacked her. She was then asked to point out the soldier she had identified at Ledo. She again pointed to the military policeman.

9. Dr. N. Chaliha, a licensed physician (R. 9) specializing in maternity cases and in gynecology, who is in charge of the Maternity Hospital at Digboi, was called to examine Ranga Devi at the Digboi Police Station (R. 10) on the morning of 29 February. Ranga Devi was very much depressed and was weeping. Dr. Chaliha, found wounds in her private parts, which in her opinion were due to forcible intercourse. Witness did not think these wounds could have been caused by a fall or by force other than through intercourse. The wounds were superficial and deep (R. 11). Dr. Chaliha's written report of the examination, which she had submitted to the Indian police, was admitted in evidence (Pros. Ex. 1) when defense counsel stated: "No objection" (R.10). In this report (Pros. Ex. 1) the wounds are described as, (1) A small hemorrhagic spot $\frac{1}{4}$ " x $\frac{1}{4}$ " on the inner side of the right labia minora, which was very tender; (2) A lacerated wound $\frac{1}{4}$ " x $\frac{1}{8}$ " on the inner side of the left labia minora and (3) anterior lip of the cervix oedemataus, congested and very tender. The report stated that the wounds were about 24 hours old, and were "definitely caused by forcible intercourse".

10. When the accused left the house of Nagendra Chandra Dey, Sahadeo Nunia, who with other villagers had gone to the vicinity upon hearing of trouble, hid in the bushes after one of the soldiers had opened fire. They watched the house and when the three soldiers departed, followed them. They informed the sentry at Namdang and they were sent to the office, where they again told what had happened (R. 39). Witness identified the three accused as the three soldiers at the house of Nagendra, and testified that Campbell was the soldier who stood guard outside and fired the rifle (R. 40).

11. Tech. Sgt. Richard A. Walmsley was on duty at the 20th General Hospital on 28 February 1944 when an Indian, who appeared to be greatly excited (R. 11) ran into his office and stated, through an interpreter, that some American soldiers had attacked his wife; that he had followed them and was looking for an American guard to apprehend them. Just then three soldiers

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entered the hospital area. The Indian became much excited and pointed at them (R. 12), and through the interpreter said that these were the three who had entered his house and attacked his wife. Sgt. Walmsley stopped the three soldiers and turned them over to the guard. At the trial he identified Williams as one of the three. The three soldiers protested over being detained, saying that they had been hunting (R. 13).

12. Pvt. Hiram Butler was on guard duty at the 20th General Hospital on 28th February 1944 when a native came up who could not speak much English and said that his "bibi" had been attacked. He told him to go down to the guard house. Sgt. Walmsley and witness picked up three colored soldiers, whom the native said were the three. At the trial witness thought that the accused were the same three soldiers but was not certain because they were dressed differently (R. 15). Witness asked the three when he stopped them "if they knew anything about this man's woman" (R. 13). They answered in the negative. Witness called the sergeant of the guard who came with the officer of the day.

13. Sgt. Jack R. Cooper was sergeant of the guard in the 20th General Hospital area on the 28 February 1944 and was called to post No. 5. On the way he met the officer of the day who went to that post with him. There a native claimed that three soldiers, who were being detained by the guard, had broken into his house and bothered his wife. The officer of the day called the Provost Marshal and the MP picked the three soldiers up. Witness identified the three accused as the soldiers in question. They told him that they had been hunting monkeys. At the guard house their rifles were inspected. They had been fired but were then empty. The three accused claimed that they had been nowhere near the natives (R. 17).

14. In response to a call from the Provost Marshal's office, Tech. Sgt. Eugene R. Jernigan went to the 20th General Hospital and picked up three colored soldiers whom he took to his office. At the time of their arrest they were carrying weapons which had been fired (R. 18).

15. Tech. Sgt. Robert W. Davis, Criminal Investigation Division, testified that on 28 February 1944 he was detained to make an investigation of the alleged raping of Ranga Devi. After making statements, various Indian witnesses at Alubri were brought to the Base Stockade. The three accused were mingled with other Negro soldiers (R. 19) and given a chance to change their clothing and to shift places in the line up. Several of the Indians identified all three accused. The woman and Nagendra Chandra Dey each identified only one. Six soldiers were lined up at a time, the three accused and three others. The three others were removed from the line up and another three placed in the line up. Approximately five Indians identified one or more

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of the accused. Gobin Chandra Gogi, Rakhal Chandra Das and Kartrick Chandra Dey identified all three. The woman identified only one. Her uncle identified Clifton Williams. A boy identified Campbell as the one who carried a gurkha knife. He picked out a knife from among other knives at the stockade. Witness identified a sketch map of the scene of the crime, which was offered in evidence by the prosecution, without objection by the defense (R. 20), as Pros. Ex. 2. Sgt. Davis further testified that on 7 March 1944 he took Ranga Devi to the stockade at Ledo for the purpose of identifying the soldier as having attacked her and that she there identified Williams as the soldier who had assaulted her (R. 48). Davis and 1st Lt. Russelle P. Tomey, Assistant Adjutant, 502nd Military Police Battalion, identified a statement (Pros. Ex. 3), which was signed and sworn to by Campbell before Lt. Tomey, after he had been warned by the sergeant of his rights under AW 24. Davis testified that no promises of any kind were made to induce the statement. Without objection by the defense, the statement was admitted in evidence (R. 50). The prosecution called the attention of the court to MCM 1928, par. 114c, limiting the use of a confession of one conspirator and providing that it cannot be considered as evidence against other co-conspirators on trial, and stated that the exhibit could be deemed to be evidence against Campbell only and not against Williams and Braswell (R. 51-52). In this statement (Pros. Ex. 3) Campbell stated that about 11:30 on 28 February 1944 he with Williams and Braswell went hunting in the jungle. Williams carried a 1903 rifle and Campbell and Braswell each carried carbines. They came to a small village where Williams and Braswell entered an Indian hut. Campbell stood guard over the group of Indians outside. Braswell came out and stood at the door while Williams remained inside about 20 minutes; then Williams came out and Braswell went in, where he remained about 15 minutes. Campbell did not enter the hut and did not see the woman, but could hear a woman inside moaning but could not distinguish what she was saying. After they left the vicinity they hunted for awhile. They were questioned by the guard at the 20th General Hospital and were then taken to the Provost Marshal's office for questioning and from there to the Base Stockade.

16. The only defense witness was Campbell, who after being fully informed of his rights, elected to take the stand and be sworn. He testified that "before chow time" on 28 February 1944 and after rifle inspection, Williams, Braswell and he took their rifles and went up the river and shot at monkeys; that on the way up the river they stopped at different residences, including that of Nagendra Chandra Dey, where he stayed outside on guard (R. 53) and the other two went inside. He did not know what went on inside. Nothing that happened was discussed by them in advance. He testified that he remained outside to keep "the rest from coming in". This was about 11:30 in the morning (R. 54). Williams was in the house alone for a time and then Braswell went in.

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After Braswell came out they all left. Witness fired his rifle in order to prevent the Indians from interfering (R. 56).

17. The foregoing evidence tends strongly to establish that Ranga Devi was raped by someone on 28 February 1944. The injuries noted by Dr. Chaliha when the physical examination was made on the following day were of such a nature as to warrant the inference that the bruises were suffered as the result of subjection to involuntary and forcible sexual intercourse. The nature of the injuries was such as to render it highly unlikely that she could have been bruised in such fashion in any other way. The evidence taken altogether is such as to lead reasonably and logically to the conclusion that these injuries must have been inflicted upon her by one or more of the three soldiers who took possession of her home on 28 February 1944, and who by armed force prevented the members of her family and other villagers from entering the house in answer to her screams. One of these soldiers was alone with her for about 30 minutes and another for about 20 minutes. After the three soldiers left, she was found to be naked and unconscious.

18. If the three accused were the three soldiers who took possession of Ranga Devi's home on 28 February 1944, there would seem to be no reason to doubt that the three accused are guilty of the rape charged in the specification of Charge I. The testimony of the accused Campbell leaves no doubt, if prior to his testimony there could have been any doubt, that the three accused were the three soldiers who took possession of the house in Alubri #2 on 28 February 1944. Under the facts and circumstances in evidence, the inability of Ranga Devi to identify the accused upon the trial seems to be of slight importance.

19. Rape is an offense of such a nature as to necessitate individual action. A joint rape is physically impossible. However, it is well settled that all persons present at the commission of a rape who aid and abet in the perpetration of the crime are guilty as principals and punishable equally with the actual perpetrator. Where two persons individually commit the offense upon a woman, without aiding, abetting or assisting each other, they commit separate offenses, however brief the interval in time between the several rapes, and cannot be convicted as principals of the same crime, because each is guilty of a separate felony (People v. Ritchie, 317 Ill. 551), but where a defendant is present and aids, abets and assists another in overcoming the resistance of a woman, he as an aider and abettor is guilty of rape, and the fact that he did not have intercourse with the victim is immaterial. (People v. De Stefano, Ill. 634). When three men hold up and rob a man or woman, and two of them rape the woman while the third prevents the man from interfering by holding a gun against him, all three are guilty of rape

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(People v. Macchiaroli, 54 Cal. App. 665, 202. Pac. 474). The applicable rule is well stated in 44 Am. Jur. 921 in the following language:

"At common law, rape was a felony, and any person who was present, aiding, abetting and assisting a man to commit the offense, whether man or woman, was a principal in the second degree, or if not present in a legal sense, might be guilty as an accessory before the fact. To be an aider and abettor, it is immaterial that the person is disqualified from being the principal actor by reason of age, sex, condition or class. A woman, a boy under the age of physical ability, or the husband of the female victim, who aids, abets, encourages or assists in the commission of the crime may be convicted as a principal in the second degree, or as an accessory before the fact, under the common law, or as a principal under statutes existing in many states, where the distinction between principals and accessories before or at the fact in felony has been eliminated. Under such statutes, all who aid or abet the commission of a rape, whether actually present or not, may be charged as principals, regardless of whether such persons can commit the crime personally. However, to render a person guilty of a crime as principal, there must be presence or participation, or the doing of some act, at the time of the commission of the crime, in furtherance of the common design."

The conviction of six men of rape was sustained in CM 236801 (Bull. J.A.G., August 1943, p. 310). In three cases reviewed in the Branch Office of The Judge Advocate General with the North African Theater of Operations it was held that "although two or more can not jointly commit a single rape * * * this rule does not prevent the joinder of persons aiding and abetting one another in the commission of the crime", and that such aiders and abettors may be charged as principals (NATO 385, NATO 646, NATO 779).

20. We have given careful consideration to the fact that it is uncertain whether Williams or Braswell was the actual ravisher of Ranga Devi. Both might have ravished her, while it is certain that Campbell did not have carnal knowledge of the unfortunate woman. Both Williams and Braswell were alone in the house with the woman for periods in excess of 15 minutes. It seems certain that she was raped by one or the other, but since she testified that only one soldier had intercourse with her and as she was unable to identify him, it has not been proven which of the two actually effected the penetration which inflic-

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ted the vaginal wounds found within her labia and vulva the next day. In *Spies v. People*, 122 Ill. 1, the Supreme Court of Illinois had before it the record of trial in a case in which the evidence indicated that a policeman was killed by some person who had been counselled and advised by the defendants to engage in the indiscriminate slaughter of police officers. The evidence indicated that it was possible and indeed likely that one of the defendants on trial was the actual slayer of Degan, but the proof as to this was inconclusive. The evidence tended to prove that all of the defendants had combined together with the intent to commit murder and had aided and abetted one another and others whose identities were unknown in the various steps which led to the homicide. The Supreme Court of Illinois held that it was immaterial whether one of the defendants on trial, or some other person whose identity was unknown, had physically inflicted the mortal wound, since it was clear from the evidence that some person acting in concert with the defendants must have been the murderer and that the defendants had aided and abetted the actual murderer. The convictions, carrying with them sentences of death, were affirmed. Since that decision in 1887, based upon principles of the common law established by numerous precedents cited therein, the principle that an aider and abettor of an unidentified principal may be convicted of murder, has been followed by other courts of last resort. These authorities are summarized in 29 C.J. 1072 in the following language:

"All who join in the common design to kill, whether in a sudden emergency, or pursuant to a conspiracy, are liable for the acts of each of their accomplices in furtherance thereof. This liability attaches whether the acts were specifically contemplated or not, and although defendant did not know when or how the homicide was to be committed, or what particular individual was to do the killing, or, although defendant was under the impression that the person whose death he was endeavoring to bring about was a different individual from the one actually killed. The accomplices are so liable, although the conspirator who actually committed the homicide can not be identified."

We see no difference in principle whether the object of an unlawful combination be rape or murder, and we think that all who joined in the common design disclosed by the evidence in this record, whether on a sudden impulse or pursuant to a conspiracy, are liable for the acts of one another in furtherance of the object thereof. The Court-Martial was justified in its conclusion that all the participants in the common course of conduct which culminated in the raping of Ranga Devi were guilty of rape, even though it is uncertain which of the parties on trial actually

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had carnal knowledge of the victim, since the conclusion that either Williams or Braswell, or both, had engaged in sexual intercourse with her forcibly and against her will is amply justified by the facts and circumstances in evidence. We think the allegation contained in each specification that the accused did jointly and in pursuance of a common intent commit the offense described in such specification, is equivalent to charging that the accused committed such offense pursuant to a conspiracy (CBI 114). In that case we held it was no bar to the existence of a conspiracy, that its only object was to be effected by only one of the conspirators, and that the acts and declarations of one in furtherance of the common design of himself and another were the acts and declarations of both. It is not necessary to constitute a conspiracy that two or more persons meet together and enter into an explicit or formal agreement, or that they should directly by words state what the unlawful scheme was to be and the details and plan of means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. Where an unlawful end is sought to be effected, and two or more persons actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of such persons becomes a member of a conspiracy. (U.S. v. Cassidy, 67 Fed. 698, 702). No formal agreement between the parties to do the act charged is necessary. It is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement is not manifested by any formal words. (Marrash v. U.S. 168 Fed. 225; Gibson v. State, 89 Ala. 121, 8 So. 98, 18 Am. St. R. 96; People v. Strauch, 240 Ill. 60). The least degree of consent or collusion between the parties to an illegal transaction makes the act of one of them the act of each other. (State v. Anderson, 92 N.C. 732, 747; Wilson v. State, 5 Okl. Cr. 649, 115 Pac. 819). A mutual implied understanding is sufficient. (U.S. v. Lancaster, 44 Fed. 896, 10, 833). If two persons pursue by their acts the same object, one performing one part of an act and another another part of the act so as to complete it with a view to attaining the object which they were pursuing, this will be sufficient to constitute a conspiracy (Ochs v. People, 124 Ill. 399; Lawrence v. State, 103 Md. 17, 22). Previous discussion is unnecessary, and it is not regarded as essential that each conspirator take part in every act or that he knew the exact part to be performed by his confederate. (Spies v. People, 122 Ill. 1). The circumstances in evidence, that Williams pointed the rifle at Gobin Chandra Gogi and demanded "bibi", and the other accused continued in his company, that the three proceeded along the river, stopping at other houses, finally reaching the house of Nagendra Chandra Dey, that Williams broke the rope fastening of the door and forced his way into the

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house where Ranga Devi was alone, that Braswell stood guard at the door and Campbell stood at the gate to the compound, that Campbell fired his rifle at the villagers who sought to rescue Ranga Devi when summoned by her screams, point very strongly to the conclusion that these accused were pursuing an unlawful end, one doing some acts and the others other acts in order to effect the object of a combination which throughout appears to have been the obtaining of sexual gratification for one or more of the group, and to resort to such force and intimidation as might be necessary to secure such gratification.

21. That which has been said in the preceding paragraphs as to the collective responsibility of the three accused for the offense charged in the specification under Charge I alleging rape, applies with equal force to their collective responsibility for the offenses charged in specifications 2 and 3 under Charge II, alleging respectively the offenses of assault with a dangerous weapon upon Sahadeo Nunia with intent to do him bodily harm, and housebreaking, by the entry into the dwelling of Nagendra Chandra Dey with intent to commit a criminal offense, to wit; rape therein. Since all three were acting jointly and in pursuance of a common design, the act of Campbell in shooting at Nunia when he sought to go to the rescue of Ranga Devi was the unlawful act of all three, and in like manner the act of Williams in forcibly entering the dwelling of Nagendra Chandra Dey was the unlawful act of all.

22. This record of trial discloses a number of irregularities of a procedural nature and error in the admission of evidence. Of these, the most serious we think was the action of the court in receiving testimony from the witnesses Davis (R.19), Gonesh Chandra Dey (R. 29) and Poziruddin Ahmed (R. 48) that villagers other than Ranga Devi had at the stockade in Ledo on 7 March 1944, picked one or more, in some instances all three, of the accused from out of a group of six men, and identified them as participants in the events at Alubri #2 on 28 February 1944. While it is for a court to determine the probative value of the testimony of the witnesses, their credibility, as a general rule, should not be bolstered up by the testimony of others that they had previously identified the accused. There is not here presented the situation that would be before us if the record disclosed that on March 7 these witnesses had accused Williams, Braswell and Campbell of the rape and the other offenses here under consideration, and that the accused hearing such accusations remained silent. Had such been the case, the conduct of the accused would have amounted to implied confessions of guilt and testimony as to their silence in the face of any such accusations of course would have been admissible. There is nothing in the record, however, to indicate that the accused or any of them were actually orally charged by any of the witnesses on March 7 with the commission of the offenses which form the basis of the

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specifications and the charges. The evidence merely is that the accused were brought out in a group of six soldiers, and that out of the group the Indians in question identified Williams, Braswell and Campbell as those who engaged in the unlawful conduct at Alubri #2 on 28 February 1944. The general rule is that such evidence is inadmissible. It is stated in Underhill Criminal Evidence, at page 127:

"One who is present when the accused was brought before the complaining party for identification can not testify that the complainant identified the accused, as that is a conclusion of fact, but the witness may testify to whatever the complainant said to the accused in his presence or he may testify that the complainant was silent when he was asked if the accused was his assailant."

The authorities are reviewed in 44 Am. Jur. 945, and the general rule is thus stated:

"A practice that is quite common with police officials, in cases where it is not certain whether the person arrested is the one who committed the crime, is to have the prosecutrix point out from a number of men the particular one who committed the crime. While such practice is no doubt of material benefit to the prosecution, the testimony of the police officers or others present as to the identification, commonly called 'extrajudicial identification,' is generally held to be inadmissible at the trial, as original evidence to prove the crime. Some courts admit it merely in corroboration of the testimony of the prosecutrix."

None of this testimony in relation to the identifications made by these Indian witnesses at Ledo on 7 March 1944 was objected to. Ranga Devi, the victim of the alleged rape, was a witness whom the circumstances of the case made indispensable, and hence under MCM 1928, par 124b, when the trial judge advocate was surprised by her erroneous identification of a military policeman, who was in court to guard the accused, and by her inability to identify Williams (R. 45), it was proper for the prosecution to inquire whether she had made statements out of court inconsistent with such testimony, and to call to her attention the time, place and circumstances of her former statement, and, upon her inability to remember, to offer proof that she had made such previous identification. The trial judge advocate was entitled to rely upon this witness' statement made in the course of the official investigation, and he was not required to express his surprise in formal language (CM ETO 438). Although we think it would have been the better practice to have excluded the testi-

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mony in question, except insofar as it related to the identification of Williams by Ranga Devi, nevertheless we are convinced that the evidence of guilt disclosed by this record is so overwhelming that the accused could not have been prejudiced by the admission of this testimony. This testimony could not have affected the court in assessing the penalty. Moreover, the sentence adjudged by the court is the minimum authorized by AW 92.

23. The language of the affidavit to the charges is somewhat unusual in that the affiant avers that the specifications are true, but omits any reference to the charges. We think, however, that the omission is of no serious consequence. No point in respect thereto was made on behalf of the accused before the trial and any deficiency in the affidavit thus was waived.

24. The following is recited at page 31 of the record:

"Defense: At this time I would like to introduce into court a signed statement that this witness made under oath at the day of the investigation--."

The record is silent as to whether the court made any ruling in respect to this request. The statement of defense counsel is apparently incomplete. It may be that defense counsel changed his mind. In any event, in view of the overwhelming evidence of guilt, we do not think that the substantial rights of the accused were injuriously affected. ~

25. At the close of the case on behalf of the prosecution and after it had rested, the defense moved for a continuance, in order as it was said, to secure a witness by whom it was hoped to prove that the accused were at a different place at the time of the events narrated in the testimony of the witnesses on behalf of the prosecution (R. 52). The motion for continuance was denied. Accused Campbell was then placed on the stand and stated positively under oath that he and the other two accused were at Alubri #2 at the time in question (R. 52-57). In no important particular, is his testimony at variance with that of the numerous Indian witnesses whose testimony is summarized in this opinion. In view of Campbell's testimony, the only evidence offered on behalf of the accused, it would seem to be clear that no alibi could have been established for the accused, and that the denial of the motion for continuance could not have been prejudicial. MCM 1928, par. 52c states as to continuance:

"The proper time for making an application to the court is after the accused is arraigned and before he pleads. The court may defer until after arraignment action on an application made before arraignment, and

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should so defer action whenever it appears that the granting of a continuance before arraignment may involve a risk of the trial of an offense being barred by the statute of limitations.

"Reasonable cause for the application must be alleged. For instance, when a continuance is desired because of the absence of a witness, the application should show that the witness is material, that due diligence has been used to procure his testimony or attendance, that the party applying for the continuance has reasonable ground to believe that he will be able to procure such testimony or attendance within the period stated in the application, the facts which he expects to be able to prove by such witness, and that he can not safely proceed with the trial without such witness."

In view of the foregoing provisions of the MCM 1928, it would appear that the application for continuance was properly denied.

26. The findings appear to be irregular in form. They are in the following language:

"The court was closed, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, the court finds each of the accused:

Of all Specifications and Charges: Guilty." (R. 58)

The record recites the following as to the sentences:

"The court was closed, and upon secret written ballot, three-fourths of the members present at the time the vote was taken concurring, sentences each of the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of each of their natural lives." (R. 60)

In a joint trial separate findings are required. The rule is stated by Winthrop in his Military Law and Precedents at page 376, as follows:

"Where the charge is a joint one, there must similarly be separate and distinct votings and findings as to each of the joint accused."

There should, likewise, have been separate sentences. The same

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authority lays it down (Winthrop, Military Law and Precedents, 391) that:

"When two or more persons have been tried on joint charges and convicted, their sentences must be several, although the punishments awarded be the same. If the sentence be discretionary with the court, a separate voting or concurrence should therefore be had as to the sentence of each of the accused."

The question therefore arises whether the record should be returned to the court for proceedings in revision. This would appear to be unnecessary, in view of the holdings digested in Section 402 (6) Dig. Ops. JAG, 1912-40:

"Dishonorable discharge; joint offenders. -- On a joint trial a sentence reading 'The court sentences the accused prisoners to be dishonorably discharged, etc.' where the accused were convicted of the same offenses, would be legal and operative, though irregular and exceptional as to form. C.M. 121636 (1918).

On a joint trial the court sentences 'each of the accused to be dishonorably discharged,' etc. 'Where several persons are charged and tried together for the same offenses, and all, or more than one, are convicted, separate sentences should be adjudged to each, precisely as if they had been separately tried.' (Winthrop, Military Law and Precedents, reprint, p. 404). The sentence is irregular, but the irregularity does not prejudice the substantial rights of the accused. C.M. 122615 (1918)."

27. The offense charged in Specification 1 of Charge II, assault with intent to commit rape, is a lesser offense included in that of rape which is alleged in the specification of Charge I. Since, however, the sentence is authorized and is the least permissible upon the conviction of Charge I and its specification, we think the accused were not prejudiced by this multiplication of charges. Corrective action would appear to be unnecessary.

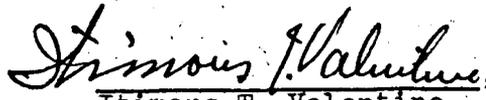
28. The court was legally constituted. It had jurisdiction of the subject matter of the offenses charged and of the persons of the accused. No errors which injuriously affected the substantial rights of the accused were committed upon the

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trial. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the sentence.

 Judge Advocate
Grenville Bearasley

 Judge Advocate
Itimous T. Valentine

 Judge Advocate
Robert C. Van Ness



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Board of Review
CM CBI 163

New Delhi, India,
29 August 1944.

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

v.

INDIA-CHINA WING, ATC

Trial on 25 May 1944 by GCM
convened at Calcutta, India.
Dismissal, total forfeitures,
confinement at hard labor for
ten years. No place of con-
finement designated.

2nd Lt. William E. Anderson,
O-737515, Station 19, India-
China Wing, Air Transport
Command.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the above named officer has been examined by the Board of Review, which submits this its holding to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

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

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

Specification: In that 2nd Lt. William Earl Anderson, Station 19, ICWATC, did at Theater Road and Chowringhee in a place known as "The Flyers Club" in Calcutta, India, on or about 2 May 1944, at about 0200 hours, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Flight Officer Edmond Lopez, a human being, by shooting him with a 32 Caliber Colt automatic pistol.

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

Specification: In that 2nd Lt. William Earl Anderson, Station 19, ICWATC, was, between the hours of 1201 and 0200 2 May 1944 drunk and disorderly in a public place to-wit, in and near "The Flyers Club", Theater Road and Chowringhee, Calcutta, India.

3. Accused pleaded not guilty to Charge I, and its specification. To Charge II, and its specification he pleaded guilty of being "Drunk in a public place to the prejudice of good order and military discipline" in violation of the 96th Article of War. The court found him guilty under Charge I and its specification,

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by exceptions, of manslaughter in violation of the 93rd Article of War, and guilty of Charge II and its specification.

4. Accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for twenty (20) years.

5. The reviewing authority approved so much only of the sentence as provides for dismissal, total forfeitures and confinement at hard labor for fifteen (15) years, and forwarded the record of trial to the Commanding General, United States Army Forces in China, Burma and India, for action under the 48th Article of War. The sentence, as approved by the reviewing authority, was confirmed but the period of confinement was reduced to ten (10) years. Pursuant to AW 50½, the order directing the execution of the sentence was withheld and the record of trial was forwarded to this office.

6. Early in the morning of 2 May 1944, Flight Officer Edmond Lopez was fatally wounded by the discharge of an automatic pistol, with which accused had menaced Lopez and others, during a struggle between accused and 1st Lt. James A. McPherson for possession of the weapon. Lopez died about hours 0430 of the same day in the 112th Station Hospital.

7. The shooting took place in the Flyers Club in Calcutta. Such club was a private, unofficial enterprise, of which one B. N. Bhattacharjee was secretary and treasurer. He furnished the money to set it up (R.11). Mrs. Lydia Such, was receptionist. Lt. McPherson roomed in her apartment. So far as the record discloses, their relationship was that of landlord and tenant (R.20). Lt. McPherson was one of the directors of the club (R.11), which was fitted with a bar, tables, chairs, piano and lounge (R.7-R.8).

8. Accused lived near the club, which was on the route between his quarters and the Grand Hotel. In the same apartment with accused, 2nd Lt. Ernest W. Alexander had separate quarters. About hours 2000, on 1 May, accused set out for the Grand Hotel, where he expected to sell a pistol, which he carried in his pocket under his bush jacket (Pros. Ex. L, Accused's Statement). On the way, he stopped in the Flyers Club. Accused thought it would be "a good chance to tie one on", as he was not flying the next day (Pros. Ex. L). He became quite intoxicated (R.48, R.58, R.66, R.70, R.86). The club was being well patronized, and everyone present became "quite happy", as the witness Such put it (R.70). While accused was there, about 20 other persons, mostly American officers and some women, were in and out of the club (R.42). From about hours 2100 until the time of the shooting, Flight Officer Lopez was among those drinking and singing in the club (R.7, R.97).

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9. About hours 2330, Mrs. Such inquired whether any one desired more to drink. Accused stepped over to the bar where she served him two drinks. Previous to that time, there had been no conversation between them (R.45). Accused pinched her twice (R.44), as she somewhat unambiguously described it, "in the lower fleshy part of the back" (R.45). She told him to keep his hands to himself, and he pinched her again. She asked Lopez, with whom she had been talking, to move her stool. Lt. McPherson and Sgt. Thomas W. Turner came over to the bar. Turner wore the uniform of a 1st Lieutenant (R.129), which had been furnished him by Lt. McPherson (R.130). Mrs. Such and Lopez tangoed and sang together. Lt. Alexander came in and sat down with accused, who had ordered a sandwich (R.46). Lt. Alexander ordered a drink, which Mrs. Such served. Accused grabbed her arm and would not let her go (R.47). She asked Lt. Alexander to take accused out of the club, as there was no more liquor. It was then shortly after midnight. Lt. Alexander and accused left the club and went to Harrington Mansions, where they lived, in a rickshaw (R.85). There, Lt. Alexander persuaded accused to go to bed. Lt. Alexander went to his own bedroom (R.87), and supposed that accused had gone to his bedroom (R.88). In about 20 minutes, accused again appeared at the club (R.47), where Mrs. Such, Lt. McPherson, Lopez and Turner were singing together on a sofa. Mrs. Such exclaimed, "Oh, nuisance has come back again" (R.47). Accused walked around and stood behind her, grinning and sneering (R.48). He asked for liquor. She said that she could give him no more. He insisted that he knew the "boss of the place, Mr. Bhattacharjee" and wanted a drink. She told him that Bhattacharjee was not there and that he would have to leave. He asked, "You and who else are going to put me out?" She answered, "Me and the rest of the people here" (R.49). Accused responded that she was no good and was "a lying bitch" (R.49). She went to the rest room. When she came back, she heard Lopez say to accused, "Just because she was nice to you and gave you what you wanted, it didn't necessarily mean she was a whore." She became very angry (R.50). She could not remember what she said. Then accused leaned forward and Lopez hit him twice, knocking him down (R.51). When accused got up, Lopez pushed him out of the club. Three or four blows were struck (R.26) to accused's chest and face, who was "literally driven through the door" by the force of the punches (R.27). After lying for a time on the grass outside the club (Pros.Ex. G), accused got up and walked down the street (R.100), (Pros. Ex.G). He got in a rickshaw and rode around the block, and then went back to the club (Pros.Ex. L.)

10. About 15 to 30 minutes later (R.14), accused appeared in the club, brandishing a pistol in his right hand (R.15). His elbow was against his side, and his right forearm was extended parallel to the floor (R.30, R.149). Lt. McPherson saw the

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the pistol and exclaimed, "Don't be a fool. Drop that gun". (R.15, R.30). Accused asked Lt. McPherson whether he had struck him (R.145). When Lt. McPherson answered in the negative, accused declared, "I am going to shoot the man that did" (R.145). Lt. McPherson seized the muzzle of the pistol in his left hand (R.15, R.16), and Sgt. Turner grasped accused's arm (R.146, R.160). They struggled for possession of the weapon (R.145, R.146), pushing accused's buttocks against a desk (R.140). Accused said, "It isn't loaded (R.146). Don't pull the trigger". (R.18, R. 146). Turner released his grip of accused. Lt. McPherson changed hands on the pistol and at that moment, it was fired (R.15, R.33), the bullet passing through Lt. McPherson's right hand (R.19) and the chest (R.113) of Lopez who fell to the floor (R.150). Accused made no attempt to flee, and helped carry Lopez to an ambulance and from the ambulance into the station hospital, where he remained until Lopez died about hours 0430 (Pros.Ex.B), from the wound (Frs.Ex.C).

11. Accused did not take the stand as a witness. After being warned of his rights, he made a lengthy statement to Captain Robert S. Fuchs, CID; Provost Marshal's Regional Office. This statement was admitted in evidence (R.172), without objection.

12. There is little conflict in the evidence. The principal object of defense counsel apparently was to establish that accused was intoxicated and was carrying the pistol, which was his private property (Pros.Ex. L), in the expectation of selling it to a prospective purchaser, who was to have met him at the Grand Hotel. The finding that accused was guilty of manslaughter, an offense lesser than and included in the charge of murder, indicates that the court believed that the evidence supported defense counsel's theory, as to these points.

13. In his statement, accused asserted that the discharge of the pistol was accidental, and that he was warning those, who were attempting to take the weapon from him, to be careful, that it was loaded. He re-entered the club with the pistol drawn because he wanted to find out "what it was all about". "I felt very angry and I figured I would just scare them and make them apologize* **." (Pros. Ex. L).

14. As murder involves a specific intent, that is to say, malice, which is an essential element or ingredient of the offense, and since evidence of drunkenness, in such a case as this, is material to a determination whether the mental capacity of the accused to entertain such specific intent was affected by drinking (MCM 1928, par. 126c; CBI 71), it was within the

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court's province to find that the homicide was voluntary manslaughter, and not murder. The evidence supporting the court's conclusion on this point is substantial.

15. Accused's contention that the weapon was fired as a result of the struggle, and without any intention on his part to pull the trigger can avail him nothing. One may become guilty of voluntary manslaughter by the reckless use of a deadly weapon, when a slaying results. When with drawn pistol, accused re-entered the club, and pointed the weapon toward those present, he thereby committed an assault with a dangerous weapon, whether or not he then entertained a specific intent to injure anyone or was mentally capable of entertaining such specific intent. (CBI 49). Where one kills another by the wanton, reckless and grossly careless use of firearms, the offense has been held to be voluntary manslaughter, although he did not act maliciously and had no intention to kill (Ewing v. Commonwealth, 129 Ky. 237, 242, 111 S. W. 352). Where a defendant, while intoxicated, carelessly handled a loaded pistol, which was discharged in a struggle and thereby killed the person seeking to disarm him, the offense might be voluntary but not involuntary manslaughter (Selby v. Commonwealth, 25 Ky. L. 2209, 80 S.W. 221). The record of trial is legally sufficient to support the findings of guilty of manslaughter in violation of AW 93, under Charge I and its specification.

16. By his pleas to Charge II and its specification of guilty of the lesser included offense of drunkenness in a public place to the prejudice of good order and military discipline, accused admitted the fact of his intoxication, which fact was abundantly proven by the testimony. The repititious pinching of Mrs. Such's derere, and the reference to her in a public place as a "lying bitch", indicate that accused's drunkenness and disorderly conduct was such as to be unbecoming an officer and a gentleman, and violative of AW 95. The evidence supports the findings of guilty of Charge II and its specification.

17. Attached to the record of trial is a request for clemency submitted by defense counsel. Its contents have been noted. The term of confinement imposed by the sentence of the court was reduced by the reviewing authority, and was further reduced by the confirming authority.

18. Accused enlisted on March 19, 1942, and was commissioned a second lieutenant in the Air Corps on 6 February 1943. At the time of the commission of the offense, he was 22 years and 11 months old.

19. The court was legally constituted. The case was well presented by able counsel, both on behalf of the prosecution as well as on behalf of the accused. The trial was fair in

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every respect. No errors intervened to the prejudice of any substantial right of the accused. The sentence, as modified by the reviewing authority and as further modified by the confirming authority, is authorized for the offense of which accused was found guilty.

20. Voluntary manslaughter is recognized as an offense of a civil nature and is so punishable by penitentiary confinement by Sections 274 and 275 of the Criminal Code of the United States (18 U.S.C. 453,454). Confinement in a penitentiary is accordingly authorized by AW 42. Either the United States Correctional Institution or the United States Disciplinary Barracks, nearest the Port of Debarkation in the United States, should be designated by the confirming authority as the place of confinement.

21. The Board of Review is of the opinion and accordingly holds that the record of trial is legally sufficient to support the findings and the sentence, as modified by the reviewing authority, and as further modified and confirmed by the confirming authority.

Grenville Beardsley, Judge Advocate

Itimous T. Valentine, Judge Advocate

Robert C. Van Ness, Judge Advocate

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CM CBI # 163 (Anderson, William E.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USAF, CBI,
APO 885, c/o Postmaster, New York, N.Y., 8 September 1944.

To: The Commanding General, USAF, CBI, APO 885, U.S. Army.

1. In the case of 2nd Lt. William E. Anderson, O-737515, Station 19, India-China Wing, Air Transport Command, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM CBI 163).


H.J. SEAMAN,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

(Sentence as modified ordered executed. GCMO 11, CBI, 8 Sep 1944)



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APO 885,
6 July 1944.

Board of Review
CM CBI # 165

UNITED STATES)

ARMY AIR FORCES)

v.)

Private Paul McK. Stewart,
13015297, 80th Depot Repair
Squadron, 80th Air Depot
Group, APO 882, c/o Post-
master, New York, N.Y.)

Trial by GCM, convened at APO 882,
c/o Postmaster, New York, N.Y.
Dishonorable discharge, total
forfeitures and confinement at
hard labor for 4 years. U.S.
Disciplinary Barracks nearest the
port of debarkation.)

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its Holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. The accused was tried on the following charges and specifications:

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

Specification: In that Private Paul McK. Stewart, 80th Depot Repair Squadron, 80th Air Depot Group, APO 882, did, at APO 882, on or about 1330 hours, 6 March 1944, fail to repair at the fixed time to the properly appointed place for routine duty: to wit, 80th Air Depot Engineering.

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

Specification: In that Private Paul McK. Stewart, 80th Depot Repair Squadron, 80th Air Depot Group, APO 882, did, at APC 882, on or about 6 March 1944, wrongfully take and use without consent of the owner and without lawful authority, a certain automobile, to wit: USA Army Vehicle, Area No. 985, Make: Dodge, 1941, 1/2-ton carry-all, Serial No. 81527711, of a value of more than fifty dollars (\$50.00), property of the U.S. furnished and intended for the military service thereof.

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

Specification 1: In that Private Paul McK. Stewart, 80th Depot Repair Squadron, 80th Air Depot Group, APO 882, having received a lawful command from Major David A. Brown, his superior officer, to "go with the military police to the guardhouse", did, at APO 882, on or about 6 March 1944, willfully disobey the same.

Specification 2: Disapproved by reviewing authority.

CHARGE IV: Violation of the 63rd Article of War.

Specification: In that Private Paul McK. Stewart, 80th Depot Repair Squadron, 80th Air Depot Group, APO 882, did, at APO 882, on or about 6 March 1944, behave himself with disrespect toward Major David A. Brown, his superior officer, by saying to him "Go take a fuck at the moon" and "I'll come down to North Carolina and get you", or words to that effect.

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

Specification 1: Disapproved by reviewing authority.

Specification 2: Finding of not guilty.

Specification 3: Finding of not guilty.

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

Specification: In that Private Paul McK. Stewart, 80th Depot Repair Squadron, 80th Air Depot Group, APO 882, a prisoner, having been duly placed in confinement in Base Stockade, APO 882, on or about 6th March 1944, did, at APO 882, on or about 31 March 1944, escape from said confinement before he was set at liberty by proper authority.

accused pled guilty to Charge I and its specification, to Charge I and its specification, to Charge V and specifications 1 & 2 hereof, and to the Additional Charge and its specification, and not guilty to all other charges and specifications. He was found not guilty of specifications 2 & 3 of Charge V, and was found guilty of all the other specifications and of all the charges. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 6 years. The reviewing authority disapproved the findings of guilty of Specification 2 of Charge III and of Specification 1 of Charge V. The reviewing

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authority did not expressly disapprove the finding of guilty of Charge V. As specification 1 of Charge V was, after the findings of not guilty of Specifications 2 & 3 of such Charge by the court, the only remaining specification thereunder, disapproval thereof left no finding of guilty of any specification under that Charge. There was, therefore, no basis for a finding of guilty of Charge V. The finding of guilty of Charge V should, therefore, have been disapproved by the reviewing authority. (Dig. Op. JAG. 1912-40, sec. 404 (1)). The reviewing authority approved the sentence, but reduced the period of confinement to 4 years. The execution of the sentence was withheld pursuant to AW 50 $\frac{1}{2}$ and the record of trial forwarded to The Judge Advocate General's Branch Office for China Burma and India. The U.S. Disciplinary Barracks nearest the port of debarkation was designated as the place of confinement.

3. The Board of Review, upon careful consideration of the whole record does not consider it necessary to discuss the evidence relating to the charges and specifications to which accused pled guilty. It is apparent that at no time during the hearing, did it appear that his pleas of guilty were not thoroughly understood by him, or were improvidently entered. No evidence was offered by the prosecution or the defense which tended to exculpate accused or to raise a reasonable doubt as to his guilt of the Charges and specifications to which he pleaded guilty. Had it appeared from the evidence or the conduct of the accused that he had not understandingly entered such pleas, there is no reason to doubt that the court would have allowed him to change his pleas and would have proceeded as if he had pleaded not guilty. (Par. 70, MCM 1928).

4. The evidence on the part of the prosecution is uncontradicted except as to specification 1 of Charge III, and as to the allegations of this specification, any conflict in the evidence is slight indeed. (R. 39). Accused offered only his own testimony (R. 29).

5. The evidence with respect to the charges and specifications to which accused pleaded not guilty may be briefly summarized. On 6 March 1944 Major David H. Brown, Air Corps, 489th Air Base, was on duty in his squadron orderly room as commanding officer of the 80th Repair Squadron, of which organization accused was a member (R. 17). About 5:30 o'clock in the afternoon (R. 17) Capt. John Bonomo, Jr., Air Corps, Headquarters 489th Air Base, Assistant Provost Marshal (R. 14) brought accused into the presence of Major Brown in the Squadron orderly room. Major Brown attempted to reason with accused and to quiet him (R. 17-18). Accused became unruly and said he was not going to the guardhouse and that if he did go the MPs. would have to come after him (R. 15). Corporal John F. Butler, 489th Air Base Squadron, MP Detachment, with two other MPs. came into the room for the purpose of arresting accused (R. 29, 30). When they attempted to take accused to the guardhouse he resisted and refused to go (R. 17-18). Major Brown then ordered accused to go with the MPs. to the guardhouse (R. 15, 25, 30). This was a direct order (R. 15). Accused refused to obey, picked up a rock (R. 25, 29, 30, 31) and entered into an altercation with the MPs.

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and Major Brown, during which altercation accused said to Major Brown: "Take a fuck at the moon" or "You go and take a fuck at the moon" (R. 18, 26, 27, 28, 29) and "I am going to get you in Carolina" (R. 18, 20, 27). Major Brown lives in North Carolina (R. 19). The altercation was renewed and his insulting language repeated by accused while he, the MPs. and Major Brown were both inside and outside the Squadron orderly room (R. 18). On the outside, accused asserted to Major Brown: "I will come down to North Carolina and get you" (R. 18, 19). Accused had been drinking (R. 16). First sergeant Charles C. Kohlenberg, 80th Depot Repair Squadron, who was present in the Squadron orderly room when accused came in and heard and saw what transpired between accused, the MPs. and Major Brown (R. 20) could not say whether accused had been drinking or acted abnormally (R. 22). Accused appeared to Sgt. Kohlenberg to be in a fit of rage (R. 28). The MPs. finally took accused away to the guardhouse.

6. Accused, after being advised of his rights, took the stand, as a witness and testified as to the allegations of specification 1 of Charge III that he did not remember whether Major Brown gave him the order in question. The defense offered no other evidence.

7. There was abundant competent evidence upon which the court could properly find accused guilty of Specification 1 of Charge III and of Charge IV and its specification. Since there is in the record substantial competent evidence, the findings of the court are conclusive. (CM CBI 109).

8. There are certain errors and irregularities which the Board of Review deems it advisable to point out:

- (a) The prosecution failed to prove the value of the automobile referred to in the specification of Charge II. Accused had pled guilty to this specification and thereby eliminated the necessity of proof of value. Since the prosecution offered evidence after the plea of guilty, it would have been the better practice to have offered proof on every element of the offense charged.
- (b) During the course of the trial the following transpired:

"President: I am not familiar with the arrangement of the Base Stockade; what is it like?
Will you please describe the stockade.

"TJA: The stockade is a barracks building approximately 150 feet long by 25 to 30 feet wide, surrounding this building on all sides is a 9 foot barbed wire fence. Between the barracks outside wall and the

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fence is a cleared space of about 30 to 40 feet. Six to seven feet outside of the inside fence there is another 9 foot barbed wire fence. Between the two are coil upon coil of barbed wire. There is only one gate which is a single gate built into the outside fence at a corner. The latrine is a small building inside the compound to the rear of the barracks building. The showers are inside the barracks building itself. Just on the outside of the stockade gate, about 30 feet away and facing the gate is a small wooden building which houses the office of the guard. At two corners of the wire fence there are guard towers which extend about 20 feet into the air. On the towers are searchlights or floodlights which are directed into the cleared space between the wire fence and the building." (R. 33)

It is not proper for a trial judge advocate to make such an unsworn statement. No objection was made to it. However, his unsworn statement was directed to a specification to which accused had pleaded guilty. Accused's substantial rights were not adversely affected, since he had formally admitted guilt of the specification concerning which the statement was made. (Dig. Op. JAG. 1912-40, Sec. 376 (3)). (Dig. Op. JAG. 1912-40, Sec. 378(3)).

(c) The assistant defense counsel certified that the record had been examined by him and was correct. He signed as defense counsel, when in fact, he was assistant defense counsel. This irregularity is of no serious consequence.

(d) The indorsements referring both the original and additional charges to Capt. Lekoy DeFord do not refer to him as the trial judge advocate of the court. He actually was the trial judge advocate of the court, and the approval of the sentence by the reviewing authority amounts to a ratification of the taking of jurisdiction by the court which tried the case. (Bull. JAG, February 1944, p. 54).

(e) The 1st indorsement on the Additional Charge Sheet is not correctly copied into the record, the organization and rank of Captain Joyce, as well as his exact capacity (R. 5) being omitted.

(f) The affidavits to the charge sheets do not show that the respective accusers swore to the charges as well as to the specifications. The rule is: "Charges and specifications will

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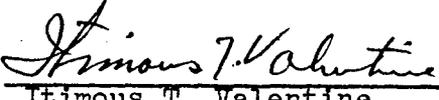
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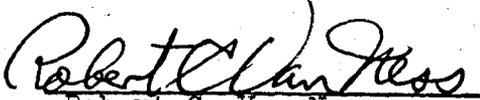
be signed and sworn to substantially as indicated on the form. (Par. 31, MCM 1928). No objection was made by the defense to this at the trial and the error was thereby waived. (Dig. Op. JAG. 1912-40, Sec. 428 (7)).

(g) A considerable amount of hearsay evidence was admitted at the trial, but all of it related to the charges and specifications to which accused had pleaded guilty. No objection was interposed to any of this testimony.

9. The court was legally constituted and the sentence is within the authorized limits. The court had jurisdiction of the subject matter and of the person of accused. No errors injuriously affecting the substantial rights of the accused occurred at the trial. The Board of Review is of the opinion, and it accordingly holds, that the record of trial is legally sufficient to support the sentence, but is legally insufficient to support the finding of guilty of Charge V.


Grenville Bearsley, Judge Advocate.


Itimous T. Valentine, Judge Advocate.


Robert C. Van Ness, Judge Advocate.

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APO 885,
7 July 1944.

Board of Review
CM CBI # 168

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

SERVICES OF SUPPLY, USAF, CBI.

v.)

Private Esau May, 35502289,)
Company B, 848th Engineer)
Aviation Battalion.)

Trial by GCM, convened at APO 629,
c/o Postmaster, New York, N.Y.,
3 June 1944. Dishonorable discharge,
total forfeitures and confinement
at hard labor for a period of 5
years. U.S. Penitentiary nearest
the port of debarkation is the place
of confinement.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office in China, Burma and India.

2. Accused was tried on a single charge, Violation of the 93rd Article of War, and one specification thereunder alleging an assault with intent to do him bodily harm upon Technician 5th Gr. Luster Parker by shooting at him with a dangerous weapon, to wit: a U.S. Army rifle, M-1. To the specification and to the charge accused pleaded not guilty. He was found guilty of the specification and the charge and sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of five (5) years. The reviewing authority approved the sentence and designated the U.S. Penitentiary nearest the port of debarkation as the place of confinement, but withheld execution and forwarded the record of trial to The Judge Advocate General's Branch Office for China, Burma and India in accordance with the provisions of Article of War 50 $\frac{1}{2}$.

3. Briefly, the evidence reveals that accused and three other soldiers, including T/5 Parker were playing cards, and an argument ensued between Parker and accused. Accused obtained

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his rifle and proceeded to clean it, then left the tent and walked over to a tea field to complete cleaning the gun. Some time later he returned to the company area, called Parker and T/5 Franklin and said that he wanted to speak to them alone. When Parker and Franklin walked toward accused he brought his rifle to port arms. Parker turned to walk away, glanced back and saw accused had brought the rifle to a firing position. Parker ran around the corner of a basha as accused fired at him. Accused then ran after Parker and fired again in his direction as the latter ran around another corner and on into a tea field. Accused stood between a tent and the basha waiting for Parker to return, until others forcibly disarmed him.

Accused, after having been warned of his rights, elected to take the stand, was sworn and testified that he was afraid of Parker and Franklin. When he returned from the tea patch after cleaning his rifle, Parker and Franklin were threatening and advancing toward him as he backed up. Parker then turned and accused believed that he was going after a gun so he fired two shots, not to hit Parker but to bluff him.

4. There is substantial and sufficient competent evidence to support the findings of the court. However, there is an error in the record upon which the Board of Review deems it necessary to comment.

5. Upon cross-examination of accused by the trial judge advocate, the following occurred:

Q. May, have you ever had any trouble before?

A. No, sir, no serious trouble.

Q. Were you ever court-martialed before?

President and Law Member: Wait a minute.

Prosecution: The prosecution desires to introduce evidence of prior convictions to impeach this witness.

President and Law Member: You can ask him only whether he was or wasn't.

Q. Were you ever court-martialed before?

A. Yes, sir, I was."

6. Although some latitude of discretion is allowed to the trial court, it is quite generally held that the mere former accusation of crime does not render the person accused less worthy of credit, and that a witness can not be asked on cross-examination whether he has been charged with, accused of, informed

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against, or arrested, imprisoned, or jailed prior to conviction, or indicted for a crime, or whether he was tried for a crime of which it does not appear that he was convicted. (70 C.J. p. 884). As a general rule, it is not permissible for the purpose of impeachment to ask a witness on cross-examination whether he had previously been arrested, confined in prison, accused of, charged with, indicted, tried or prosecuted for crime (Underhill's Criminal Evidence, sec. 435). Par. 124 (b) MCM 1928 provides:

"Impeachment of witnesses, Conviction of Crime.-- Evidence of conviction of any crime is admissible for the purpose of impeachment where such crime either involves moral turpitude or is such as to affect the credibility of the witness. * * * * * Evidence relating to an offense not involving moral turpitude or affecting the credibility of the witness should be excluded." (Underscoring supplied).

In this connection see also CM CBI # 132. It is stated in the Digest of Opinions of The Judge Advocate General (Dig. Op. JAG. 1912-40, sec. 395(8) that:

"It is well settled that for the purposes of discrediting a witness it is competent to show that he has been convicted of a crime, but nothing short of a conviction of a crime is admissible. CM 202770 (1935)."

7. It is clear from the foregoing authorities that to impeach accused in the manner attempted, there must be proof of conviction of an offense or offenses involving moral turpitude or affecting the credibility of accused. To limit such interrogation to whether or not accused had ever been court-martialed is clearly an error. In any case, to permit questions on cross-examination as to whether accused had been previously tried for other offenses, without proof of conviction, would, in many instances, create prejudice in the minds of the court, and even though it later be proved that such trials resulted in acquittals, any prejudice created thereby would not necessarily be removed. However, in this case the evidence of guilt is so overwhelming and conclusive, that we feel that the error could not have affected the result of the trial. It is not reasonable to assume that, but for this impropriety, accused might have been found not guilty. The error, therefore, was not prejudicial to the substantial rights of accused, and did not invalidate the proceedings.

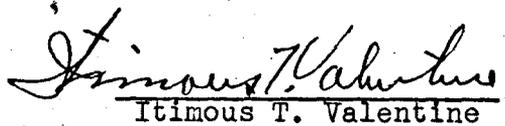
8. The court was legally constituted and the sentence is within the authorized limits. The court had jurisdiction of the subject matter and of the person of accused. No errors injuriously

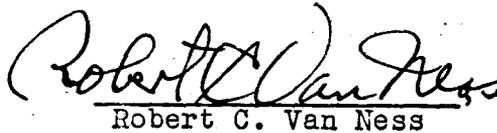
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affecting the substantial rights of accused were committed at the trial. The Board of Review is of the opinion and accordingly holds, that the record of trial is legally sufficient to support the sentence.


Grenville Bearisley Judge Advocate


Itimous T. Valentine, Judge Advocate


Robert C. Van Ness Judge Advocate

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

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New Delhi, India,
21 July 1944.

Board of Review
CM CBI # 171

U N I T E D S T A T E S)	SERVICES OF SUPPLY, USAF, CBI.
)	
v.	)	Trial by GCM, convened at APO
	)	881, c/o Postmaster, New York,
Private James (NMI) Doyle,	)	N.Y. Dishonorable discharge,
34328151, Headquarters POD,	)	total forfeitures and confinement
TS, SOS, USAF, CBI, APO	)	at hard labor for 15 years. U.S.
881, c/o Postmaster, New York,	)	Penitentiary nearest the Port
N. Y.	)	of Debarkation.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private James (NMI) Doyle, Headquarters Port of Debarkation Transportation Service, SOS, USAF, CBI, Bombay, India, did, at 25 Dalal Street, Sub-Area 43, Bombay, India on or about 2000 hours, 26 April 1944 with intent to commit a felony, viz. murder, commit an assault upon Able Bodied William Hinnigan by willfully and feloniously stabbing said Able Bodied William Hinnigan in the chest and buttock with a dangerous weapon, to wit, a knife.

Accused pleaded not guilty to the specification of the charge and to the charge, and was found guilty of the specification of the charge and of the charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for a period of 15 years.

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3. The reviewing authority approved the sentence and designated the U. S. Penitentiary nearest the Port of Debarkation in the United States as the place of confinement. The execution of the sentence was withheld pursuant to AW 50 $\frac{1}{2}$, and the record of trial forwarded to the Judge Advocate General's Branch Office for China, Burma and India.

EVIDENCE FOR THE PROSECUTION

4. Sheehan, Hinnigan and Norton, British shore patrolmen, sometime between 1940 hours and 2000 hours, while it was still day-light (R.8,12,15,16) went to 25 Dalal Street, a brothel, to clear out British soldiers (R.7, 12,16). There were some American negro soldiers there also, and Sheehan told two of them that if the MPs caught them they would run them in, to which they replied, "OK we will get out" (R.7). All the American soldiers were in suntans except accused (R.8). Accused, who was dressed in ODs (R.8,18) and sandals (R.8) came up to Sheehan and said, "Get out Limey, this has nothing to do with you". Hinnigan and Sheehan went around to some of the other rooms, and accused came up and said to Sheehan, "Get out or I'll kill you". (R.7,12). Sheehan stood between two rooms and Hinnigan stood close by with his back to a door (R.7). Accused circled, came up to Hinnigan, pushed him with his left hand and jabbed him in the chest (R.7,12,17) with his right hand (R.7). At the time accused had his right hand wrapped in a handkerchief (R.9,12,17), and as he jabbed Hinnigan in the chest, the latter exclaimed, "Oh, that knife" and grabbed his chest (R.10,16). No one actually saw a knife in the hands of accused, but Hinnigan felt the knife in him (R.31). As Hinnigan turned, accused, stabbed him in the buttock (R.12). Hinnigan went to another room with blood on him (R.7), then ran downstairs (R.7) and into a cafe where he was placed in a chair (R.12,41). Accused went to the top of the stairs, and as Sheehan rushed past, accused pushed him to the first landing (R.7). Sheehan ran up the street with accused running close behind him (R.7). When Sheehan saw an MP he said, "Get that man, he just stabbed one of our patrolmen (R.7,18) and as he did accused turned, ran a short distance, stumbled, got up and ran into a cafe (R.7,18). When the MPs entered, accused was fumbling around behind a counter. His person was searched but no knife found (R.18,19). Accused was not drunk (R.11,13,17,19), though he appeared excited (R.9, 17,20). He was not staggering (R.17,19) and spoke as a normal person (R.19). No threats or threatening gestures were made against accused (R.10,17).

Accused was taken to MP headquarters. The clothes he wore were taken and the Provost Marshal marked them (R.23). They were examined and blood stains found on a leg of the trousers and left sleeve (R.23). These were analyzed and found to be blood that came from outside and not from within the clothing (R.27).

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At MP headquarters accused was warned of his rights under AW 24 and stated that he had been in the brothel area, ran into the cafe to get a broken bottle to defend himself, that he was not drunk and that he was not under the influence of drugs (R.23,24). The Provost Marshal testified that all three British patrolmen identified accused in a line up (R.24). Sheehan, Hinnigan and Norton testified that they had identified accused in a previous line up (R.10,15,17) and they also identified accused at the trial (R.10,12). At the trial accused was asked to come forward and Sheehan and Norton identified his sandals to be the same type as he had on the night of the incident (R.8,16). Sheehan stated that accused had a mark below his lip, whereupon accused was brought forward and exhibited a small mark on his lower lip (R.10). At the hospital where Hinnigan was taken the British Army doctor examined him about hours 2010. (R.14). His clothes were covered with blood; his condition bad. He suffered from loss of blood and air hunger, had difficulty in breathing and his heart could hardly be heard (R.14). He was close to death and would have died within an hour if he had not been given medical attention which necessitated the transfusion of two pints of blood (R.14). The wound was a clean cut about 3/4" in length, but the weapon did not penetrate the heart. He had lost so much blood he had stopped bleeding, but upon being given an transfusion the wound again began to bleed. An x-ray revealed no blood in the chest (R.14). The doctor was of the opinion that a double edged knife caused the wound and could have resulted in his death (R.14).

EVIDENCE FOR ACCUSED

5. Accused was excited (R.28,31) and jittery at the time of the incident (R.28,29). Hinnigan was recalled by defense as a witness. He stated that he did not see a knife and only saw a handkerchief in accused's hand (R.31). A soldier was sent to collect accused's baggage to bring to the place of confinement. Among his effects was a cigarette packet with what looked like old leaves wrapped in newspaper (R.32). It was stipulated that this was ganja (R.35). Medical testimony was given that a person under the influence of marijuana is ordinarily mildly excited at first, followed by weakness and dizziness (R.34,35). Many lose sense of time and it is possible to commit an act and afterwards have no knowledge of it (R.35).

Accused, after having had his rights explained to him was sworn and testified. He stated that he used drugs, that is "reefers", called ganja in India, and that he has been using them for three years (R 36). He further testified that he had smoked two or three that day just before going to the brothel and also had had a drink of whisky. After going to the brothel

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the Navy patrolmen came up and said, "You soldiers had better go", which was about three minutes after accused had arrived. Accused went to the door, stood a moment thinking where another lady was and then "seemed to go downstairs", Two or three people ran over him and the Navy patrolmen chased him, at which time he ran to the cafe to find a bottle to defend himself (R.37). He was standing in the doorway by the stairs of the brothel when the argument started but didn't do anything (R.38) and didn't think he had done anything wrong (R.39). He did not know what had happened. He identified his clothes that had previously been admitted as Exhibit A (R.40). The only time that he remembered having seen Hinnigan was when the latter was put in a chair at the cafe, at which time accused saw blood on Hinnigan's clothes (R.41). Accused testified that he did not remember having seen Sheehan any place other than in the cafe and then testified that Sheehan walked in the brothel house and said, "You soldiers have to go. You know you are off limits" (R.42). Accused stated that he gets a kick out of two or three reefers and sometimes smokes seven or eight a day (R.41). He further testified that on the night of the incident he did not have a handkerchief (R.41).

REBUTTAL EVIDENCE

6. A sanity hearing had been ordered for the accused, report of which is Exhibit D (R.43). The Board found the accused sane at the time of the incident and at the time of the hearing, Exhibit D. Captain Silverman who was at the sanity hearing testified that accused had denied using drugs and stated that he was not under the influence of drugs the night that this incident took place. Accused further denied being drunk, though he stated that he had had one drink of whisky (R.43). Captain Silverman further testified that accused had told the Medical Board that the reefers in India were not the same as the ones he had had in the United States; that he did not become excited, likes to be left alone and that it makes him feel good all over. The investigating officer testified that accused had been warned of his rights under Article of War 24, and had told him that he, accused, had not used any reefers that day.

7. Accused then returned to the stand and being reminded that he was still under oath testified that he had stated he did not use any reefers that day because he was ashamed to tell that he had as he did not want them to know that he used drugs (R.45).

8. Accused was charged in effect with assault aggravated by the concurrence of the specific intent to murder by stabbing with a dangerous weapon, to wit, a knife. To substantiate such charge it is necessary for the prosecution to prove that the accused assaulted Hinnigan as alleged, and facts and circumstances indicating the existence at the time of the assault of the specific

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intent to commit murder. (MCM 1928, par. 149(1)). There must be an overt act in pursuance of the intent as distinguished from the mere intent alone. Nor is it an essential requisite that a deadly weapon shall have been used but there must be present a real and apparent ability to accomplish it,

9. The evidence is clear that an assault and battery was made upon Hinnigan by accused and it is uncontradicted in the record that at the time accused jabbed at Hinnigan's chest the latter received a wound which nearly proved fatal. There is no direct testimony that any witnesses saw a knife in the possession of accused. However, there is substantial and competent evidence that when accused jabbed at Hinnigan's chest with his handkerchief covered hand the latter grabbed his chest and cried, "Oh, that knife", at which time blood appeared on Hinnigan. Hinnigan himself testified that he could feel the knife in him. An examination of the wound by the British medical officer revealed that it was a clean cut about $\frac{3}{4}$ " in length and one which in the officer's opinion was caused by a double edged knife. It cannot be doubted that the injured man was stabbed by an instrument in the nature of a knife and such facts and circumstances we feel were adequately sufficient to warrant a conclusion by the court that the accused did stab Hinnigan with a knife. Indeed we believe that any other theory would be unreasonable under the evidence in this record.

10. When the weapon is not per se a dangerous one it is ordinarily a fact question whether or not such instrument was of such dangerous character, depending upon the size and manner in which it was used. (30 C.J., p. 329). Some weapons are so clearly deadly when used under particular circumstances that they may be deadly as a matter of law. So it has been held that a club, a large stone * * * or a knife when used in striking distance is a deadly weapon per se and proof of an assault with any of these will prove conviction of an assault with a deadly weapon. (Underhills Criminal Evidence, Sec. 598). A deadly weapon is one which in the manner used is likely to cause death or a serious bodily injury. (Whartons Criminal Law, Vol. I, Sec. 850). A deadly weapon is not one that must or may kill. It is an instrument which is likely to produce death or great bodily harm under the circumstances of its use. The deadly character of the weapon depends sometimes more on the manner of its use and the condition of the person assaulted than upon the intrinsic character of the weapon itself. (CM CBI # 91). Though the record affirmatively reveals that the weapon used did not penetrate to the heart and an ex-ray showed no blood in the chest, yet there is clear and uncontradicted testimony that the wound could have been fatal and that Hinnigan might have died within an hour in the absence of proper care. It cannot, in our opinion, be gain-said that the instrument used was a dangerous weapon. The reasonable and logical inference drawn by the court was wholly justified.

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11. Motive or malice aforethought is an essential ingredient of assault with intent to murder. (30 C.J. p. 20). Specific intent as an element of murder is implied in the definition of malice, an essential ingredient of the offense. The absence of malice is the characteristic which distinguishes voluntary manslaughter from murder. Malice is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, and consists in the intentional doing of a wrongful act without legal justification or excuse. It may be express or implied. Express malice is that deliberate intention unlawfully to take the life of a fellow creature which is manifested by external circumstances susceptible of proof. It need not be evidenced by words only, but may be inferred from circumstances. Implied malice is that which is inferred from the naked fact of the homicide. Malice is implied when no considerable provocation appears or when all circumstances of the killing show a wicked and malignant heart (CM CBI # 71). We believe the same principle applies in assault with intent to murder. A specific intent to take human life is an essential element of the offense alleged, but such intent may be inferred from the attendant circumstances. However, if the evidence shows no more than an intent to do bodily harm a conviction under the charge of an assault with intent to murder may not be supported. Whether the requisite homicidal intent is present is ordinarily a question of fact, and when the instrument used is not per se dangerous, the facts and circumstances must be such that it was used in such a manner as likely to cause death or that accused believed that he was using a means capable of accomplishing that act. In such circumstances the character of the assault and nature or extent of the wounds or injury, the presence or absence of excusing facts and prior threats are all circumstances that may be considered. Though prior threats may be taken into consideration it is true that if the acts of accused show a different intent the intent may not be based solely on such statement. Sheehan, Hinnigan and Norton all entered the brothel area where the incident later took place. Their purpose was to remove British soldiers therefrom. There is no evidence of any threats or threatening gestures towards accused by them and no indication of any reason from which any inference of excusable circumstances could be drawn at or prior to the time the injury was inflicted. Accused had told Sheehan, "Get out Limey, this has nothing to do with you", and a few minutes later threatened the same patrolman by saying, "Get out or I'll kill you". Though these words were not directed to the injured person they are, we feel, indicative of the animus of the accused and could properly be considered by the court in determining intent. After making the foregoing threat accused circled around, came up to Hinnigan, pushed him with his left hand, jabbed him with his handkerchief covered hand and as Hinnigan grabbed his chest and turned accused stabbed him in the buttock. The weapon was apparently first directed at a part of the body where a wound would be likely to prove fatal; the wound was such that death would have resulted and the weapon

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was used in such a manner as was likely to cause death if proper medical attention had not been quickly received. From the nature of the weapon used, the severity of the wound inflicted, the absence of proof of any legal excuse, legal justification or provocation, and from the attendant circumstances, the court was justified in inferring that the assault was made wantonly, wilfully and with malice aforethought, i.e. with intent to commit murder.

12. The defense contended that accused was at the time under the influence of drugs. This in itself would not excuse accused for a crime committed while in such a condition, but may be considered as affecting his mental capacity to entertain specific intent, where such intent is a necessary element of the offense. There is evidence that accused was excited and jittery, and he testified that he had three "reefers" before going to the brothel. However, there is testimony to the contrary, and that he acted normally and that he had previously stated he was not under the influence of drugs that night. This presented two questions of fact. (1) Had accused used drugs which might have affected his mind and (2) if he had, did he have the necessary mental capacity to form the requisite intent. It is the province of the court to judge the credibility of witnesses and to weigh the evidence. Those are questions exclusively for the court-martial, and as there is substantial evidence to support its conclusions, we would not be justified in reaching different conclusions. (CM CBI # 111).

13. The record of trial discloses a number of errors and irregularities, the effect of which upon the substantial rights of the accused we now proceed to consider.

14. At the beginning of the trial 1st Lt. William K. Burton, C.E., was challenged by accused for cause (R. 3a):

"On the grounds that he is in possession of material facts in connection with the case * * * * * that a member of the court should not be in possession of."

The challenged member was sworn upon his voir dire, and testified that he was well acquainted with the brothel area and the location where the crime took place and was aware of the fact that the accused and other enlisted men were present in the brothel, and that he did not know that accused was apprehended by the Military Police shortly after entering the brothel or that there had been a fight from which the accused was injured. He had been asked to make a sketch of the brothel house in which the crime took place, and had discussed the case and circumstances with the trial judge advocate while making a map of the scene of the crime. The discussion of the events that took place had to do with the scene and the premises. He was not aware of any of the events which were

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alleged to have taken place in the house on the 26 April. He had formed no conclusion as to the guilt or innocence of accused (R. 3b).

The court thereupon was closed and the challenged member withdrew. When the court was opened, the president announced that the challenge was not sustained. The challenged member thereupon resumed his seat. The accused was thereupon asked by the trial judge advocate whether he wished to exercise his right to one peremptory challenge against any member other than the law member, whereupon the defense counsel peremptorily challenged 1st Lt. Waldon R. Porterfield, QMC (R. 3b).

From the recitals as to the disposition of the challenge (R.3b) it does not affirmatively appear that the voting on the challenge was by secret written ballot. Every reasonable presumption is in favor of the regularity of the proceedings, other than jurisdictional matters, except when the contrary appears. In the absence of anything in the record of the accompanying papers to the contrary, it would be our duty to hold that the court, in voting upon the challenge, did so by secret written ballot, and that a majority of the members of the court voted against the sustaining of the challenge. However, we find among the papers attached to the record of trial the following letter, signed by the president of the court:

" Subject: Error in General Court Martial Trial.
To: The Trial Judge Advocate.

1. I have discovered and must report that during my review prior to authentication of the record of trial in the case of James Doyle, the Court erred in not deciding the challenge of Lt. Burton by secret written ballot.

2. The matter was decided orally without dissent or objection. I did not recall at the time that a secret written ballot was prescribed in such cases. The responsibility of the error is solely mine.

3. Request that this letter be forwarded with the record of trial to the reviewing authority.

/s/ R. E. York
/t/ R. E. YORK
Colonel, C.E.,
Commanding.

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While it can be argued that a member of a general court-martial may not properly, by such a letter, impeach the record and validity of the proceedings upon a trial in which he participated, nevertheless if this record were returned for proceedings in revision or for a certificate of correction, it is apparent to all that such proceedings or revision would show: (1) that the vote upon the challenge was viva voca, and (2) that all of the members of the court voted that the challenge be not sustained. The law does not require the doing of a useless thing (36 C.J. p. 1049 (Note 88)), and we deem it proper in order to avoid delays to consider the record as though a formal certificate of correction, signed by the president and the trial judge advocate, were attached to the record reciting the facts stated in Colonel York's letter.

Disposition of the challenge by oral voting was a clear and direct violation of the plain provisions of AW 31, which provided:

"Vote by members of a general * * * court-martial upon questions of challenge * * * shall be by secret written ballot."

The question is then presented whether the failure by the court, to follow the plain and unambiguous provisions of AW 31 in this important particular, is fatal to the validity of the proceedings. In Article of War Annotated at page 40, Colonel Tillotson states:

"The vote upon a challenge for cause must be by secret written ballot. (30 Sup. 1344; 40-375(1))."

His language seems to imply that the failure to vote upon a challenge by secret written ballot would be fatal to the proceedings, if the challenge were not sustained. However, the authorities cited by the learned author do not seem to us to indicate that the error is necessarily fatal. Section 375 (3) Dig. Op. JAG. 1912-40, to which the writer evidently refers, reads in part:

"In the trial of a soldier by court-martial, the court sustained a peremptory challenge made by the defense after the prosecution had submitted all its evidence and rested. Before arraignment the accused was given an opportunity to challenge peremptorily and for cause and said he had no challenge to make. Held, That paragraph 58e, MCM, 1928, provides that only challenges for cause can be made subsequent to arraignment. In this case the challenge may not be treated as a challenge for cause, because, while the record shows that the court determined in closed session to excuse the challenged member, it does not show that the issue was decided by secret written ballot, as is expressly required by A.W. 31. The

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error of the court was not considered fatal.
C.M. 199231. (1932)."

The testimony of Lt. Burton clearly shows that none of the grounds for challenge for cause set out in MCM 1928, par. 58e had any basis in fact, and that there was no substantial ground upon which the members of the court, acting as reasonable men, could properly vote to sustain the challenge. It would seem that, after hearing Lt. Burton's testimony, the defense counsel and accused were of the same opinion, because no peremptory challenge was submitted as to Lt. Burton. The accused's peremptory challenge was exercised as to Lt. Porterfield, as to whom it may fairly be presumed there was no ground for challenge for cause, since otherwise a challenge for cause would have been made as to him, before the exercise of the right of peremptory challenge.

The affording of an opportunity to exercise the right to challenge members of the court appears to be jurisdictional, but the manner of disposing of a challenge, when interposed, seems to us to be a procedural matter, which does not go to the jurisdiction of the court. In view of the express provision of AW 37, that no finding or sentence shall be disapproved in any case for any error has injuriously affected the substantial rights of the accused, and since we are of the opinion, after careful consideration of the entire record, that the substantial rights of the accused were not injuriously affected by the irregular and improper manner in which the challenge for cause was disposed of and, it appears to us that it would be unreasonable to hold that the irregularity is fatal. AW 31 of course was enacted to be complied with. While the neglect of the court to follow the plain and express provisions of AW 31 is such as to subject it to severe criticism, nevertheless we are of the opinion that the error considered together with the entire record, is not such as to invalidate the findings and the sentence.

15. There are certain other matters in the record upon which the Board of Review deems it desirable to comment. The certificate of previous convictions introduced after the findings of guilty had been adopted, is not in proper form. In regard to previous convictions accused's service record or an admissible copy or extract copy thereof may also be used. (Par. 79c, MCM 1928). However, objections not asserted may be regarded as waived. (Par. 79c & 79c, MCM 1928). No objection to the form of the certificate of previous convictions was made in this case.

Taylor, an MP, testified that Sheehan came up to the corner and said, "Get that man, he just stabbed one of our patrolmen", and that Sheehan pointed and said, "There he goes". This was not objected to, but ordinarily such statement would be incompetent as hearsay evidence, unless made in the presence of accused.

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The record is not clear as to this but accused denied having heard such statement. 22 C.J.S. p. 1065 states:

"Declarations and exclamations of third person which are so connected with the offense as to constitute a part of the res gestae thereof are admissible in evidence even though made after the offense, but they are not admissible if merely a narrative of a past event or if made so long after the offense as to indicate a lack of spontaneity in immediate causal relation to the offense. Likewise, the acts and conduct of third persons after the offense may be admissible as res gestae, but not if there is no immediate causal relation to the offense or if other essential requirements for res gestae are absent."

We think the above principle is applicable here that such exclamations were part of the res gestae, and no error was committed.

The Provost Marshal and an MP testified that the three British patrolmen had identified accused in a line up of several soldiers. In CM CBI 159 we are presented with a similar problem and there held such testimony as to an extra-judicial identification to be inadmissible. However, as in that case, we believe that the evidence of guilt is so overwhelming that accused could not have been prejudiced, especially as the three patrolmen had previously testified that they had so identified accused.

Accused was compelled to testify as to the disposition of his money while he was in "jail". His testimony was to the effect that he bought ganja and that someone brought it to him. This was entirely irrelevant, had no bearing on the case and as such was error. But in the light of the whole record we do not believe any substantial right of accused was prejudiced.

The record recites that three quarters of the members present when the vote was taken concurred in each finding of guilty. An offense of this nature requires only a vote of two-thirds. The irregular recital is harmless (CM CBI # 111).

The sentence recites * * * to be dishonorably discharged from the service * * *. This is not in accordance with the approved form set forth in App. 9, MCM 1928. This is a harmless irregularity.

Attached to the record is a paper marked Exhibit B. This was not introduced in evidence and should therefore not be included amongst the exhibits appended to the record.

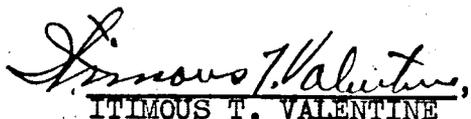
16. The court was legally constituted and the sentence is within the authorized limits. The court had jurisdiction of the subject matter of the offense and of the person of the accused.

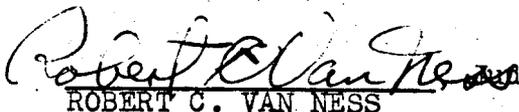
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No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the findings of guilty of the sentence.


Grenville Beardsley, Judge Advocate
GRENVILLE BEARDSLEY


Timous T. Valentine, Judge Advocate
TIMOUS T. VALENTINE


Robert C. Van Ness, Judge Advocate
ROBERT C. VAN NESS

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APO 885
7 July 1944

Board of Review
CM CBI 172

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

v.

Private HERMAN THOMPSON,
33137930, Hq. & Service
Company, 382nd Engineer
Battalion (Sep.)

SERVICE OF SUPPLY, USAF, CBI

) Trial by GCM 15 May 1944 at
) Calcutta, India. Dishonorable
) discharge, total forfeitures,
) confinement at hard labor for
) 10 years. U.S. Disciplinary
) Barracks nearest the port of
) debarkation.

HOLDING of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier above named has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. Accused was tried on the following charges and specifications:

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

Specification: In that Private Herman (NMI) Thompson, Headquarters and Service Company, 382nd Engineer Battalion (Separate), did, without proper leave, absent himself from his company at Kharagpur, India, from about 23 February 1944, to about 25 February 1944.

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

Specification: In that Private Herman (NMI) Thompson, Headquarters and Service Company, 382nd Engineer Battalion (Separate), did, at his Company area, Kharagpur, India, on or about 26 February 1944, use the following threatening, insubordinate and disrespectful language toward First Sergeant Edward W. Nance, Headquarters and Service Company, 382nd Engineer Battalion (Separate), a noncommissioned officer who was then in the execution of his office: "You Chicken Shit Son-of-a-Bitch; "I'm gonna fix all you rotten Mother-Fuckers for not letting a man go to town on a God-Damned G. I. truck".

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CHARGE III: Violation of the 63rd Article of War.

Specification: In that Private Herman (NMI) Thompson, Headquarters and Service Company, 382nd Engineer Battalion (Separate), did, at Kharagpur, India, on or about 27 February 1944, behave himself with disrespect toward First Lieutenant Richard J. Brush, Headquarters, 382nd Engineer Battalion (Separate), his superior officer, by saying to him: "You'll have to get a guard house if you expect to keep me around here", or words to that effect.

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

Specification: In that Private Herman (NMI) Thompson, Headquarters and Service Company, 382nd Engineer Battalion (Separate), did, at Kharagpur, India, on or about 27 February 1944, draw a weapon, to wit: a knife against First Lieutenant Richard J. Brush, Headquarters, 382nd Engineer Battalion (Separate), his superior officer, who was then in the execution of his office.

3. Accused pleaded not guilty and was found guilty by the court of all the charges and specifications. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. The reviewing authority approved the sentence, withheld the order of execution pursuant to AW 50½, and forwarded the record of trial to The Judge Advocate General's Branch Office for China, Burma and India. The United States Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement.

4. At the time of the events to which the charges and the evidence relate, the accused was 24 years of age and had been in the military service two years. About 12 February 1944, when the organization was paid, accused received in excess of Rs. 1000. The battalion chaplain suggested that he save some of his money. Accused turned over Rs. 1000 to the chaplain, who turned it over to 1st Lt. Richard J. Brush, battalion personnel officer, as the latter had a safe in which it could be securely kept (R. 10). On various dates between February 12th and 27th, accused went to Lieutenant Brush and withdrew portions of this fund, and on 27 February only Rs. 300 was left. About 6 p.m. o'clock, 27 February, accused went to Lieutenant Brush's tent and asked for the balance of the money. Lieutenant Brush took the money from the safe, but before delivering it to accused, suggested that they go to the tent of his company commander, Captain McGowan. Captain McGowan was not in the tent when they arrived. In the presence of Captain Frank W. Vukmanic, 1st Lt. Charles A. Ouellette and 1st Lt. Lawrence A. Vallimont, who

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were in the tent, Lt. Brush suggested to accused that you "ought to try to keep the rest of your money here a little bit longer than you did the other that you had, and if I were you I wouldn't go AWOL the way you did." Accused answered that the lieutenant was a "God damned liar," and that "I didn't go AWOL". After some discussion as to what the morning report showed, Lt. Brush said, "All right, take your money and get out." Both he and accused were angry. Accused took the money, stepped back, stopped and said, "You Mother-fucker, I'd like to see you put me out." Lt. Brush started toward accused, who went to the door of the tent, and crouched there. Lt. Brush followed and stopped when about two feet away from him. Accused drew a pocket knife with a four inch blade of the type that springs open when "you press it where you pull the blade out" (R. 11). He raised it to shoulder height, fumbling with the blade to open it. From the testimony of the witnesses, it is uncertain whether the knife was actually opened or not. Lt. Brush thought it was not (R. 11). Captain Vukmanic's view was obscured, and he could not "swear if the knife was half open or completely closed" (R. 13). Lt. Ouellette testified that accused drew the knife, started to open it and said, "You mother fucker, I'd like to see you put me out" (R. 14). Lt. Vallimont testified that when accused drew the knife, he said, "I'll cut some of you Mother-fucking officers' throats", and that accused was facing Lt. Brush and making a movement toward him with the knife (R. 15). Accused then seemed to lose his nerve, (R. 12) or his courage failed him (R. 11), and he turned and went out from the tent, saying as he left, "You'll have to keep me in a guard house if you want to keep me around here" (R. 11, R. 12, R. 15).

5. First Sgt. Edward W. Nance of the company, to which accused was assigned, testified that as 1st sergeant it was "my duty to charge Private Herman Thompson as AWOL": He was AWOL "approximately 2 days, or about from the 23rd to the 25th of February" (R. 7). On 26 February 1944, 1st Sgt. Nance, in the presence of Staff Sgt. Norman T. Allison, checked a truck which was about to depart that evening for Kharagpur, to see that each passenger had a pass. Both 1st Sgt. Nance (R. 7) and Staff Sgt. Allison (R. 8) substantially agree in their testimony that accused was on the truck, that he had no pass, that 1st Sgt. Nance ordered him to leave the truck, that after some hesitation, accused got off the truck, and then called 1st Sgt. Nance a "chicken-shit son-of-a-bitch" and said, "I'm going to fix all you rotten mother fuckers for not letting a man ride to town on a God damned G.I. truck."

6. No evidence was offered by or on behalf of accused (R. 15). In the absence of contradictory evidence, the foregoing facts and circumstances, related in the testimony of the witnesses for the prosecution, seem to us to constitute substantial

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evidence from which the members of the court could properly and reasonably infer that the accused was guilty of all of the offenses charged.

7. Lieutenant Brush testified that when he got up from his desk, after being insulted by accused, it was his intention to "put him out of the tent if I had to," and that his was "the first threatening move or act" (R. 11), while Captain Vukmanic testified that Lt. Brush "did not take any step or make any threatening action" (R. 13). Lt. Ouellette testified that in his opinion the words and actions of Lt. Brush were not threatening (R. 14). Lt. Vallimont characterized the words and action of Lt. Brush, as "stern, but they weren't threatening" (R. 15). While a soldier may in necessary self-defense of his person, lift or draw up a weapon or otherwise without excessive force resist an attack by his superior officer (CBI 122) without violating AW 64, the record here discloses no circumstances, which tend logically to raise an inference that there existed any actual or apparent necessity for accused to resort to force in self-protection. The situation was not such as to cause accused to believe as a reasonable man that, if he did not draw and lift up the knife against Lt. Brush, he was in danger either of indignity to his person or bodily harm.

8. The testimony of the 1st sergeant is positive on the point that accused was absent, and that his absence was without leave from about February 23rd to February 25th (R. 7). No member of the organization was in a better position to know personally whether accused was present or absent during the period in question, and if absent whether he had permission from competent authority to be absent, than the 1st sergeant. The testimony of Lt. Brush, the unit personnel officer, that he had examined the morning report, and from the entires therein had ascertained that accused was absent without leave (R. 10), was hearsay and incompetent. The usual method of proving absence without leave is by the introduction of properly certified extract copies of the morning report. Such method of proof is not the only means of proving absence without leave. Like other facts and conditions, it may be established by admissions and by the testimony of witnesses who have knowledge in respect thereof (CM 120354, par. 416 (6) Dig. Ops. JAG, 1940; CM 126112, par. 419 (2), DIG. Ops. JAG 1940). First Sergeant Nance testified positively that accused was absent without leave from 23 February to 25 February. This testimony is substantial evidence which supports the findings of guilty of Charge I and its Specification.

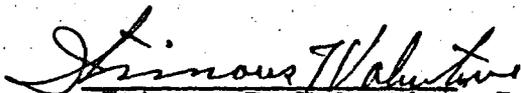
9. The court was legally constituted. It had jurisdiction of the subject matter of the offense and of the person of the accused. No error injuriously affecting any substantial right of the accused was committed during the trial. For a violation

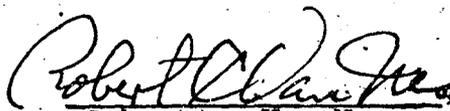
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of AW 64, the maximum punishment authorized is death and for absence without leave in violation of AW 61, any penalty less than death is authorized. Although the sentence seems somewhat severe, the accused had been twice previously convicted (Pros. Ex. 2), on one occasion of absence without leave for 10 days in violation of AW 61 and on the other occasion for disrespect to a commissioned officer in violation of AW 63. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the sentence.


Grenville Beardsley Judge Advocate.


Itimous T. Valentine Judge Advocate.


Robert C. Van Ness Judge Advocate

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APO 885,
24 July 1944.

Board of Review
CM CBI # 177

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

SERVICES OF SUPPLY, USAF, CBI.

v.

Private Ernest (NMI) Drayton,
Company C. 45th Engineer
Regiment (GS), APO 689, c/o
Postmaster, New York.

) Trial by GCM convened at APO 689,
) c/o Postmaster, New York, 7 June
) 1944: Dishonorable discharge,
) total forfeitures and confinement
) at hard labor for 5 years 6 months.
) U.S. Disciplinary Barracks nearest
) the port of debarkation in the
) United States is designated as
) the place of confinement.

HOLDING of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. The accused was tried on the following charges and specifications:

CHARGE I: Violation of the 63rd Article of War.

Specification: In that Private Ernest (NMI) Drayton, Company C, Forty Fifth Engineer Regiment (GS), did, at Ningam Sakan, Burma, on or about March 9, 1944, behave himself with disrespect toward Captain Taylor S. Womack, his superior officer, by calling him a "Prick", or words to that effect.

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

Specification: In that Private Ernest (NMI) Drayton, Company C, Forty Fifth Engineer Regiment (GS), did, at Ningam Sakan, Burma, on or about March 9, 1944, with intent to commit murder, commit an assault upon Corporal

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Willie Owen, by willfully and feloniously shooting him in the cheek and in the shoudler, with a dangerous weapon, to wit, a rifle.

Accused pleaded guilty to Charge I and its specification and not guilty to Charge II and its specification. He was found guilty of Charge I and its specification, and of Charge II, but by exceptions and substitutions under the specification of Charge II, the court found him guilty only of assault with a dangerous weapon with intent to do bodily harm.

EVIDENCE FOR THE PROSECUTION

3. On 9 March 1944 at about 1:30 or 2:00 in the afternoon (R. 9,17,33,39) at Camp Leap Year (R.18,19) accused was in the tent of Willie Owen with Corporal Lawrence J. Williams, Staff Sgt. Brown and Pvt. Yates Link, all of Company C, 45th Engineer Regiment (GS) where they had a bottle of liquor and were drinking (R.20,33,41,44,49). An argument arose between accused and Yates Link (R.19,33,39). Accused had a knife and brandished it threateningly during the argument which lasted a considerable length of time (R.19,21,33,34,37,39). Corporal Owen ordered accused out of his tent and when he refused to go pushed him out of the tent (R.19,21,22,25,26,39,50). Shortly thereafter accused came back into the tent of Owen and renewed the hostilities. Sgt. Brown came in and took accused out of Owen's tent (R.19,29). Accused then rushed into his tent (R.19,37) and came out with his rifle and fired several shots toward Owen's tent (R. 40,19,22) two of which struck Corporal Owen, one in the cheek and another in the shoulder, producing skin wounds (R.19, 20). When Owen was shot he fell back in his tent, then got up. Accused kept shooting at him (R.22). Accused was within 20 or 30 feet of Owen when the shooting took place (R.22). The tent of accused was the last one on company street (R. 14,15) and Corporal Owen's tent was next (R. 13). Accused had been drinking (R. 11, 35) but knew what he was doing (R.20). When accused fired the shots Willie Owen was standing in the door of his tent with nothing in his hand (R. 38). When accused fired the shots at his tent Owen fell back into his tent and accused kept shooting at him from a distance of about 20 or 30 feet (R.22). Corporal Owen then got his rifle and went in pursuit of accused, firing about 2 or 3 clips in the general direction of the brushland into which accused has disappeared (R. 20,31,40,41). Upon hearing the shooting Lt. Pecoraro started down the company street where he met Sgt. Armstead. Soon thereafter he saw Corporal Owen coming out of his tent, and saw him fire several shots in the direction of the brush or woodland into which accused had gone. The rifle was then taken away from Corporal Owen and at this point Lt. Pecoraro noticed that Corporal Owen was shot and had blood on his jacket (R.13,14,45). When Lt. Pecoraro went into accused's tent (R.14,15) he found a rifle and an empty clip

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(R.15). There were six or seven bullet holes in the wall of Corporal Owen's tent, some of which had ripped the blankets and others were about the height of a man's head. These bullets went on through other tents down the line. These bullets came through the door of Corporal Owen's tent (R.15). Corporal Owen was immediately carried to the regimental dispensary where he was examined by Captain Reuben R. Harris, medical officer, 45th Engineer Regiment (GS) (R.5,6). Upon examination of Owen, it was found that he had two gunshot wounds, one in his right cheek and the other in the right deltoid region of the shoulder (R.6). These wounds were about $\frac{1}{2}$ " in depth -- the skin had been laid open with little or no bleeding (R.6). Captain Harris described the wounds as "creases" (R.6). Captain Taylor S. Womack, commanding officer of Company C, 45th Engineer Regiment (GS) (R.9) was at the time of this incident on duty about 200 feet from the orderly tent. Lt. Pecoraro went into the woods back of accused's tent, and brought him into the company orderly room where he saluted, took off his pistol belt with the knife and scabbard attached and said, "That's all I have". When asked by Captain Womack why he fired his rifle he answered, "To protect my life". Immediately thereafter accused denied having or firing a rifle (R. 10). Several men were called into the orderly room and questioned in the presence of accused. These men said Owen had been fired on by accused (R.10). During the first part of the interview between Captain Womack and accused, accused was quiet and did not give any trouble. He later became unruly and kept "butting into the conversation" (R.10). He was cautioned to sit down (R.10). In his rage accused referred to Captain Womack as a "prick". While accused was in the orderly room and in this frame of mind he said "If I had my rifle I would blow up that tent with the cocksucker in it right now". At that time Captain Womack was the only person in the tent referred to by accused (R.12). Directly to Captain Womack accused used the expression: "Captain Womack, that prick". (R.12).

EVIDENCE FOR THE DEFENSE

4. On this occasion Corporal Lawrence Williams, Company C, 45th Engineer Regiment (GS) was in Owen's tent when the argument and altercation in question occurred.

Private Steve Booth of the same company and regiment (R.51) saw Owen shooting in the bushes and noticed accused when he came or was brought out (R.52).

Accused elected to be sworn and take the stand as a witness in his own behalf (R.52). According to him Corporal Lawrence Williams on the morning 9 March 1944 went with him to a nearby Chinese camp for whisky. When they got back to

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company street they found Yates Link in the tent of Corporal Owen. There they had some drinks. All of those present in the tent chipped in and sent for another bottle of whisky. By this time Jackson Williams had joined the crowd. One of the bottles of liquor was placed on the floor by the bed. Accused knocked this bottle over accidentally. The loss of this liquor made Yates Link mad and an argument ensued, during which accused "smacked Link". The argument quieted down and then flared up afresh. According to accused Owen grabbed him around his neck and pushed his knife down in the scabbard. Owen pushed accused in the face and said "Don't you think I have got a gun to blow your brains out". Accused testified that Owen at this point grabbed his rifle and the tent was vacated. Accused claims that he ran out of Owen's tent and into his own, and that when he looked back (R. 53) Owen was in the door of his own tent with his rifle about 2/5ths out of the door. Accused claimed that he then grabbed his rifle because Owen was so close he could not get away. Accused also stated that he backed up and that Owen got nervous and "started working his rifle". He fired eight shots when Owen ran back in his tent. Accused put his gun down, jumped into the bushes and hid behind a log and by this means got away from Owen (R.53,54). Owen then came out of his tent and started shooting in the bushes. Accused was not drunk and knew what he was doing (R..55). Accused admitted that when he fired the shots, Owen was standing in the entrance of his tent "with his rifle pushed out" (R. 55).

5. The preliminary opinion and advice of the staff judge advocate under AW 70 and par. 35 MCM 1928, together with the record of the investigation and summary of the expected evidence discloses that the case was investigated upon a charge sheet containing a specification under AW 63 charging disrespect to a commissioned officer. Another charge under AW 96 charging disorderly conduct in camp and still another under AW 93 charging an assault with intent to do bodily harm with a rifle. These charges were completely and thoroughly investigated and a report with a summary of the expected evidence duly filed. Thereafter, upon consideration of this report and the advice of his staff judge advocate the appointing authority ordered that the charges and specifications be redrafted so as to omit Charge II and its specification and rearrange Charge III and its specification so as to replace the deleted charge and specification and further that the specification under Charge II as redrafted be so drawn as to charge accused with a willful and felonious assault with intent to commit murder upon Willie Owen by shooting him with a rifle. This increased possible punishment under this charge from 5 to 20 years. The charges and specifications otherwise remained the same. The redrafted charges and specifications were duly served on accused on 18 May 1944 and the trial was commenced on June 7, 1944. The accused made no objection to the

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redrafted charges. Except for the alteration of Charge II and its specification, the accused benefited by the change since it eliminated one charge and its specification. The summary of the evidence accompanying the report of the investigating officer discloses every fact which could possibly have been developed upon a reinvestigation of the amended charges. A prima facie case of guilty of Charge II and its specification as redrafted is disclosed by the evidence accompanying the report of the investigating officer. The question then arises: Was it necessary to have another investigation upon the redrafted charges? It appears that every witness (except 3 and the testimony of these did not tend to exculpate accused) who was used at the trial was examined fully during the investigation and all facts concerning this incident known to the respective witness was fully developed. Therefore a second investigation would have produced the same evidentiary results. The investigation of charges and specifications required under AW 70 is procedural and a failure to comply therewith literally will not always defeat the jurisdiction of the court, provided no matter not included in the charges as investigated is included in the redrafted charges. (Sec. 428, sub-sec. I, Dig. Op. JAG 1928). In this case there was matter included in the redrafted charges which did not appear in the charges as investigated but the court, by exceptions and substitutions reduced the crime to exactly the same as that which was in the charge sheet when the investigation was made. Therefore if any irregularity was present it was eliminated by this action of the court and no substantial right of accused was adversely affected even if his rights were threatened by the redrafted charges. In any event it would have been a useless and vain thing to conduct a complete and new investigation upon the redrafted charges which of necessity would have produced the same results as the investigation upon the original charges. It has long been an accepted doctrine that the law never requires the doing of a vain or useless thing. This principle is aptly stated in 36 C.J. 1049 (note 88):

"The law does not command useless things,
for useless labor is folly."

The conduct of the accused under the circumstances here disclosed constitutes the crime alleged unless he is protected by some rule of law under which his behaving can be justified or excused.

"An assault with a dangerous or deadly weapon is, unless otherwise provided by statute, merely an assault, although of an aggravated kind. By specific statutory provisions, however, such assaults are commonly made a distinct offense. As, among other instances, where the assault is made with the intent to inflict a bodily harm or injury,

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where it is without a premeditated design to effect the death of the person assaulted, or where made under circumstances not amounting to an intent to murder, maim, etc." (5 C.J. par. 211 (15)).

"Elements of Offense -- (1) In General: As in simple assault, there must be an attempt or offer to use the weapon, coupled with present ability. The assailant must be near enough to the person assaulted to effect his unlawful intent, otherwise the distance between them is immaterial. Intent: In accordance with the general rule as to intent in criminal assaults there must be an intent to injure in order that there shall be an assault with a dangerous or deadly weapon, although, where the statute makes the gist of the offense consist in the use of the deadly or dangerous weapon, no specific intent is essential other than that inferred from the character of the weapon employed * * * * * " (5 C.J. Par. 212b.)

"Intent: As has been stated, the presumption of a criminal intent may arise from proof of the commission of an unlawful act, and a sane man is presumed to intent the necessary or the natural and probable consequences of his voluntary acts. (16 C.J. 1013d.)

"The character of the instrument or weapon with which the assault is committed constitutes the gist of this offense as distinguishing it from simple assault; and, in case the statute more specifically describes the character of the weapon, the weapon employed must comply with the specific description. A dangerous or deadly weapon, within the meaning of a statute punishing assaults with weapons of such character, is a weapon which, in the manner in which it is used, or attempted to be used, is one which may endanger life or inflict great bodily harm, or, as it is otherwise described, one which is likely to produce death or great bodily injury * * * * * " (5 C.J. Par. 213 (2)).

As his sole defense accused invoked the doctrine of self-defense and sought to justify the shooting of Corporal Owen on that ground. In this contention he is not supported by the evidence. When the argument in which Owen had taken no part grew too heated for comfort or safety Owen ordered to leave the tent and when this injunction went unheeded accused was pushed out of the tent. Accused emphasized his claim of right to remain in Owen's tent by the use of a knife which he drew

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from its scabbard and brandished threateningly. The second time accused went into the tent of Owen he had to be taken out by Sgt. Brown. Thereafter accused went into his tent, got his rifle, came to a point in front of his tent and fired several shots into the tent of Owen where Owen has a right to be actually inflicting wounds upon Owen, Owen did not leave his tent after the altercation until seven or eight shots had been fired into the open door and through his tent by accused, some of which were low enough to rip the blankets on the cot and some approximately the height of a man's head. Accused then fled into the nearby brushland. His conduct immediately after he had shot Owen was properly a part of the evidence to be weighed by the court and is sometimes regarded as a strong indication of guilt.

"The wicked flee when no man pursueth". (16 C.J. 1363(31a)).

The nearest approach to a claim of self-defense disclosed by accused's own testimony is his statement that when he fired the shots Willie Owen was standing in the door of his own tent, with his rifle about 2/5ths out of the door. He does not even suggest that Owen aimed his rifle or otherwise attempted to shoot until after he himself had fired and was retreating. The evidence of the prosecution tends to prove that Owen got his rifle only after he had himself been shot and was bleeding. Only the testimony of Sgt. Brown, who was a hostile witness, suggests the contrary and even Sgt. Brown said he was not looking in that direction when the first two shots were fired (R. 28). Accused seems to have invited the argument in the first place and to have prosecuted it rather vigorously and repeatedly and at one time emphasising his hostility by the brandishing of a knife.

The rule into which accused must bring himself before he can successfully defend on the ground of self-defense is stated in C.J., par. 235(2):

"To support a plea of self-defense, however, there must be some actual attempt or offer to do bodily harm, or defendant must have had reasonable ground to apprehend a design on the prosecutor's part to commit a felony on him or do some great bodily harm, and that there was imminent danger to him of such design being accomplished. His right of self-defense is not limited, however, to the absolute necessity of the occasion, but only by what reasonably appears to him to be dangerous at the time viewed from his standpoint and no other. Accordingly he may act on apparent danger as it reasonably appeared to him at the time; the danger need not be real,

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nor is it necessary that he should be in peril of his life or serious bodily injury."

The accused did not bring himself within the rule of self-defense and therefore is not protected by its doctrine.

There was overwhelming evidence that accused was neither in danger nor threatened with apparent danger at the time he fired the shots with the resultant injury to Owen. In such a situation and where the evidence is in conflict, the court in reaching its findings, the staff judge advocate in reviewing the record, and the reviewing authority in acting thereon have the right to weigh the evidence and to pass upon the credibility of witnesses, and with their conclusions this Board of Review is not authorized to interfere. (CBI 110).

The defense counsel was without authority excused by the court, MCM 1928, par. 43a, but accused when asked by the trial judge advocate whom he desired to introduce as counsel stated that he desired to be defended by the duly appointed assistant defense counsel. This amounted to a selection of his counsel. At no time did it appear that he had made a bad choice, nor that he was not properly defended. So his substantial rights have not been affected by the erroneous but harmless action of the court in excusing the defense counsel. The action of the reviewing authority upon this record cured any defect on this account. Bull. JAG, Feb: 1944, p. 54.

At the appropriate stage of the trial evidence of two previous convictions were considered. The certificate of previous conviction fails to show the dates of the commission of the previous crimes. It does, however, show that the sentence upon one of such previous convictions was approved 5 October 1943 and the other 31 December 1943.

The crime here charged was committed on 9 March 1944. Accused made no objection to the introduction of the abstract copy of his service record when it was offered in evidence for the purpose of showing previous convictions. In the absence of such an objection the crimes may be deemed to have been committed within the statutory time and the evidence thereby properly received. (CM CBI 140).

During the course of the examination of Sgt. Brown (R.29) the trial judge advocate pointed out to the court that Sgt. Brown was a hostile witness and requested a wider latitude of examination than is ordinarily allowed under the circumstances. This was granted under authority of MCM 1928, par.

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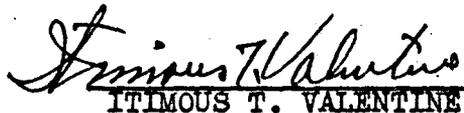
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129. No substantial rights of accused was thereby adversely affected.

The affidavit upon the charge sheet does not show that the accuser swore to the charges as well as the specifications. The rule is "Charges and specifications will be signed and sworn to substantially as indicated on the form". (Par.31, MCM, 1928) (CBI 165).

6. The court was legally constituted and the sentence is within the authorized limits. The court had jurisdiction of the subject matter and of the person of the accused. No errors injuriously affecting the substantial rights of the accused were committed at the trial. The Board of Review is of the opinion, and it accordingly holds that the record of trial is legally sufficient to support the findings and the sentence.

 , Judge Advocate
GRENVILLE BEARDSLEY

 , Judge Advocate
ITIMOUS T. VALENTINE

 Judge Advocate
ROBERT C. VAN NESS

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New Delhi, India,
26 August 1944.

Board of Review
CM CBI # 181

UNITED STATES

INDIA-CHINA WING, ATC

v.

1st Lt. Andrew G. Hood, Jr.,
O-559939, Station # 6,
India-China Wing, Air
Transport Command.

) Trial by GCM convened on
) 22 June 1944 at Misamari,
) India. To be dismissed the
) service.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial of the above named officer has been examined by the Board of Review and the Board of Review submits this, its holding to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Andrew G. Hood, Jr., Station 6, India China Wing, Air Transport Command having been officially entrusted with United States Mail consisting of letters written by Enlisted Men of the United States Army for the purpose of censoring and posting same, did, at or near Misamari, India, on or about 22 May 1944 wrongfully and unlawfully request First Lieutenant James W. Wimberley, Air Corps, to burn said letters and a United States Mail pouch or to instruct a servant to burn said letters together with said United States Mail pouch containing said letters with intent to deceive his superior officers and the persons who wrote said letters into believing that he, First Lieutenant Andrew G. Hood, Jr, had censored said mail and posted the same and to prevent his superior officers and the persons who wrote said letters from knowing or discovering that he had failed to perform the official duty of censorship and posting entrusted to him.

Specification 2: (Deleted by the court upon motion of defense).

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3. Upon arraignment of accused, the defense made a motion to strike specification 2 on the ground of duplicity. This motion was granted. Accused then pleaded not guilty to and was found guilty of the Charge and specification 1 thereof, and sentenced to be dismissed the service. The sentence was approved by the reviewing authority and the case forwarded to the Commanding General, United States Army Forces in China, Burma and India, for action under Article of War 48. The sentence was confirmed by the confirming authority. The order of execution was withheld and the record of trial transmitted to this office pursuant to the provisions of Article of War 50½.

4. About the 14th of April 1944, approximately 200 men from the Misamari Station were sent over to Jorhat for 30 day temporary guard duty (R.10) during an invasion emergency (R.66). Captain Clements first commanded the detachment (R.10). Later it was commanded by a Lieutenant Leslie (R.10). On May 6, the accused was sent over to Jorhat and he replaced Lt. Leslie in Command (R.8,11,66). Lt. Leslie returned to Misamari, 7 May (R.8,11). Accused was the commanding officer of the detachment from 12 May to 17 May (R.67). No other commissioned officer was with the detachment (R.11).

Corporal Martin was acting 1st Sergeant during all of the accused's command period, 6 May to 17 May (R.11). The entire detachment returned to home station by air on 17 May (R.8,12). Accused saw them off and returned alone in a jeep (R.21), arriving at Misamari, 18 May (R.8,12).

The orderly room of the detachment was the back room of the barracks and there was a cigarette carton or box in which the men deposited mail for censoring (R.13,22,36). The letters were deposited unsealed (R.22,35,36). On heavy days there might be 100 letters (R.28) and the mail would be picked up by the commanding officer or else the mail orderly would take it over to the officer's (accused's) tent (R.14,22,26). Lt. Hood usually censored it in his tent (R.14).

Incoming mail was brought over in a U.S. Mail bag, and the same bag would be used to carry the censored mail back to the post office (R.14,15,22). After being deposited in the box for censoring the mail was not returned to the men (R.15). During the period from 6 May to 17 May there was some censored mail posted at the post office (R.17). On the evening before the day they broke camp, a box with approximately a hundred letters was taken to accused's tent for censoring, by Pvt. Daniels who was the C.Q. and mail orderly (R.20) (29)..

Accused returned to his home station, Misamari on 18 May and on 22 May, was ordered to another station for a permanent

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change of station (R.8,38). On 22 May, just before his taking off, the accused told a Lieutenant Wimberly, who lived in a basha directly across from the accused's (R.39) to dispose of a sack of mail over in accused's basha (R.39), telling Lt. Wimberly to burn it, and dispose of the sack also (R.40). The accused referred to it as old mail (R.54) and Lt. Wimberly thought he meant old personal letters (R.54).

The next morning, 22 May (R.56), about 8:30 AM (R.62) and right after breakfast, Lt. Wimberly went to accused's basha, found the sack of mail, and found it contained enlisted men's mail (R.41,56), approximately one hundred pieces (R.57). It was an ordinary mail bag, with no lock on it (R.41), a canvas U. S. Government Mail pouch (R.70). A tag on it said "Men on duty at Jorhat" or something to that effect (R.41,42). Lt. Wimberly called to a nearby officer, Captain Panzen, and the two examined the mail (R.41,56,60) and then turned it over to Lt. Sorrough, the area military executive (R.41,57).

There was no other bag, nor anything else, in the room (R.41,63,64). The letters were unsealed and uncensored (R.42, 57,63,69) and Lt. Sorrough recognized the names of men in his area who had been in the Jorhat detachment (R.62,63). Lt. Sorrough turned the bag of mail over to the Executive Officer (R.64,68,69) and later that day at the office of the Executive Officer (R.42) Captain Panzen and Lt. Wimberly inventoried the letters as listed by Ex.1 (R.43,57) as directed by the Executive Officer (R.70). After listing sender and addressee, of each letter on Ex.1 (R.58), the letters were turned back for censoring and mailing unsealed (R.45).

There were 109 letters (R.70). The names of the senders on Exhibit 1 were identified by the acting 1st Sergeant as men stationed with the Jorhat detachment (R.16). Capt. Herndon, the Executive Officer recognized the uncensored letters as being written by the men on detached service at Jorhat (R.69) dated variously from 6 May to 12 May (R.69). Several men identified the addressees listed on Ex. 1 as friends or relatives they had addressed letters to, and had deposited in the box for censoring by the accused, during 8 May to 17 May (R.23,24). One witness identified five letters (R.32,33,34).

The accused made the comment, voluntarily, that "the work piled up on me and I thought I'd get rid of it" (R.73).

USAF, CBI Cir. 44, 27 April 1944, and WDTC 66, 12 May 1943 were judicially noticed, establishing responsibility for censorship of all mail of enlisted personnel of his command, upon the company or unit commander (R.75).

5. The evidence conclusively shows that accused was the commanding officer of the unit of approximately 200 soldiers.

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sent from Misamari to Jorhat for temporary guard duty, from the 12th to the 17th of May 1944 and as such, was under section II, par. 27, TC 15, War Department, 16 February 1943, "Responsible for the censorship of all mail (except blue envelopes) of enlisted men of his command." The same training circular, in par. 28, recites: "Mail will be received from enlisted personnel in unsealed envelopes ready for mailing or in sealed blue envelopes", and further in paragraph 22 it is said: "All private communications of individuals in a theater of operations are subject to censorship and such delay in transmission as may be deemed necessary by the military authorities in interest of security. Generally, however, mail should not be held more than 48 hours, and then only with the express knowledge and approval of the chief base censor." Circular No. 44 USAF, CBI, 27 April 1944 amplifies the duty of accused in this respect and nowise diminishes his responsibility. This put the duty and responsibility of censoring and posting expeditiously all mail of the enlisted personnel of his command including that in question squarely upon accused.

The evidence clearly shows that the mail which was committed to his charge was mail to be censored by the commanding officer or by some authorized person by him properly delegated as distinguished from the "blue envelope" mail which is to be handled in a different manner.

A servicable and satisfactory means was provided for handling the uncensored mail of the enlisted men of this detail and 109 pieces of such mail was properly handled through the means thus provided and delivered into the possession and in the quarters of accused, who himself took this mail still uncensored back to his home station and into his basha where it was found by Lt. Wimberly who had been directed by accused to take the mail, burn it up or cause it to be burned and to also destroy the United States mail bag in which the mail had been transported. This mail bag was so labeled as to make it perfectly clear that it contained men's mail. The mail was dated from 6 May to 12 May and was retained by accused until 22 May. The fact that the work piled up on accused gave him no reason or excuse for the method he sought to employ in disposing of it.

The only evidence offered for the accused was directed to an impairment of hearing from which Lt. Wimberly was suffering at the time and prior to the time he was directed by accused to destroy the mail and its container. The probative tendency of this evidence in the light of the positive and unequivocal statement of Lt. Wimberly that he did hear and clearly understand accused is too feeble for serious consideration.

One of life's finest fiduciary relationships exists between a unit commander and the enlisted personnel of his command and

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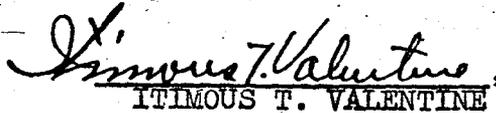
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this relationship should be guarded with jealous care. It is difficult to conceive of a way to more completely disrupt and destroy disciplined comradeship than for the commanding officer to break faith with his men. Accused employed an excellent method to accomplish this end when he sought to delay and destroy personal mail of the men of his command. Letters to and from the people back home are a great stabilizing factor in the morale of the armed forces. There was, in the opinion of the Board of Review, abundant competent evidence to support the findings of the court.

The court was legally constituted and had jurisdiction both of the person of accused and the subject matter of the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The punishment is authorized. The record of trial is legally sufficient to support the finding and sentence.


GRENVILLE BEARDSLEY

Judge Advocate


ITIMOUS T. VALENTINE

Judge Advocate


ROBERT C. VAN NESS

Judge Advocate

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CM CBI # 181 (Hood, Andrew G. Jr.,) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USAF, CBI,
APO 885, c/o Postmaster, New York, N. Y., 2 September 1944.

To: The Commanding General, Headquarters, USAF, CBI, APO 885,
U. S. Army.

1. In the case of 1st Lt. Andrew G. Hood, Jr., O-559939, Station #6, India-China Wing, Air Transport Command, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM CBI 181).


H. J. SEMAN,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 8, CBI, 6 Sep 1944)

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Specification 3: In that Pvt. James S. Champion, Co. D Casual Detachment RG-250-AAA, did at the Stockade Base Section No. 2, Kanchrapara, India, on or about 30 May 1944 assault Sgt. Herbert G. Sommerfeld a non-commissioned officer who was then in the execution of his office, by striking him on the head and body with a club.

3. Accused pleaded not guilty to and was found guilty of all the charges and specifications. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for 10 years. The sentence was approved by the reviewing authority, who designated the United States Disciplinary Barracks nearest the Port of Debarkation in the United States as the place of confinement. The order of execution was withheld and the record of trial forwarded to this office pursuant to the provisions of AW 50½.

4. Accused is a city youth (R.6-18), 23 years old, who is afraid of the dark, and for that reason was not placed on guard duty when stationed in the United States. After arriving in India and prior to 12 May 1944, he had communicated his fears to his superiors (R.6-12) and had been placed on kitchen police instead of guard duty (R.6-18). On the night of 12-13 May, he was placed on guard duty, and was posted as a sentinel for the third relief from hours 1200 to 0400 (R.6-1), at post two miles from the guard tent, guarding ammunition at a road block (R.6-3). Without being relieved from his post, accused left it and went to the guard tent about hours 0130. There he handed his rifle to the sergeant of the guard (R.6-2) and said that he had come back because he was scared and wanted to save his skin. "He looked pretty scared". At this post, the howls of jackals and the wailing music of the Gurkas could be heard (R.6-3). The officer of the day directed that he be placed in arrest in quarters, and another guard was posted.

5. On 30 May 1944, accused was a prisoner in the stockade. About 1800 hours, when the prisoners were lining up for chow, the order was given to come to attention. Champion failed to obey. Corporal James E. Eubanks, Company A, 792nd MP Bn., said to accused, "I am giving you a direct order", and Champion replied that he did not have to remain at attention (R.6-4). Sergeant Herbert G. Summerfeld of the same organization started to march the other prisoners to their food (R.6-4), at which accused observed, "If you think I am going to miss a meal, you are crazy as hell". Corporal Eubanks went toward him. From this point, the evidence is in considerable conflict as to just what occurred. According to Sergeant Summerfeld and Corporal Eubanks, accused "jumped" Eubanks, who hit him over the head with his club (R.6-4). About 10 to 15 prisoners broke ranks and with accused took the club from Summerfeld and Eubanks, and beat, struck and kicked them. The fight lasted 10 or 15 minutes (R.6-5). Accused had Eubanks' club during the melee, and with it struck a blow which broke Eubanks' collar bone, and dislocated his shoulder. Sergeant Summerfeld was struck by accused both with his fists and with the club (R.6-8). The officer

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of the day called other guards, and the disturbance was suppressed by the display of their rifles. The non-commissioned officers are substantially supported in their testimony by the officer of the day, 2nd Lieutenant Donald C. Lawrence, who testified (R.6-10) that accused refused to fall in for mess until he found his mess gear, and then refused to fall out of line when so directed; that Corporal Eubanks to enforce compliance with his orders took him by the arm to lead him from the mess line; that accused bore Eubanks to the ground and Sergeant Summerfeld went to the latter's aid; and that witness thought a riot possible and went to the guard house for guards (R.6-10). Witness saw accused strike Corporal Eubanks with his fist, and saw Sergeant Summerfeld struck by several other prisoners, but not by accused (R.6-11). Accused testified that he went to get his mess kit, and the Corporal yelled, "Don't you know what attention is", and told him to get in line. The Corporal told the sergeant to take the others, and said to accused, "you come here", and grabbed him. Accused told him to take his "damn hands off me". The corporal pulled out his stick and "lit into" accused (R.6-18). In the ensuing fight, accused got Eubanks down, and sergeant Summerfeld came, picked up the club, and began to strike accused on the head and body. Accused grabbed his feet and got him down. All three tried to get the club. Accused got it and hit one of them on the head (R.6-19). The testimony of Privates Clarence A. Barnes (R.6-13; R.6-15), Charles E. Barnes (R.6-15); (R.6-16) and Andrew were (R.6-16-R.6-17) all fellow prisoners in the stockade, substantially agreed with accused's version. Where the evidence is this sharply in conflict, it is for the court to weigh the evidence, judge of the credibility of such irreconcilable testimony, and determine where the truth lies. It is in a much better position to do this than any others, since it has the opportunity to observe the manner, conduct and demeanor of the witnesses, while testifying, and to observe their apparent frankness and fairness or lack of frankness and fairness while on the witness stand. The court thus can best determine the apparent truthfulness or untruthfulness of the witnesses. There is substantial testimony to support the conclusions reached by the court. Accordingly, we have no power to substitute other conclusions for those reached by the duly authorized triers of the facts.

6. A grievous error was committed by the president of the court, the law member unfortunately being absent, when he overruled the defense objection to the highly improper question put on cross examination to the defense witness, Private Clarence A. Barnes, "How many times have you been court-martialed" (R.6-15), to which question the witness was thus forced to answer, "Six times". This question ought not to have been put by the trial judge advocate (MCM 1928, par. 120c, *ibid.*, 124b). If this witness had in fact been convicted of offenses involving moral turpitude or otherwise of such nature as to affect the credibility of this witness, the trial judge advocate failed in his duty in not seeking, in the proper manner, to prove such previous convictions. By this improper question, under the imprimatur of the ruling of the

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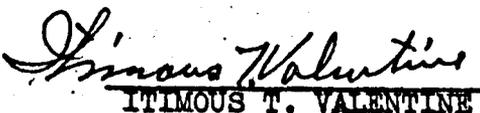
president of the court, suspicion was wrongfully cast upon the veracity of this witness. After careful consideration of all the evidence, however, we are of the opinion that it would be unreasonable to say that the result of the trial would have been different had the objection to the improper question been sustained, as it should have been. It follows that the substantial rights of the accused were not prejudiced by this error.

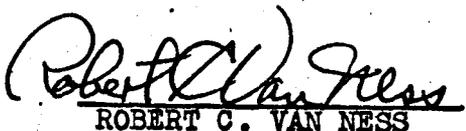
7. The terrors of the night and accused's unreasoning fear of howling jackals and other noises can not be said to furnish legal justification or excuse for his abandonment of his sentry post. The consequences might have been serious. Nevertheless, we are strongly in accord with the following statement, which appears in paragraph 5 of the excellent review which the staff judge advocate submitted to the reviewing authority:

" * * * because of this soldier's reasonably good prior military record, * * * it will also be recommended that, at some time before this prisoner leaves this Theater, a General Court-Martial Order be made at this Headquarters remitting five years of the confinement at hard labor which has been imposed."

8. The court was legally constituted and the sentence is within authorized limits. The court had jurisdiction of the subject matter, and of the person of accused. No errors occurred, which can be said to have substantially affected accused's substantial rights. The Board of Review is of the opinion, and therefore holds, that the record of trial is legally sufficient to support the sentence.


GRENVILLE BEARDSLEY, Judge Advocate


ITIMOUS T. VALENTINE, Judge Advocate


ROBERT C. VAN NESS, Judge Advocate

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
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New Delhi, India,
25 July 1944..

Board of Review
CM CBI # 188

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

SERVICES OF SUPPLY, USAF, CBI.

v.)

Pvt. Lee A. Mitchell,)
39119066, Headquarters)
Detachment, 518th Quarter-)
master Bn. (Mobile) Services)
of Supply.)

) Trial by GCM, convened at APO 689,
) c/o Postmaster, New York, N.Y.,
) 7 June 1944. Dishonorable dis-
) charge, total forfeitures and
) confinement at hard labor for a
) period of 3 years. United States
) Penitentiary nearest the Port of
) Debarkation is the place of con-
) finement.
)

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office in China, Burma and India.

2. Accused was tried on a single charge, Violation of the 93rd Article of War, and one specification thereunder alleging an assault with intent to do bodily harm on Private Fred Cardoza, by cutting him on the head, chest, and arm, with a dangerous instrument to wit, a knife. To the charge defendant pleaded "not guilty of violation of the 93rd Article of War but guilty of the 96th Article of War", and to the specification he pleaded guilty, except the words "with intent to do him bodily harm, commit and assault upon Private (NMI) Cardoza, by cutting him on the head, chest and arm, with a dangerous instrument to wit, a knife", substituting therefor, respectively, the words "wrongfully strike Private (NMI) Cardoza on the head, chest and arm, with a knife", of the excepted words not guilty, of the substituted words guilty. Accused was found guilty of the specification and the charge and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of three (3) years. The reviewing authority approved the sentence and designated the U. S. Penitentiary nearest the port of debarkation as the place of confinement but withheld execution and forwarded the record of trial to The Judge Advocate General's Branch Office for China, Burma and India in accordance with the provisions of Article of War 50½.

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3. Accused and Cardoza both were prisoners confined at hard labor in the stockade at Base Section Number Three, Services of Supply. On the morning of 25 March 1944 the prisoners were lined up and marched into the mess hall (R.11,13,16,19,22) for breakfast. Accused and Cardoza were seated on opposite sides of the table (R.17). According to Corporal Don F. Hurley III, 502 MP Bn. who was on guard, accused arose from the table and asked to get some coffee. On his return accused "set his cup down about a table away from ...his place... and made a dash towards Cardoza's back". (R.11). Pvt. Keith Kemper, Co. A, 502 MP Bn., testified that he saw the incident and when asked if he saw anything in Mitchell's hand he answered, "Not until I heard Cardoza holler that he had cut him, I seen a knife." (R.20). The knife was an old U. S. Scout Knife or Army Scout Knife with blade 4 inches long and was taken away from accused with the blade open while in the mess hall (R.23). Later at the dispensary witness had a better chance to observe the knife and saw blood on it. (R.22). After the two were separated, Cardoza ran. Later he was treated at the dispensary by Captain Donald Williams, MC, who testified that he suffered three separate distinct wounds: one in the scalp an inch long which penetrated the soft tissue and was stopped by the cranium; a second in the chest wall penetrating cartilage to the third rib; and a third in the right arm about three inches below the shoulder joint, a flesh wound about 3/4 inches deep. Witness sutured all three wounds which were bleeding profusely (R.6). The wounds were inflicted with a dull instrument which might have penetrated both the head and chest if it had been sharp (R.7). The evidence shows that there had been no other disturbance that morning. (R.12,17,20) but the day before as evidenced by Cardoza's testimony (R.25) Cardoza had hit accused in the eye as a result of an argument in which accused had said that Cardoza "... is not a man". Evidence of other witnesses corroborated this testimony (R.28). The knife was not introduced as an exhibit at the trial.

4. The accused was properly found guilty of the charge and specification under AW 93. Under AW 96 assaults may be charged which lack elements of the aggravated assaults denounced by AW 93. Evidence does not sustain the contention of the defense that the charge should have been under the 96th Article of War. Accused was properly found guilty of the aggravated assault charged and not merely of the lesser included offense of assault and battery to which he pleaded guilty.

"A deadly weapon is not one that must or may kill. It is an instrument which is likely to produce death or a great bodily harm under the circumstances of its use. The deadly character of the weapon depends sometimes more upon the manner of its use and the condition of the person assaulted than upon the intrinsic character of the weapon itself." State v. Archbell, 139 N.C. 537, 539; 51 S.E., 801.

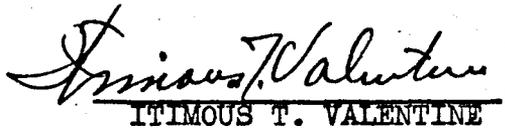
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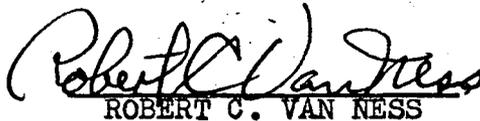
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In CM CBI No. 91 the Board of Review cited the above decision with approval together with State v. Sinclair, 120 N.C. 603; 27 S.E. 77; State v. Norwood, 115 N.C. 789; 20 S.E. 712; 44 A.N., S.R. 498, and held that a stone was such a dangerous instrument that when hurled by the proper persons with the proper intent might cause death or serious bodily harm. There can be no doubt but that the evidence that a knife with a four inch blade was used in such a manner by attacking Cardoza and in cutting him on the head, chest and arm was proof such as to warrant the court in reaching the conclusion that the knife was a dangerous weapon even though it was old and dull. It would have been better procedure to have introduced the knife in evidence, but the evidence of the manner of use of the weapon and the nature of the use made of it was sufficient.

5. The court was legally constituted and the sentence is within the authorized limits. The court had jurisdiction of the subject matter and the person of accused. No errors injuriously affecting the substantial rights of accused were committed at the trial. The Board of Review is of the opinion and accordingly holds, that the record of trial is legally sufficient to support the sentence.


GRENVILLE BEARDSLEY, Judge Advocate


ITIMOUS T. VALENTINE, Judge Advocate


ROBERT C. VAN NESS, Judge Advocate



WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL,
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

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New Delhi, India,
28 July 1944.

Board of Review
CM CBI # 190

U N I T E D S T A T E S) SERVICES OF SUPPLY, USAF, CBI.
)
) Trial on 19 June 1944, by GCM
) convened at Calcutta, India.
) Dishonorable discharge, total
Private Norman Rose, Jr.,) forfeitures and confinement at
33450337, 591st Ordnance) hard labor for ten (10) years.
Ammunition Company.) USDB nearest Port of Debarkation.
)

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier above named has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. The accused was tried on the following charge and specifications:

CHARGE I: Violation of the 63rd Article of War.

Specification 1: In that Private Norman (NMI) Rose Jr., 591st Ordnance Ammunition Company, did, at Kanchrapara, India, on or about 16 April 1944 behave himself with disrespect toward Kenneth Bixler, Captain, QMC, his superior officer, by saying to him, "What do you mean I'm under arrest," "Who is going to arrest me?", "Oh! you're an officer, got two stars or bars, or something, but no son of a bitch'n white officer is going to arrest me", "You make me stop, nobody's going to make me stop, you mother-fuckers. I'm from Brooklyn and I do as I Goddam please", "Come in and get me, you mother-fucking Bastard", "You White mother-fucking Bastards, I have fucked your sisters", or words to that effect.

Specification 2: In that Private Norman (NMI) Rose Jr., 591st Ordnance Ammunition Company, did, at Kanchrapara, India, on or about 16 April 1944, behave himself with disrespect toward Edward S. Nance, 2nd Lt., Inf., his superior

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officer by saying to him, "No mother-fucking son-of-a-bitch cock sucker is going to arrest me", or words to that effect.

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

Specification 1: In that Private Norman (NMI) Rose Jr., Ordnance Ammunition Company, did, at Kanchrapara, India, on or about 16 April 1944, strike Kenneth Bixler, Captain QMC, his superior officer, who was then in the execution of his office, on the head with his fist.

Specification 2: In that Private Norman (NMI) Rose Jr., 591st Ordnance Ammunition Company, did, at Kanchrapara, India, on or about 16 April 1944, having received a lawful command from Kenneth Bixler, Captain QMC, his superior officer, to get out of the cab of the truck he had been driving, wilfully disobey the same.

Specification 3: In that Private Norman (NMI) Rose Jr., 591st Ordnance Ammunition Company, did, at Kanchrapara, India, on or about 16 April 1944, having received a lawful command from Edward S. Nance, 2nd Lt., Inf, his superior officer, to get out of the cab of the truck he had been driving, wilfully disobey the same.

3. Accused pleaded not guilty to and was found guilty of all the charges and specifications. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 16 years. The reviewing authority approved the sentence, reduced the period of confinement to 10 years, and designated the United States Disciplinary Barracks nearest the port of debarkation as the place of confinement, but withheld the order of execution and forwarded the record of trial to this office pursuant to the provisions of AW 50½.

4. Captain Kenneth Bixler and 2nd Lt. Edward S. Nance were standing near the highway (R.4) in front of the staging area at Kanchrapara on 16 April 1944, and saw accused driving an Army truck in an unusual manner. The truck in its progress lunged and swerved from one side of the road to the other, into and out of the ditches at the sides of the road (R.5), and finally stalled in a ditch at the intersection with another road, after knocking down three bamboo fence posts (R.5). Both officers ran to the intersection. Captain Bixler removed the ignition key from the dashboard, told accused that he was under arrest and ordered him to get out of the truck, to which accused replied, "No mother-fucking Captain is going to put me

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under arrest." Lieutenant Nance then told accused that he was under arrest and ordered him to get out of the truck. Accused stated, "No mother fucking second lieutenant can put me under arrest either." He then observed that "You are a bunch of white bastards, I am from Brooklyn, New York, and I will do as I damned please." Lieutenant Nance testified that accused cursed him "in every manner possible, calling me a second lieutenant" (R.5). Among other things, accused said to the lieutenant, "You are a mother fucker, you're a grandmanny fucker, you're a God damned bastard and a son of a bitch" (R.5). Flying Officer Peter Kelly, R.A.F., appeared on the scene and accused greeted him as a "God damned limey mother fucking son of a bitch of a bastard" (R.6). Both Captain Bixler and Lieutenant Nance ordered accused to get out of the truck, but he refused to obey such orders. Captain Bixler stepped on the running board to open the door of the truck. Accused struck him on the head with his fist, knocking off the captain's hat (R.6,8). Upon the arrival of a military police lieutenant, accused submitted to arrest with the comment, "I'll go with you. You are my friend" (R.6). Accused was intoxicated, but was able to distinguish between the various grades of rank of the several officers (R.5), and between British and American uniforms (R.7,9). He could walk (R.8), and his speech was coherent (R.6, 8).

5. Accused, after due warning of his rights, was sworn and testified that while driving the truck on official business, he stopped to render assistance to some British soldiers who were having mechanical troubles with two trucks. One of them gave him a drink, which he thought was "bamboo juice", and he consumed three to four inches out of the bottle which was between a pint and a quart in size (R.11). He had drunk bamboo juice before, but never so much (R.12). He could remember nothing that happened after taking the drink, until he awakened in bed the next morning. Major George O. Riggs testified on accused's behalf that the latter had served under his observation for six months and performed his duties in a very satisfactory manner. Witness saw accused daily, never knew him to be drunk or insubordinate, and he stated that accused was extremely courteous, well disciplined and always respectful (R.10).

6. The members of the court, acting as reasonable men, could not do otherwise than find that the accused had committed the acts and made the disrespectful statements set out in the various specifications of the charges. It must have been equally clear to the members of the court, as it is to us, that at the time and place in question, the accused was drunk and intoxicated. MCM, 1928, par. 126a provides:

"Drunkenness. -- It is a general rule of law that

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voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense."

The element of specific intent does not enter into the definition of the offenses of striking an officer, or of behaving with disrespect to a superior officer. Accused testified that the drinking of the "bamboo juice" was under circumstances, from which it is clear that the drinking was a voluntary act on his part. His drunkenness, therefore, can not relieve him of the legal consequences of those offenses. As to the offense of willful disobedience of the lawful order of a superior officer, whether or not a specific intent be regarded as an element of such offense, we believe there were facts and circumstances in evidence from which the court could reasonably infer that accused knew what he was doing. Such was its province.

7. MCM, 1928, par. 126a, also provides:

"In courts-martial, however, evidence of drunkenness of the accused, as indicating his state of mind at the time of the alleged offense, whether it may be considered as properly affecting the issue to be tried, or only the measure of punishment to be awarded in the event of conviction, is generally admitted in evidence."

That the fact of drunkenness may under some circumstances be proper for consideration by the court in determining the severity of punishment seems implicit in the foregoing language. The accused was properly found guilty of three capital offenses. As the court sentenced him to dishonorable discharge, total forfeitures and confinement at hard labor for 16 years, it is apparent that the fact of his intoxication was given consideration by the court in assessing the punishment to be awarded the accused. Although under all the circumstances, the penalty adjudged by the court may seem somewhat severe, it was well within the prescribed limits. The reviewing authority has reduced the period of confinement to 10 years.

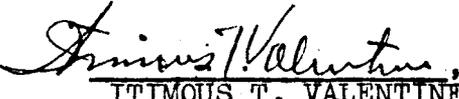
8. The court was legally constituted and the sentence is within the authorized limits. The court had jurisdiction of the subject matter and of the person of the accused. No errors injuriously affecting the substantial rights of accused

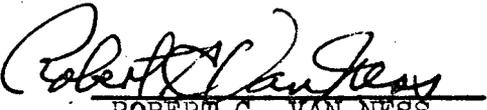
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were committed upon the trial. The Board of Review is of the opinion and accordingly holds that the record of trial is legally sufficient to support the sentence.


GRENVILLE BEARDSLEY, Judge Advocate


ITIMOUS T. VALENTINE, Judge Advocate


ROBERT C. VAN NESS, Judge Advocate



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UNITED STATES ARMY FORCES CHINA BURMA INDIA

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New Delhi, India,
1 August 1944.

Board of Review,
CM CBI # 192.

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

v.

Pvt. Raymond GAUTHIER, 11048557,
Hq & Hq Sqdn, 25th Service Gp.,
XX Bomber Command.

XX BOMBER COMMAND

Trial by GCM 5 July 1944 at
APO 493, c/o Postmaster,
New York, N.Y. Dishonorable
discharge, total forfeitures
confinement at hard labor for
10 years. The Eastern Branch,
USDB, Greenhaven, N.Y., is
place of confinement.

HOLDING of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier above named has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. Accused was tried on the following charges and specifications:

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

Specification 1: In that Private Raymond Gauthier, Headquarters & Headquarters Squadron, 25th Service Group, did, without proper leave, absent himself from his proper Organization and station aboard the United States Army Transport Athos II at Fremantle, West Australia from about 1200 9 April 1944 to about 2400 9 April 1944.

Specification 2: In that Private Raymond Gauthier, Headquarters & Headquarters Squadron, 25th Service Group, did, without proper leave, absent himself from his proper organization and station aboard the United States Army Transport Athos II at Fremantle, West Australia from about 1200 11 April 1944 to about 2400 12 April 1944.

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

Specification 1: In that Private Raymond Gauthier, Headquarters & Headquarters Squadron, 25th Service Group, having received a lawful command from 1st Lt. Edward McDowell

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his superior officer, to remain on board the United States Army Transport Athos II, did at Fremantle, West Australia, on or about 11 April 1944, willfully disobey the command.

Specification 2: In that Private Raymond Gauthier, Headquarters & Headquarters Squadron, 25th Service Group, having received a lawful command from Captain William E. Boyle, Jr, his superior officer, to return to the United States Army Transport Athos II and report to the Officer of the Day or Officer of the Guard, did, at Perth, West Australia, on or about 12 April 1944, willfully disobey the command.

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

Specification: In that Private Raymond Gauthier, Headquarters & Headquarters Squadron, 25th Service Group, having received a lawful order from First Sergeant Thomas B. Harton, Jr., a non-commissioned, officer who was then in the execution of his office, to remain on board the United States Army Transport Athos II, did, at Fremantle, West Australia, on or about 9 April 1944, willfully disobey the same.

3. Accused pleaded not guilty to Charge III and its specification but guilty to all other charges and specifications. He was found guilty of all charges and specifications and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 10 years. The reviewing authority approved the sentence, withheld the order of execution pursuant to AW 50½ and forwarded the record of trial to the Judge Advocate General's Branch Office for China, Burma, and India. The Eastern Branch, U. S. Disciplinary Barracks, Greenhaven, New York was designated as the place of confinement.

4. Accused's plea of guilty admitted every element necessary to constitute the crime alleged in each charge and specification to which he pleaded guilty and thereby eliminated the necessity for the introduction of proof of those crimes. The effect of his pleas of guilty was thoroughly explained to him and he was given ample opportunity to change it if he so desired or if he felt that his rights were thereby jeopardized (R.6).

We, therefore, deem it unnecessary to recite the evidence bearing upon or to discuss these Charges and specifications.

5. The evidence upon which the court found accused guilty of Charge III and its specification was given by 1st Sergeant Thomas B. Harton, Jr., Headquarters, Base Service Squadron, 86th Service Group, of which organization accused was a member (R.16).

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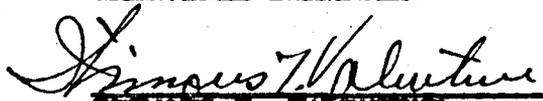
Harton was on duty with his organization on 9 April. He met accused outside the door of the Transport Commander's Office while the transport was docked at Fremantle, Australia. Harton said to accused, "Gauthier, you know you aren't suppose to go to town today", to which accused answered, "Yes". (R.16). To a question, "Did you give him an order on that day?" Harton answered, "Yes, Sir." However when asked to give the axact words used by him, Sergeant Harton to accused at the time in question said, "Private Gauthier, I suppose you know you aren't to leave the ship." Accused answered, "Yes, Sergeant". Nothing else was said. (R.18). Accused did go to town on the 9th. (Pros. Ex. 2). The order or command contemplated by the Article of War under which the accused is charged must be an express and personal one and of a specific character addressed or given to accused in person. (Winthrop's Military Laws and Precedent (1920 reprint) page 573). In the opinion of the Board, the language used by Sergeant Harton does not come within the rule and the evidence in this record is not sufficient to sustain the finding on Charge III and its specification.

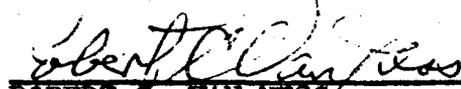
The specifications allege that the offense occurred at Fremantle, West Australia and the proof shows that it was at Perth, Australia, a town about ten miles from Fremantle (R.12). This slight variance is immaterial. Dig. Ops. JAG 1912-40. Sec. 395 (46).

The punishment is authorized.

6. The court was legally constituted and had jurisdiction of the person of accused and of the subject matter of the offenses. The record is not legally sufficient to support the findings of guilty under Charge III and its specification, but is legally sufficient to support the findings of guilty under all the other Charges and specifications, and to support the sentence, and the Board of Review so holds.


_____, Judge Advocate.
GRENVILLE BEARDSLEY


_____, Judge Advocate.
TIMOUS T. VALENTINE


_____, Judge Advocate.
ROBERT C. VAN NESS

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New Delhi, India,
1 August 1944.

Board of Review
CM CBI # 193

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

SERVICES OF SUPPLY USAF, CBI.

v.)

Trial by GCM 26 June 1944 at APO

689, c/o Postmaster, New York,

Pvt. Paul (NMI) Wellons,)

N.Y. Dishonorable discharge, total

33228604, Co. A, 849th)

forfeiture, confinement at hard

Eng. Avia. Battalion.)

labor for ten (10) years.

HOLDING by the BOARD OF REVIEW

BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. Accused was tried on the following charges and specifications:

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

Specification 1: In that Private Paul (NMI) Wellons, Jr., 33228604, Company "A", 849th Engineer Aviation Battalion, was at Nam Yung, Ledo Road, on or about March 6, 1944, disorderly in camp. rel

Specification 2: In that Private Paul (NMI) Wellons, Jr., 33228604, Company "A", 849th Engineer Aviation Battalion, did, at Nam Yung, Ledo Road, on or about March 6, 1944, through carelessness, discharge a service rifle in his tent. 101

Specification 3: In that Private Paul (NMI) Wellons, Jr., 33228604, Company "A", 849th Engineer Aviation Battalion, having received a lawful order from Captain Richard P. Moore to surrender his rifle, the said Captain Richard P. Moore being in the execution of his office, did, at Nam Yung, Ledo Road, on or about March 6, 1944, fail to obey the same.

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

Specification 1: In that Private Paul (NMI) Wellons, Jr., 33228604, Company "A", 849th Engineer Aviation Battalion, did, at Nam Yung, Ledo Road, on or about March 6, 1944, lift up a weapon, to wit a rifle against Captain Richard P. Moore, his superior officer, who was then in the execution of his office.

3. Accused pleaded guilty to specifications 1 and 2 of Charge I, and not guilty to specification 3 of Charge I and Charge II and its specification. He was found guilty of all Charges and specifications, and was sentenced to be dishonorably discharge the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The reviewing authority approved the sentence and designated the U.S. Disciplinary Barracks nearest the port of debarkation in the United States as the place of confinement. The execution of the sentence was withheld pursuant to AW 50½ and the record of trial forwarded to Judge Advocate General's Branch Office for China, Burma and India.

4. This is a companion case to that of Private James (NMI) Edwards (CM CBI # 196). The appointing authority authorized a common trial of accused and Private Edwards. In the absence of objection by either accused, such a trial was had. Attention is invited to our holding in the case of Private Edwards (CM CBI # 196).

EVIDENCE FOR THE PROSECUTION

5. While Lieutenant-Colonel, Hiatt and Captain Moore were at supper, shots were heard in the camp area. Lt. Colonel Hiatt sent Captain Moore to investigate (R.7,14). At the tent area, he saw Corporal McKnight, accused and Edwards, the latter two with rifles. Accused and Edwards had been firing in their tent (R.25, 28, 31). Edwards was just outside the tent and accused was crouching in the doorway. Captain Moore entered the tent and asked why they were firing. Receiving no satisfactory reply, he asked Edwards for his rifle. Edwards said, "No, I am not going to give you my rifle. It's loaded". Edwards attempted to remove the clip. As he turned around, Captain Moore reached for the rifle. At that time he heard accused slip a cartridge into the chamber of his gun. Accused pointed it at the Captain and said, "Don't take that rifle." Then he said, "Do you want my rifle, too?" (R.15). Captain Moore said, "Certainly" (R.16), and accused replied, "I'll give it to you; but the way I am going to give it to you you won't be able to take". (R.15,16,25). Captain Moore had backed fifty to seventy five feet away from the tent, when he heard another shot. He could not tell whether it was meant for him. (R.15). He went back to Colonel Hiatt and explained the situation (R.7,15,20). At the time he seemed

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rather excited (R.7). Lt. Coker and Captain Alpert got guns (R.7,18,19,22). Captain Moore and Captain Alpert went in one direction and Lt. Col. Hiatt and Lt. Coker in another, so that each would approach the tent from a different direction (R.7,15). They got close to the tent while still concealed (R. 7), and heard cursing, loud talking and an occasional shot from the tent. Captain Moore and Lt. Col. Hiatt shouted to the men in the tent to cease firing and come out. For a long time there was no answer or reaction, except continued arguing, heckling and an occasional shot. (R.7). Two shots were fired into the air by Captain Moore (R.8,15,19) and shortly thereafter Edwards came out (R.8,15). He was told to put his hands in the air. He did so, mumbling as he came to the effect that they were shooting the wrong man (R.8,16). He wanted Lt. Col. Hiatt's pistol so he could get someone in the tent (R.8,16) Lt. Col. Hiatt searched Edwards. At this time, accused came out talking and acting in the same manner as Edwards (R.8,16). Coker had been sent for some smoke bombs, and when he returned with the supply officer, the latter took charge of accused and Edwards, putting them under guard (R. 9,16,23).

Accused and Edwards appeared to have been drinking (R.10, 11,16,20,26). Although they talked rather incoherently, they recognized the officers as such (R.10,11,16,23). There was testimony that they were not drunk (R.10,16,20). Lt. Col. Hiatt was of the opinion that they knew right from wrong and that they recognized his authority (R.13). Accused was attached to Captain Moore's company (R.17). Both he and Edwards recognized Lt. Coker, calling him by name.

EVIDENCE FOR THE DEFENSE.

6. Accused had been a good soldier in the past (R.34). He had been drinking (R.33).

Accused made an unsworn statement to the effect that he had consumed a large quantity of whiskey (R. 36) and could not remember what had happened (R. 37).

7. The evidence in support of specification 1, Charge II and Charge II, to which accused pleaded not guilty, is uncontradicted that accused slipped a cartridge into the chamber of his gun and pointed the rifle at Captain Moore at the same time saying, "I'll give it to you, but the way I'm going to give it to you, you won't be able to take".

Winthrop in his treatise on Military Law and Precedents at page 570, states:

"Draws or lifts up any weapon against.-

" 'Here, however, are intended simple assaults;

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the offense consisting either in a mere threatening of violence without anything further being proposed, or in an attempt to do violence which is not effectuated. * * * The raising in a threatening manner of a fire-arm * * * or any implement or thing by which a serious blow could be given, would be within the description-lifts up."

Bull JAG, Jan., 1943, p. 11, states:

To constitute lifting up a weapon within the meaning of AW 64 there must be some physical attempt or menace of violence. Mere words are not enough.

In speaking of "superior officer", Winthrop further says, at p. 570:

By the term "superior", as used in this part of article, is clearly meant an officer of rank superior to that of the offender---or, where an enlisted man is the offender, any commissioned officer whatever. * * * * To warrant a conviction, it should appear that the accused was aware that the person assailed by him was his superior officer. If the latter was an officer of the same company, regiment or garrison, or if he wore a uniform indicating his rank, the accused may, in general be presumed to have known or believed that he was such superior.

It is further necessary to prove that the officer was in the execution of his office. If the accused was not aware that such person was his superior officer it is available as a defense. (Par 134, MCM, 1928). It is not essential that the act should be one pertaining to the special branch of duty of an officer. If the officer engages in the quelling of an affray or disorder, he would properly be regarded as being in the execution of his office. It is our opinion that this offense is not one requiring specific intent and that any question of drunkenness would only be a matter to be considered by the court as to the measure of punishment imposed or the awareness of accused as to Captain Moore's position as an officer.

To us it appears that there is sufficient and competent evidence substantiating all the necessary elements of the offense, and that the court was warranted in finding that the accused was guilty as charged.

8. Accused was also charged with failure to obey a lawful order in violation of AW 96. The only evidence of an order to accused was the following which took place after Edwards refused Captain Moore's demand for his rifle. Accused said, "Do you want my rifle, too?" Captain Moore answered, "Certainly", and accused replied, "I'll give it to you, but the way I'm going to give it

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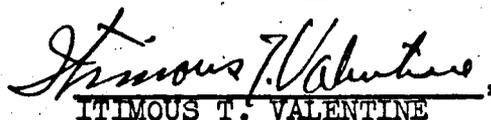
to you, you won't be able to take." The form of the order, is immaterial, if the substance amounts to a positive mandate (Winthrop Military Law and Precedents. p. 574). It is clear that accused knew for what purpose Captain Moore had come to his tent. When accused asked Captain Moore if he wanted his rifle, and Captain answered in the affirmative, these facts and circumstances warrant the conclusion that there was a positive mandate, and, as such, sufficient as an order. We feel that such conclusion is not an unreasonable one, and indeed, it appears clear from the reply of accused that he so considered it. Though accused stated that he would let him have it, his further words and actions were such as to indicate willfull disobedience. Failure to obey, with which accused was charged, is a lesser included offense of willfull disobedience. The court was justified in its finding of guilty.

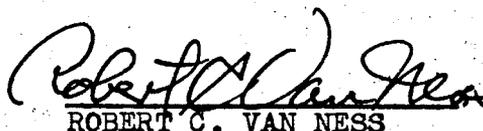
9. As to specification 1 and 2 of Charge I, the accused pleaded guilty. Though, as to specification 2, the record tends to show that the discharge of the rifle was deliberate rather than through carelessness, we do not feel constrained, in view of the guilty plea, to over rule the findings of the court.

10. Accused introduced evidence that he was a good soldier (R. 21,34) and upon cross examination of the witnesses from which such testimony was adduced, the prosecution asked whether or not accused had been court-martialed (R.21) or convicted by court-martial (R.34). The defense made no objection to this line of questioning. In view of the record as a whole, we feel that no substantial rights of accused were thereby prejudiced.

11. The court was legally constituted. It had jurisdiction of the subject matter of the offenses charged and of the persons of the accused. No errors which injuriously affected the substantial rights of the accused were committed upon the trial. The Board of Review is of the opinion and accordingly holds, that the record of trial is legally sufficient to support the sentence.


GRENVILLE BEARDSLEY, Judge Advocate


ITTIMOUS T. VALENTINE, Judge Advocate


ROBERT C. VAN NESS, Judge Advocate



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APO 885,
2 August 1944.

Board of Review
CM CBI # 194

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

v.

Private Charlie Ranson, 36300317,
3303rd Quartermaster Truck Co.,
Advanced Section No.2,
Services of Supply.

SERVICES OF SUPPLY, USAF, CBI

) Trial by GCM, convened at Hq.
) Advanced Section No. 2, SOS,
) APO 629, o/o Postmaster, New
) York, N.Y. Dishonorable
) discharge, total forfeitures
) and confinement at hard labor
) for five (5) years. The U.S
) Disciplinary Barracks nearest
) the Port of Debarkation in
) the United States is place of
) confinement.

HOLDING by the BOARD OF REVIEW

BEARDSLEY, VALENTINE, and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office in China, Burma and India.

2. The accused was tried on the following charges and specifications:

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

Specification 1: In that Private Charlie Ranson, 3303rd Quartermaster Truck Company, did, at Dibrugarh, Assam, India, on or about 0100 hours, 9 May 1944, with intent to do him bodily harm, commit and assault upon T/5th Grade Raymond T. Bell, by shooting him in the arm, with a dangerous weapon, to wit: a 30 calibre 1903 rifle.

Specification 2: In that Private Charlie Ranson, 3303rd Quartermaster Truck Company, did, at Dibrugarh, Assam, India, on or about 9 May 1944, by force and violence, and by putting him in fear, feloniously steal and carry away, currency from the presence of T/5th Grade Raymond T. Bell, the property of the said T/5th Grade Raymond T. Bell, value of about \$90.00.

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The accused pleaded "not guilty" to and was found "guilty" of both specifications and the charge and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for five (5) years. The reviewing authority approved the sentence and designated the U.S. Disciplinary Barracks nearest the port of debarkation in the United States as the place of confinement but withheld execution and forwarded the record of trial to The Judge Advocate General's Branch Officer for China, Burma, and India in accordance with the provisions of Article of War 50½.

3. In the shop tent at or near Dibrugar, Assam, India (R.4, 9,11,12,14) on 9 May 1944 at about 1200 to 1300 or 1330 hours accused, T/5th Grade Raymond T. Bell, K.F. Peterson, (R.4, 9,12,15) Brady T. Dozier (R.4,12,15), Levi Johnson (R.4,6), John W. Steel and Private Perttis D. Taplin, (R.4,9,12) all members of the 3303rd Quartermaster Truck Company, were assembled (R.9) to either take part in or watch a game of dice (R.5,9,12,15). Bell lost during the first part of the game but his luck became better and he won a considerable amount of money from accused (R.10) who from time to time borrowed or otherwise replenished his supply of rupees (R.9,15,5). In all Bell finally had about 2 or 3 hundred rupees and some considerable change. (R.6,10) Bell had the three 100 rupee notes in his wallet and kept the other money in his hand (R.6). Accused went out and Bell asked him if he was coming back. Shortly thereafter accused came back armed with a Springfield rifle (R.5,12). He stopped in the door of the tent with his rifle pointed at Bell and said "Give me one hundred rupees!" or some similar expression. (R.5,12,17,10,14,15,17). Bell turned in his chair toward accused who pulled the trigger of his rifle and fired a shot which took effect in Bell's upper right arm but did not break the bone... (R.6,11,15,16). Bell then threw his wallet and the money on the table. Accused immediately stepped into the tent and as he approached the table on which the wallet containing the money had been thrown by Bell he said: "Don't nobody move or say anything" (R.6), or some similar expression (R.7,15,16) Accused then picked up Bell's wallet, opened it and took out three one hundred rupee notes and backed out of the tent. (R.5-6). Bell did not allow accused to take his money but was forced to give it to him by reason of accused armed demand. (R.6,8).

EVIDENCE FOR THE ACCUSED

4. After being duly warned of his rights, accused took the stand as a witness and stated among things that on the 9 May he engaged in a game of dice with Bell and some others in the tent and that he was a heavy loser while a majority of the other fellows went "busted" (R.18,19). He borrowed money from his friend to continue in the game and noticed that Bell was winning every throw of the dice. Accused became suspicious and asked to see the dice.

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The dice were thereupon thrown at accused by Bell and that was "the only time the dice ever missed" (R.19). Accused observed that Bell kept a one hundred rupee note in the same hand with the dice all the time. Accused asked Bell to give him one hundred rupees and when this was refused went and got his rifle. Accused put it this way: "I asked him to give me 100 rupees and the dice and he refused. So I got my gun and came back not intending to do harm but only to persuade the fellows to give up the dice." Accused admitted shooting Bell from a position of about 4 feet from the table (R.20). Bell would not have given accused the money if it had not been for the gun (R.20). Accused stated that he took only a hundred rupee note from the wallet of Bell after shooting him. He never got the dice and they were not laid on the table with the wallet and money (R.19).

5. Accused was charged under the 93rd Article of War with assault with intent to do bodily harm with a dangerous weapon, to wit: a rifle, upon a charge sheet dated 9 May 1944, which was referred for investigation under paragraph 35a MCM, 1928 and Article of War 70 on 11 May 1944. This charge was fully and thoroughly investigated in the presence of the accused after all of his rights had been explained to him. From the testimony given at this investigation any court would have been justified in finding beyond a reasonable doubt that accused was guilty not only of the crime with which was then in the charge sheet but also of robbery. Upon the disclosures of this testimony the charge sheet was re-drawn on 9 June 1944, sworn to and served upon the accused on 12 June 1944. The trial was commenced 17 June 1944, and upon arraignment accused interposed no objection to the charge as redrafted. The trial proceeded and four of the six witnesses who were examined at the investigation gave testimony. The evidence of the other two as disclosed by the statements attached to the record would have been largely cumulative and in no event would have helped accused. There was not a material fact brought out at the trial that did not appear fully upon the investigation.

6. There was abundant competent evidence from which the court could have, as it properly did, find the accused guilty of both specifications of the charge and of the charge.

7. The only serious legal question which arises upon this record concerns the amendment of the charges, so as to include an additional specification averring a new and serious offense, robbery, which had not been preferred at the time the investigation of the charge and specification alleging assault with a rifle with intent to do bodily harm, was had, and the reference of the charges and specifications for trial, without first having an investigation of the new specification. A new investigation would

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have elicited no new facts or additional testimony. The original investigation went into the entire transaction. Both the robbery and the aggravated assault were fairly and thoroughly investigated. The new investigation would have duplicated the original one. It is not surprising that such a new investigation might have appeared burdensome, vain and useless to the staff judge advocate. The law never requires the doing of a useless thing (CBI 177).

8. The provisions of Article of War 70 relating to the signature and oath to the charges and specifications are procedural and for the benefit of the accused and may be waived by him either explicitly or by failure to object (Dig. Ops. JAG 1913-40 Sec. 428 (7)). The same rule would seem to apply to the requirement of that Article of War for an impartial investigation of the Charges, and the jurisdiction of the Court of the person of the accused under the additional specification was not affected by the failure to conduct a second investigation, in the absence of objection on the part of the accused by plea to the jurisdiction of the court, motion to strike the additional specification or otherwise. Where, as here, all the facts were fully developed upon the investigation under Article of War 70, the accused and his counsel could best judge whether his interests were adversely affected by the failure to investigate the additional specification, when the substance of such specification had been fully investigated in the presence and hearing of accused. There was ample opportunity for accused to object and he failed to do so. The irregularity is one of procedure in the acquisition by the court of jurisdiction of the person of the accused and does not affect jurisdiction of the subject matter. Jurisdiction of the subject matter means jurisdiction to try cases of the general class to which the particular case belongs and can never be conferred by consent of the parties. A defect in procedure in acquiring jurisdiction of the person of the accused, however, may be waived either expressly or by implication. Formal investigation of the additional specification, a step in the acquiring by the court of jurisdiction of the person of the accused as to the offense charged, in specification 2nd could be waived by him, and was waived by him by his failure to object to the amendment of the charge sheet after the investigation so as to include the additional specification, and the reference of the case for trial without a further investigation as to such specification. Of course, had the accused objected, either by motion to strike or by plea to the jurisdiction as to the additional specification, and had the court overruled such motion or plea, a different question would be presented but such question does not arise on the record now before us.

9. In CM 229477, one of the Boards of Review in the Office of The Judge Advocate General of the Army, reviewed a record

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presenting for consideration the legal effect of the identical procedural irregularity. It was there held:

"The foregoing cases * * justify the conclusion that the investigation required by Article of War 70 is not mandatory and that its omission does not constitute, fatal error. This conclusion coincides with the apparent Congressional intention in enacting the statute, which was to prevent "unnecessary and unjust trials" based "on flimsy evidence without a prima facie case" (Hearings before the Senate Committee on Military Affairs on S.B. 5320, 65th Cong., 3rd Sess., p. 108; Hearings before the Subcommittee, Senate Committee on Military Affairs, on S.B. 64, 66th Cong., 1st Sess., pp. 101, 1390; Proceedings, Report of Special War Department Board on Courts-Martial and Their Procedure, July 17, 1919, p. 5). The requirements are wholly procedural and do not affect the processes of courts-martial in their determinations of guilt or innocence. Although the language of a statute is mandatory, it may be regarded as directory if the legislative purpose can best be carried out by such a construction (59 C.J.1072). Moreover, the Supreme Court has held that the provisions of the Fourth, Fifth and Sixth Amendments to the Constitution, which are mandatory in form and some of which involve procedural matters, are not limitations upon the jurisdiction of the trial court and may be waived (see, for example, Trono v. United States, 199 U.S., 521; Diaz v. United States, 223 U.S. 442; Segourola v. United States, 275 U.S. 106; Johnson v. Zerbst, 304 U.S. 458). In United States v. Gill, 55 Fed. (2nd) 399, a United States district court has expressed the view that indictment by a grand jury (a procedure basically similar to investigation of charges) may be waived. In reaching this conclusion the court applied the reasoning of the Supreme Court in Patton v. United States, 281 U.S. 276, a case pertaining to Waiver of trial by jury in criminal cases, guaranteed by section 2, Article III of the Constitution. In that case the Supreme Court said, among other things:

"The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive

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power of the King and the arbitrary or partial judgement of the court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it 'the glory of the English law', nevertheless looked upon it as a 'privilege', albeit 'the most transcendent privilege which any subject can enjoy.'

* * * * *

"In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.

* * * * *

"Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so is to convert a privilege into an imperative requirement" (Patton v. United States, 281 U.S., 276, 296-298).

For the foregoing reasons it is the opinion of the Board of Review that the provisions of Article of War 70 requiring investigation of the charges before trial are not jurisdictional, and that under the circumstances of the present case failure to comply with them did not injuriously affect the substantial rights of accused.* * "

10. The 37th Article of War contemplates the viewing of the record from its four corners and makes it necessary that a substantial right of accused be adversely affected by a procedural error or irregularity before the authority to hold the proceeding invalid arises. This clearly contemplates that, because a mere procedural irregularity intervened, to which the accused did not object, and which did not actually operate to deprive him of any protection to which he was entitled, the proceedings shall not be held in consequence thereof to be invalid, Even handed and speedy administration of justice in the interest of those subject to military law and in furtherance of discipline is the pulsating power of AW 37. Ample opportunity was afforded accused to assert his rights, his trial was fair, and he has no grounds for complaint.

11. Although we prefer not to base our decision in a spirit

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of narrow legalism upon purely technical grounds, it may be noted in passing that, although the first paragraph of AW 70 requires charges and specifications to be signed and sworn to, the second paragraph in relation to investigation before reference for trial does not mention specifications but simply states:

"No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. * *."

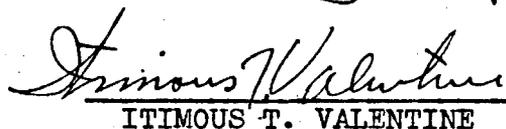
It could be argued not unreasonably that in accordance with the maximum, "expressio unius est exclusio alterius," the article of war specifies that upon which it is to operate, and might be construed as excluding from its effect that which is not expressly mentioned, and that since the additional specification merely avers another offense under the charge of violation of AW 93, which charge had been thoroughly investigated, it was unnecessary, as the staff judge advocate held, to conduct a supplemental investigation as to such specification, before referring the charge for trial. We prefer, however, to base our decision on the broader grounds hereinbefore discussed.

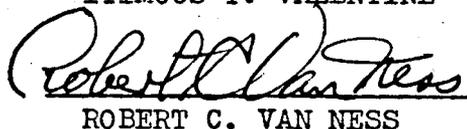
12. Both the defense counsel and the assistant trial judge advocate were excused by the court. This was a function of the appointing authority and not within the power of the court but upon this record as a whole the improper action of the court appears not to have harmed the accused. (Dig. Ops. JAG 1912-40 Sec. 395 (46)).

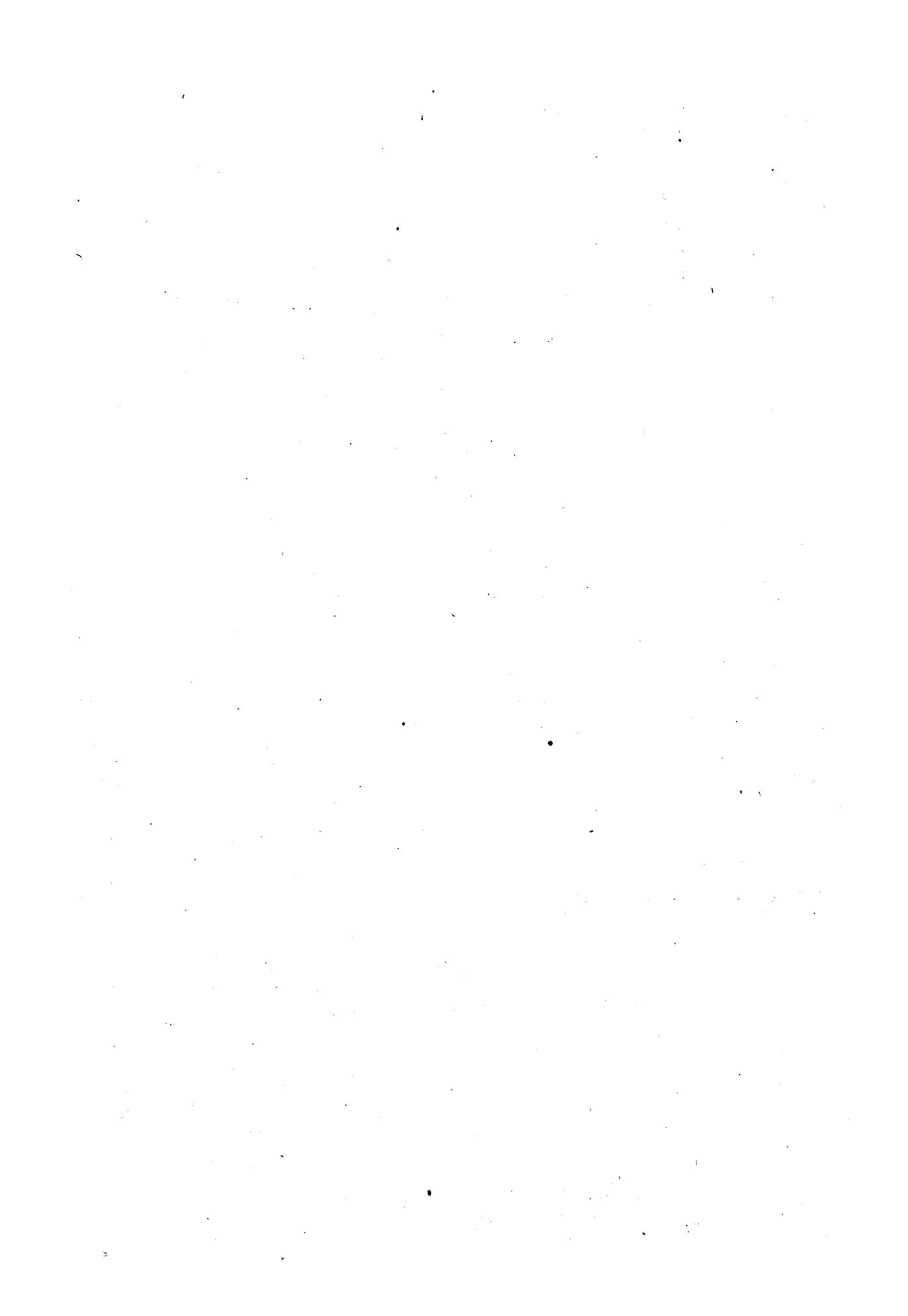
The punishment here administered is well within the limits prescribed by law.

13. The court was legally constituted and had jurisdiction of the subject matter of the offenses and of the person of the accused. No error injuriously affecting any substantial right of the accused was committed during the trial. The Board of Review is of the opinion and, therefore, holds, that the record of trial is legally sufficient to support the findings of guilty and the sentence.


GRENVILLE BEARDLEY, Judge Advocate


TIMOUS T. VALENTINE, Judge Advocate


ROBERT C. VAN NESS, Judge Advocate



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New Delhi, India,
19 July 1944

Board of Review
CM CBI 195

U N I T E D S T A T E S) SERVICES OF SUPPLY USAF, CBI.
v.)
Private Robert Williams,) Trial by GCM at APO 689, c/o Post-
39852658, 3466th QM) master, New York N.Y., 20 June 1944.
Truck Company.) Dishonorable Discharge, Total For-
feitures, Confinement at hard labor
for 5 years. USDB nearest Port of
Debarkation.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the above named soldier has been examined by the Board of Review and the Board of Review submits this its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. The accused was tried on the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private Robert (NMI) Williams, 3466th QM Trk. Co., did, near Digboi, Assam, India, on or about 7 February 1944, feloniously, unlawfully kill T/5 Willard W. Wicker, by negligently operating and overturning a Government Vehicle, and pining him under said vehicle causing death by drowning.

CHARGE II: Violation of the 94th Article of War.
Specification: In that Private Robert (NMI) Williams, 3466th QM Trk. Co., did, near Ledo, Assam, India, on or about 7 February 1944, knowingly wrongfully and without proper authority, apply to his own use, one (1) 6x6, 2½ ton GMC, Combat Cargo Truck, USA # 4184781, of the value of about twenty-five hundred (\$2500.00) dollars, property of the United States, furnished and intended for the military service thereof.

CHARGE III: Violation of the 61st Article of War.
Specification: In that Private Robert (NMI) Williams, 3466th QM Trk. Co., did, without proper leave, absent

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himself from this command at Ledo, Assam, India, from about 0800 hours, 7 February 1944, to about 1630 hours, 7 February 1944.

3. From accused's confession (Pros. Ex. 3) and his unsworn statement (R.31-R.32) and from the testimony of the witnesses, all of whom were called by the prosecution, it was made to appear upon this trial that between hours 0700 and 0800 on 7 February 1944, accused was discharged from 20th General Hospital, at APO 689, where he had been a patient (R.9). He did not report to his organization (R. 8), 3466th QM Truck Company at the same station, but decided to absent himself without leave and visit Calcutta, and discussed his plans to that end with Private Albert C. Mitchell of the same organization (R. 27), who was unable to dissuade him. Without authority, (R.11) accused took a government truck (R.30) assigned to 18th Special Service Unit (R.12)(R.124) and drove towards Digboi, Assam. On the way, he had as passengers for a time two American colored soldiers (R.30) and later picked up Private Louis Smith and T/5 Willard Wicker, both of whom were on pass (R.13) and desired to ride as far as Bogapani. All three soldiers rode in the cab (R.32). The truck was driven by accused in a reckless manner over a muddy and slippery road (R.14). Near Digboi, he attempted to negotiate a blind (R.23) hairpin (R.16) turn at a speed of 25 to 30 miles per hour (R.14). The speed limit at this point was 10 miles per hour (R.25). Accused did not slow down. The truck skidded, and after skidding along the road for about 60 feet (R.15) slid into and over the ditch, turned over, and bottom side up (R.30) went into a nearby "tank" or pond, filled with water. Accused and Smith were able to climb out of the cab, but Wicker was pinned in the truck beneath the water. Smith, without assistance from accused (R.14) vainly tried to extricate Wicker. He asked accused to wait beside the pond and went for help (R.14). When Smith returned with Sergeant Floyd E. Gillespie, Co. A, 502nd M.P. Battalion, accused was (R.14, 22) gone. It took over an hour to remove the body of Wicker (R.25) who was dead from drowning (R.10). At hours 1715 of the same day, accused was arrested by a British M.P. at the railway station in Digboi, when he attempted to purchase a ticket to Calcutta and was unable to show authority for his absence (R.26). He told the M.P. that he had stolen a truck, which had turned over near Digboi.

4. The proof is clear and convincing that, in consequence of reckless and grossly negligent operation by accused, a truck overturned into a pond, thus causing the death of T/5 Wicker. There would appear to be no doubt as to the legal sufficiency of this record of trial to support the finding of guilty of involuntary manslaughter under Charge I and its specification

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(CM CBI 17). There is substantial evidence that accused was absent without proper leave from his organization and station for about 10 hours, and the record is therefore legally sufficient to support the findings of guilty of absence without leave under Charge III and its specification.

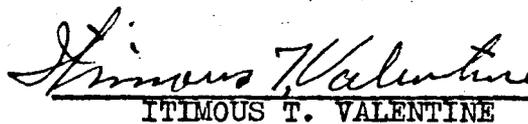
5. As the Charge II and its specification, the question arises whether or not there is a variance between the allegations of such specification that accused did "knowingly wrongfully and without authority apply to his own use one * * * combat cargo truck * * * of the value of * * * \$2500.00 * * *", property of the United States, furnished and intended for the military service thereof, and the evidence in support of such charge and specification. That truck was assigned to the 18th Special Service Unit (R.11). It was found to be missing on 7 February, and subsequently was located in the Ordnance Shop at Haragolai (R.12), in a damaged condition. It was the truck which had turned over (R.24) and was identified by the serial numbers. Its value was \$2500.00 (R.21). Accused told Sergeant Floyd E. Gillespie that he "stole" the truck (R.23, R.24), and after due warning (R.29) made and signed a confession under oath to Captain Eugene Kirk, Provost Marshal, Base Section 3, that he "picked up" the truck and drove toward Digboi, en route to Calcutta. He described the taking of the truck, in like manner, in his unsworn statement (R.13). This evidence tends to prove that accused was guilty of the larceny of the truck, in violation of the 94th AW, or of unlawfully taking and using the truck without the consent of the owner, in violation of AW 96. Accused did not have lawful custody or possession of the truck, and therefore could not have been guilty of the "misappropriation" of the truck, in violation of AW 94. The latter offense cannot be proven by evidence of larceny. The specification, however, does not charge "misappropriation." It avers that accused did "knowingly wrongfully and without authority apply" the truck "to his own use." Among the definitions of "apply" given in Webster's Dictionary is "to use, to appropriate." The same authority defines "appropriate" as "to take to one's self in exclusion of others." "Apply" does not necessarily exclude the connotation of taking by trespass. The specification is reasonably susceptible of the construction that it avers that accused did "knowingly wrongfully and without authority take, to his own use, one truck," etc. Although the wrongful application must be for the personal benefit of the offender, it is immaterial whether the property wrongfully applied to his personal use was or was not entrusted to his charge (Winthrop, Mil. Law & Proc. 708). We must therefore hold that the evidence is legally sufficient to support the findings of guilty under Charge II and its specification.

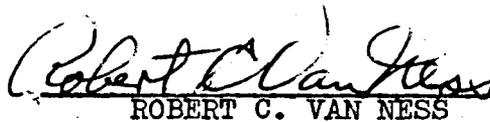
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6. The court was legally constituted. The sentence is well within authorized limits, since the maximum penalty for the offenses of which accused was found guilty is dishonorable discharge, total forfeitures, and confinement at hard labor for life. No errors injuriously affecting the substantial rights of the accused were committed. It is the opinion of the Board of Review and it accordingly holds that the record of trial is legally sufficient to support the sentence.

 , Judge Advocate
GRENVILLE BEARDSLEY

 , Judge Advocate
ITIMOUS T. VALENTINE

 , Judge Advocate
ROBERT C. VAN NESS

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APO 885,
2 August 1944.

Board of Review
CM CBI # 196

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

SERVICES OF SUPPLY USAF, CBI.

v.)

Private James Edwards, Jr.,)
33228586, 849th Engineer)
Aviation Battalion,)
Services of Supply.)

) Trial by GCM at APO 689, C/o Post-
) master, New York, N.Y., 26 June
) 1944. Dishonorable discharge,
) total forfeitures, confinement at
) hard labor five (5) years. United
) States Disciplinary Barracks
) nearest Port of Debarkation.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates.

1. The record of trial in the case of the above named soldier has been examined by the Board of Review and the Board of Review submits this its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. The accused was tried on the following charges and specifications:

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

Specification 1: In that Private James (nmi) Edwards, Jr., 33228586, Company "A", 849th Engineer Aviation Battalion, was at -----, on or about March 6, 1944, disorderly in camp.

Specification 2: In that Private James (nmi) Edwards, Jr., 33228586, Company "A", 849th Engineer Aviation Battalion, did at -----, on or about March 6, 1944, through carelessness, discharge a service rifle in his tent.

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

Specification: In that Private James (nmi) Edwards, Jr., 33228586, Company "A", 849th Engineer Aviation Battalion, having received a lawful command from Captain Richard P. Moore, his superior officer, to surrender his rifle, did, at -----, on or about March 6, 1944, wilfully disobey the same.

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3. Accused pleaded guilty to specifications 1 and 2 of Charge I, and Charge I, and not guilty of Charge II and its specification. He was found guilty of all Charges and specifications, and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such places as the reviewing authority may direct for five (5) years. The reviewing authority approved the sentence but remitted three years of the confinement at hard labor, and designated the United States Disciplinary Barracks nearest the port of debarkation in the United States as the place of confinement. The execution of the sentence was withheld pursuant to AW 50½ and the record of trial forwarded to The Judge Advocate General's Branch Office for China, Burma and India.

4. This is a companion case to that of Private Paul Wellons (CM CBI # 193). The appointing authority authorized a common trial of accused and Private Wellons. In the absence of objection by either accused, such a trial was had. Attention is invited to our holding in the case of Private Paul Wellons (CM CBI # 193).

5. Evidence for the prosecution. While Lieutenant-Colonel Hiatt and Captain Moore were at supper, shots were heard in the camp area. Lt. Col. Hiatt sent Captain Moore to investigate (R. 7, 14). At the tent area he saw Corporal McKnight, accused and Wellons, the latter two with rifles. Accused and Wellons had been firing in their tent (R. 25, 28, 31). Accused was just outside the tent and Wellons was crouching in the doorway. Captain Moore entered the tent and asked why they were firing. Receiving no satisfactory reply, he asked accused for his rifle. Accused said, "No, I am not going to give you my rifle. It's loaded". Accused attempted to remove the clip. As he turned around, Captain Moore reached for the rifle. At that time he heard Wellons slip a cartridge into the chamber of his gun. Wellons pointed it at the Captain and said, "Don't take that rifle". Captain Moore had backed fifty to seventy five feet away from the tent when he heard another shot. He couldn't tell whether it was meant for him. (R.15). He went back to Col. Hiatt and explained the situation (R. 7, 15, 20). At the time he seemed rather excited. (R.7). Lt. Coker and Capt. Alpert got guns (R.7, 18, 19, 22). Captain Moore and Captain Alpert went in one direction; Lt. Col. Hiatt and Lt. Coker went in another so that each would approach the tent from a different direction. (R.7, 15). They got close to the tent while still concealed (R.7), and heard cursing, loud talking and an occasional shot from the tent. Capt. Moore and Lt. Col. Hiatt shouted to the men in the tent to cease firing and come out. For a long time there was no answer or reaction, except continued arguing, heckling and an occasional shot. (R.7). Two shots were fired into the air by Capt. Moore (R. 8, 15, 19) and shortly thereafter accused came out (R.8, 15). He was told to put his hands in the air. He did so, mumbling as he came to the effect that they were shooting the wrong man (R.8, 16). He wanted Lt. Col. Hiatt's pistol so he could get

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someone in the tent (R8,16). Lt. Col. Hiatt searched Edwards. Coker had been sent for some smoke bombs, and when he returned with the supply officer, the latter took charge of accused and Wellons, putting them under guard (R.9,16,23).

Accused and Wellons appeared to have been drinking (R.10, 11, 16,20,26). Although they talked rather incoherently, they recognized the officers as such (R.10,11,16,23). There was testimony that they were not drunk (R.10,16,20). Lt. Col. Hiatt was of the opinion that they knew right from wrong and that they recognized his authority (R.13). Accused was attached to Captain Moore's Company (R.17). Both he and Wellons recognized Lt. Coker calling him by name.

EVIDENCE FOR THE DEFENSE.

6. Accused had been a good soldier in the past (R.34). He had been drinking (R.33). Accused made an unsworn statement to the effect that he had consumed a large quantity of whisky (R. 36), he went to sleep and woke up in the guard tent next morning and that he didn't remember what had happened.(R.37).

7. When a direct order is given by a superior officer it is ordinarily the obligation of the inferior to obey without hesitation, with alacrity and to the full; he must obey promptly and implicitly. The evidence reveals that Captain Moore asked accused for his rifle and accused replied: "No, I am not going to give you my rifle, it's loaded." He then stood there and attempted to remove the clip, and as he turned around Captain Moore started to reach for the rifle when the latter was stopped by Wellons.

Under some circumstances it has been held that alacrity and promptness are not the essence of a lawful command and that where there is no necessity for haste in obedience to an order, a tardy and reluctant compliance is not such a wilful disobedience as contemplated by AW 64 (Bull, JAG, Aug. 1943, p.308).

There is no evidence that accused intended to or was complying with the order after attempting to remove the clip. To say that such was his intent and that he was handing the gun over to Captain Moore when the latter was stopped by Wellons, appears to us speculative and a matter of conjecture. On the contrary the evidence reveals an express refusal to comply. The court as the triers of the facts so found and we agree that the evidence clearly shows a disobedience of a positive and deliberate character, an intentional disregard and defiance of authority.

8. Other matters in this case have been covered in our

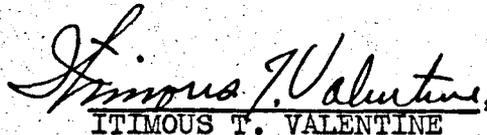
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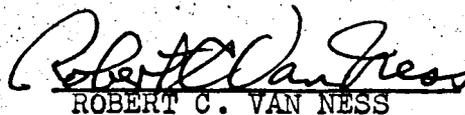
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opinion in the Wellons case and we do not believe it necessary to discuss them here.

9. The court was legally constituted. The sentence is well within authorized limits. No errors injuriously affecting the substantial rights of the accused were committed. It is the opinion of the Board of Review and it accordingly holds that the record of trial is legally sufficient to support the sentence.


GRENVILLE BEARDSLEY, Judge Advocate


ITIMOUS T. VALENTINE, Judge Advocate


ROBERT C. VAN NESS, Judge Advocate

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
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New Delhi, India,
4 August 1944.

Board of Review
CM CBI No. 198

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

XX BOMBER COMMAND

v.)

Corp. Ernest M. Johnson,)
32875973, 1903rd Ordnance)
Company, Ammunition (Avn),)
XX Bomber Command.)

) Trial by GCM convened at APO 493,
) % Postmaster, New York, N. Y.,
) 26 June 1944. Dishonorable
) discharge, total forfeitures
) and confinement at hard labor
) for ten (10) years. The United
) States Disciplinary Barracks,
) Greenhaven, New York.

HOLDING of the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma, and India.

2. Accused was charged jointly with another soldier under the 92nd Article of War for murder of an Indian. At the trial the causes were severed and the court proceeded to the trial of accused. The specification was amended to read:

Specification: In that Corporal Ernest M. Johnson, 1903rd Ordnance Company, Ammunition (Aviation) did, acting in conjunction with Private William (NMI) McDaniel, 1903rd Ordnance Company Ammunition (Aviation) at or near APO 631, on or about 12 May 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Kala Lohar, a human being by shooting him with a carbine.

Accused pleaded "not guilty" to the specification and the Charge. He was found guilty of the specification except the words "with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Kala Lohar", substituting therefor the words "willfully, feloniously, and unlawfully kill one Kala Lohar." Of the excepted words "not guilty" --of the substituted words, "guilty". Of the Charge, "not guilty"

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of the violation of the 92nd Article of War but guilty of violation of the 93rd Article of War."

The accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten (10) years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as place of confinement, but withheld execution and forwarded the record of trial to The Judge Advocate General's Branch Office for China, Burma, and India in accordance with the provisions of Article of War 50½.

3. The corpus delicti was proved by the testimony of 1st Lt. Estill B. Jones, who testified he went to the native village about 0130 hours and found a dead native (R,7). The body was lying underneath a hut and blood on the ground as evidenced in a photograph (Ex 2,5). The prosecution and defense entered into a stipulation that the body found was the body of Kala Lohar (R.32). Lt. Jones and some MPs removed the body to the hospital (R.8) about 1100 or 1200 hours (R.26) where an examination was made by Major Clarence B. Warrenburg who testified he examined the body of the dead Indian brought by Lt. Jones and found he was killed by a small caliber rifle bullet. (R.11). A bullet passing through the mid-section of the body as it did in this Indian (R.12) would probably hit the liver, lower left lung, and some arteries (R.11). He examined no other dead Indians on that date.

4. There was undisputed evidence from the statements of accused and the testimony of accused and other witnesses that accused and McDaniel were at the scene of the crime (Ex 7,11--R.39,61,73) and that they both fired their carbines toward the natives when trouble arose with them. (Ex 7,11--R 44,45,74,80,81) With the corroborating evidence such facts and circumstances were sufficient to warrant the conviction of the accused.

5. Evidence for Defense. The two statements of accused (Pros Ex 7,11) were not confessions in that they failed to contain all the elements necessary for complete acknowledgements of guilt. According to accused, on the 12th of May 1944, he and McDaniel took a walk along Chakulia-Gualsita road. Each carried a carbine as ordered by the commanding officer. McDaniel borrowed his. (Ex 7) They were picked up by a truck which turned off the road about a mile from camp and the two returned for flashlights. They then walked down the same road as darkness came on. According to accused, the two were curious about a fire in the field and asked some natives at the village "Woh kia hai" which means "what is it" and pointed to the fire in the

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field (R.22,42). The natives immediately became angry throwing and hitting them with sticks (R.45). McDaniel fired two or three times and accused fell down and fired in the air. (R.23) They then started back to camp. Accused asked McDaniel why he fired so much and McDaniel told him he saved accused's life. McDaniel adjusted his shirt and saw that he was hurt and fired again into the village (R.45). Also accused made a second statement (Ex 11) in which he said his first statement (Ex 7) contained only one false statement, I "did not remember hearing another shot after I fired....however, McDaniel was very angry when he stopped to examine our injuries. He mentioned the stick or something hit him in the side and raised his carbine and fired in anger....".

6. Accused does not seem to have been altogether frank and truthful. Neither did he tell the complete story as to the cause of the trouble at the village. He testified on cross-examination that there were only three shots (R.47) and McDaniel fired the third. He changed his statement that he fired the 3rd shot because he was charged with murder (R.53). He did not explain his second statement that he fired the third and McDaniel a fourth shot. (Ex 11).

7. According to a native witness (R.68) the two asked for "Bibi" at the native huts throwing in a torch light. (flashlight) The women cried and witness and others ran to the hut (R.70). The two soldiers were standing near the road when the third shot was fired (R.65,71) about 50 yards from where Kala Lohar fell. There were only three shots and the third shot killed Kala Lohar (R.68).

8. Five photographs (Pros Ex 1 to 5 incl) were used which showed the scene of the crime and blood spots where the victim fell (Ex 2,5). A carbine, clip, and empty shell were also introduced as evidence. (Ex 8,9,10). An overseas khaki cap bearing initial and last four digits of McDaniel's serial number (Ex 6) was found at B (Ex 1).

9. "...unlawful homicide without malice aforethought and is either voluntary or involuntary. Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation." Par. 149a MCM, 1928, p. 165.

"Assault upon accused, actual or attempted, by the person killed, an attempt to commit serious personal injury or equivalent circumstances, necessary to reduce a homicide to voluntary manslaughter. But neither assault, nor an attempt to commit an assault,

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is necessary where the evidence shows that the circumstances were such as to justify the excitement of passion to the same extent that an actual assault would have done." Sec. 426, Wharton's Criminal Law. Vol. I, p. 651.

10. Regardless of which one of the two soldiers fired the fatal shot they were both guilty.

"Merely witnessing a crime, without intervention, does not make a person a party...though when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement." Sec. 246, Wharton's Criminal Law. Vol. I, p. 329, 333.

Both soldiers appear to have been particeps criminis for much more than mere presence is disclosed by the evidence. The soldiers were together the whole evening. The village was about a mile from camp (R.7,28,71,73). It was out of bounds to soldiers (R.87). They were seen on the road by the light of a truck and immediately after the third shot was fired, killing Kala Lohar (R.62), a flashlight being flashed at the same time (R.62).

11. The native witnesses were sworn in the manner prescribed by AW 19 and with an oath to the God in which each believed (Krishna or Shatyanarayan) (R.13,17,60,72), and each was questioned as to whether he knew he would be punished by that God if he lied. Each said he understood. The interpreter was so sworn.

12. In designating a place of confinement the reviewing authority designated the United States Disciplinary Barracks, Greenhaven, New York. According to Circular 10, Hq. USAF, CBI, he should have designated the United States Disciplinary Barracks nearest the port of debarkation.

13. The court was authorized to find accused guilty of the offense of manslaughter under AW 93, which is a lesser offense included in murder AW 92. The court was legally constituted. It had jurisdiction of the subject matter of the offense charged and of the person of accused. No errors which injuriously affected the substantial rights of the accused were committed at the trial. The maximum punishment of ten (10)

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years was not exceeded. The Board of Review is of the opinion,
and accordingly holds, that the record of trial is legally
sufficient to support the sentence.

Grenville Beardsley, Judge Advocate
GRENVILLE BEARDSLEY

Itimous T. Valentine, Judge Advocate
ITIMOUS T. VALENTINE

Robert C. Van Ness, Judge Advocate
ROBERT C. VAN NESS





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(269)

New Delhi, India,
8 August 1944.

Board of Review
CM CBI # 199

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

v.

Private William McDaniel,
32205471, 1903rd Ordnance
Company, Ammunition (Aviation).

XX BOMBER COMMAND.

Trial on 15 July 1944 by GCM
convened at APO 493 c/o Post-
master, New York, N.Y. Dis-
honorable discharge, total for-
feitures and confinement at hard
labor for 10 years. U.D. Dis-
ciplinary Barracks, Greenhaven,
New York.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this its holding to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. Accused was tried on the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Ernest M. Johnson, 1903rd Ordnance Company, Ammunition (Aviation), and Private William (NMI) McDaniel, 1903rd Ordnance Company, Ammunition (Aviation), acting jointly and in pursuance of a common intent, did, at or near APO 631, on or about 12 May 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Kala Lohar, a human being by shooting him with a carbine.

As a severance previously had been granted by another court, the specification upon motion of the prosecution was amended to read:

Specification: In that Private William (NMI) McDaniel, 1903rd Ordnance Company, Ammunition (Aviation), did, acting in conjunction with Corporal Ernest M. Johnson, 1903rd Ordnance

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Company, Ammunition (Aviation), at or near APO 631, on or about 12 May 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with pre-meditation kill one Kala Lohar, a human being, by shooting him with a carbine.

Accused pleaded not guilty to the charge and to the specification as amended. He was found guilty of the specification "With the following exceptions: delete the words 'acting in conjunction with Corporal Ernest M. Johnson, 1903rd Ordnance Company, Ammunition (Aviation) APO 631' and 'with malice aforethought, deliberately and with premeditation', and with the following addition, the word 'and' between the words 'feloniously, unlawfully'", and not guilty of the charge but "guilty of the 93rd Article of War". He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten (10) years. The reviewing authority approved the sentence and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, but withheld the order directing the execution of the sentence, and forwarded the record of trial to The Judge Advocate General's Branch Office for China, Burma and India.

3. Accused and Corporal Ernest M. Johnson, both of whom belonged to the same organization, walked from camp about 1000 yards along a country road on the evening of 12 May 1944. Each of them carried a carbine. When darkness approached, they returned to camp and got flash lights and went back along the road to a point where a nearby native village of seven or eight huts could be seen from the road. About 50 coolies, half male and half female (R.29) lived in the village which adjoined a brick yard and kiln (R.26). No road or path led to the village directly from the road on which the soldiers were (R.44). An open field lies between the road and the village, which at the nearest point is 75 feet from the road (R.9). The victim of the homicide, Kala Lohar, and the native witnesses, Chuman Missir, Sudhir Chandra Sing, Jagannath Tanty and Banmali Lohar were living in the village on the night in question. According to accused (first statement, Pros. Ex. 8) and to Johnson, who was called as a witness on behalf of the prosecution, the soldiers did not go into the village but according to the Indian witnesses, two soldiers entered the village, flashed the lights of their "torches" into the huts (R.27) and cried, "Bibi, bibi" (R.18,26), a Hindustani word meaning "woman" or "wife", which in the lingua franca of our soldiers and others in India has come to have a broader and an immoral connotation. The female coolies began to cry out, "Lights, lights. Alas, alas. The soldiers have come". (R.18,31,32). All the coolies ran to the front of the same hut. The soldiers withdrew a little and then fired two shots (R.18,33). The inhabitants of

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the village then ran away and fled (R.18,34). After a few minutes, in the belief that the soldiers had gone, they began to return (R.18). A truck passed, by the lights of which the two soldiers were visible on the road. Another shot was heard. The bullet struck Kala Lohar and he fell, crying "Father, Father" (R.27). The villagers again fled. About ten minutes intervened between the first two shots and this third shot (R.19). The Indian witnesses deny that any stones were thrown, or that the soldiers were molested in any way at any time. (R.19,28). None of the natives were near the road when the third shot was fired (R.29).

Corporal Johnson testified as a witness for the prosecution (R.48) and for the court (R.63). He swore that with accused he was walking back to camp when their attention was attracted by a big red glow off from the road (R.69). In the direction of the red glow, they saw a man standing near a hut, and started toward him to inquire as to the cause of the fire. They pointed toward the flame (which came from the brick kiln), and asked what it was. He did not answer. Almost at the same moment, a "mob", as Johnson put it (R.70), assailed the soldiers with bamboo poles and bricks. The two took to their heels. Near the road, Johnson fell. Believing that he could not get up before the coolies reached him, he fired "with the butt of the carbine on the ground" (R.71) to frighten his pursuers. Just before he fired, he heard another shot from some distance away. The natives fled and he started toward the road, where McDaniel joined him. They started toward camp. A truck passed them, and witness realized he had lost his flashlight. They retraced their steps, and he used accused's flashlight to find his flashlight, just off the road (R.73). They walked back toward camp about eight or ten steps, when Johnson turned around and saw McDaniel fire a shot. McDaniel said that the people were coming back. The shot was fired in the general direction of the village (R.74). The two then returned to camp together (R.75).

Five photographs (Pros. Ex. 1-5) showing (1) the village and the earthen wall about it, (2) the hut where Kala Lohar was found to be shot, (3) the view of the village from the highway, (4) the brick kiln and yard adjoining the village, and (5) the spot where Kala Lohar's body was found, were admitted in evidence by agreement (R.6).

Captain Estil B. Jones, CMP, Assistant Provost Marshall, went to the village about 2 o'clock in the morning of 13 May 1944 (R.11). There he found the body of a native by the hut shown on Pros. Ex. 2, at the spot of blood shown on Pros. Ex. 5. This hut was about 75 feet from the road (R.9). He accompanied the body, which showed no signs of life and was beginning to chill (R.7) to the station hospital, where it was examined by Major Warrenburg, who found the man to have been dead for three hours or more (R.13) from a bullet wound. A government issue garrison cap (Pros. Ex. 7) was found between the road and hut (R.11), near the wall around the village (R.60).

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It was marked with the first letter of the owner's name, M, and the figures 5471, the last four digits of his serial number (R.36). After reading AW 24 to him and advising him that anything he said would be used against him and that he didn't have to say anything if he didn't wish to (R.37), Captain Jones questioned accused, who made two statements in writing, which he signed (Pros. Ex. 8 and 9). In Pros. Ex. 8, accused stated that he and Johnson were walking along the road, but denied that they ever left it. Accused felt a sudden and sharp blow to his hip, and fell into the ditch beside the road, where he lost his cap. Johnson ran and dropped into a ditch nearby. Natives were around them throwing bricks, stones, sticks and other missiles. He called to Johnson, who answered. All but two or three of the natives ran toward Johnson. Accused then fired once at an angle of 45 degrees into the air. He heard another shot from Johnson's direction. They had started to run to the camp, where they went to bed without reporting the incident. In Pros. Ex. 8, he stated that "after we got back to the road and the natives had quit throwing things at us", Johnson stated he had lost his flashlight. He borrowed accused's flashlight and "walked back toward the village some 100 to 150 feet". The natives started back toward them. Johnson turned around and fired one more shot towards the village. They then ran back to camp.

4. Defense counsel refused to stipulate (R.11) that the body found by Captain Jones was that of Kala Lohar, named in the specification of the charge as the victim of the homicide. However, we think that the testimony of the Indian witnesses that Kala Lohar was shot and "fell down, crying piteously" (R.19,20,27) at the spot where Captain Jones found the body, together with the testimony of Captain Jones and the findings of Major Warrenburg, proves conclusively that Kala Lohar came to his death from a gun shot wound, and that the bullet was fired either by accused or by Johnson.

5. The theory of the defense upon the trial seems to have been that the fatal shot was fired by Johnson, after both he and accused had fired into the air a few minutes before in self defense. Johnson testified that the shot was fired by accused, apparently in a spirit of revenge for what he testified was an unprovoked assault by a mob of coolies from the village, as accused also claimed in his statement. If the Indian witnesses are to be believed, however, both accused and Johnson were unlawful trespassers, flashing lights into their huts, and asking for "bibi", and one of them without any provocation shot and killed Kala Lohar. It was for the court to determine from the conflicting versions of the witnesses, and from the other evidence before it, what the ultimate facts were. Its finding that accused shot Kala Lohar, under circumstances which made the killing manslaughter, is amply supported by the evidence.

6. Johnson was found guilty by another court of manslaughter "in conjunction with" accused (CM CBI 198, Johnson, Ernest M.)

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The finding in the instant case, which excepts the words, "acting in conjunction with Corporal Ernest M. Johnson, 1903rd Ordnance Company, Ammunition (Aviation)" (R.81), is at variance with the finding of guilty made by the other court as to Johnson. On 4 August 1944, we found the record of trial in that case to be legally sufficient to support the findings of guilty and the sentence to dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. There may appear to be some inconsistency between the finding in the other case that Johnson was guilty of manslaughter "in conjunction with" with accused, and the finding in this case that accused is guilty of manslaughter, but not in conjunction with Johnson. However, we do not feel that the inconsistency between the findings is such as to impair the validity of the findings and the sentence in this case. (CM 197115, Dig. Ops. JAG, 1912-40, Sec. 395 (44)).

7. The interpreter and the Indian witnesses were sworn in the manner prescribed by AW 19 and with an oath to the Hindu God worshiped by each (Krishna, R.3; Krishna, R.15; Krishna, R.25; Shatyanarayan, R.51; Shatyanarayan, R.54). Such procedure has been held by this board to be proper as to Hindus (CM CBI 198) and as to Mohammedans (CM CBI 37, CM CBI 65).

8. Where it is desired by a court in a proper case to find an accused guilty of an offense lesser than and included in that charged, the proper method is by exceptions and substitutions, that is: as to the specification: "Guilty, except the words '***', substituting therefor the words '***'; of the substituted words 'guilty', of the excepted words, 'not guilty'." As to the charge in such a case, the finding should be: "Not guilty, but guilty of a violation of the Article of War." Here, the findings were by "deletion" and "addition" of words. While unusual, exceptional and irregular in form, the findings of guilty adjudged by the court are easily understood and are unambiguous. Corrective action is therefore unnecessary. The court in its finding of guilty, deleted the words "APO 631". The specification and finding taken together thus omit the venue of the crime. Since the jurisdiction of military courts is not territorial, the error does not prejudice the accused.

9. The reviewing authority designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement. The practice prescribed in this Theater is to designate "the branch of the United States Disciplinary Barracks nearest the port of debarkation in the United States." (Cir. 10, Hq. USAF, CBI, cs).

10. The court was legally constituted, and had jurisdiction of the subject matter and of the person of the accused. No errors were committed which injuriously affected the substantial rights

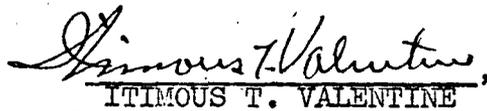
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of the accused. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the sentence.

 Judge Advocate
GRENVILLE BEARDSLEY

 Judge Advocate
TITIMOUS T. VALENTINE

 Judge Advocate
ROBERT C. VAN NESS

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New Delhi, India,
24 August 1944.

Board of Review
CM CBI # 219

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

SERVICES OF SUPPLY USAF, CBI.

v.

Private Robert L. Price,
34068497, 3307th QM Truck
Co., 39th QM Bn. Mobile.

) Trial on 24 July 1944 by GCM at
) APO 689, c/o Postmaster, New York,
) N.Y. Dishonorable discharge,
) total forfeitures and confinement
) at hard labor for life. U. S.
) Penitentiary nearest Port of
) Debarkation in the United States.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates.

1. The record of trial in the case of the above named soldier has been examined by the Board of Review, which submits this its holding to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India,

2. Accused was tried on the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert L. Price, 3307th QM Truck Company, 39th QM Battalion Mobile, did, at Harmony Church,----- India, on or about June 15, 1944 with Malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Corporal Louie Miller, a human being by shooting him in the head with a rifle.

3. Accused pleaded not guilty to and was found guilty of the specification and the charge, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life (R.46). The sentence was approved by the reviewing authority, who designated the United States Penitentiary nearest the Port of Debarkation in the United States as the place of confinement. The order of execution was withheld and the record of trial was forwarded to this office pursuant to the provisions of AW 50½.

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4. About hours 0745 on 15 June 1944, accused with two other soldiers went to the first sergeant's office ready to go on pass (R. 17). The first sergeant told accused that only two could go, and that he would receive a pass when the other two returned. Accused complained that he was all dressed to go on pass, and was told that he had lost nothing but some time. He went to his basha, got into working clothes, and then returned to the office and told the first sergeant he would like to talk to him. An argument ensued, and when accused refused to leave the office, the first sergeant pointed a "tommy gun" at him and told him to throw away a knife which accused carried in a scabbard on his belt. The knife had not been drawn (R.18). Accused complied with the order and then was forced to go to the day room, where First Sergeant Hawkins told Corporal Louie Miller to get his rifle and hold accused there "under arrest". This Corporal Miller did. Soon, 1st Lieutenant Swenson arrived. Accused renewed his complaint, and after a time was told by Hawkins to "shut up". Accused refused and the first sergeant struck him. A platoon sergeant then took accused to his basha. After a time, accused looked out and saw First Sergeant Hawkins and Corporal Miller standing on the lawn engaged in conversation. Accused loaded his rifle, and shot at Hawkins (R.18). The bullet struck Miller in the head, penetrating the cranial cavity (R.8). He was taken to the 20th General Hospital, where Captain Paul O. Klingensmith, MC, upon examination found that he had died from such wound. Shortly after finishing his lunch on the same day, Captain Royal R. Higgason, Signal Corps, learned that a colored soldier, armed with a rifle, was in the area of his organization. The captain had heard of a shooting across the street from his area. He armed himself and went out: He saw accused holding a rifle, which was cocked, and asked him (R.9) what he was doing in the area. Accused said he wanted to talk to him. Captain Higgason observed that he was excited and nervous. He told accused to relax and advised him that he did not need to say anything, and that anything which he did say might be used against him. Accused seemed to want to discuss the matter, and related a version of the homicide and the events leading up to it, which substantially agrees with the foregoing summation of the facts (R.10-12). Captain Higgason heard the fatal shot, and fixed the time between hours 1120 and 1145. The conversation with accused took place between hours 1315 and 1330. Accused expressed sorrow that he had killed the wrong man, and said that the man he killed was his best friend (R.11,14).

1st Lieutenant Aaron D. McCulley, CMP, of the Criminal Investigation Division of the regional office of the Theater Provost Marshal, questioned accused after warning him of his rights. Accused's statement was reduced to writing, and signed and sworn to by him, in the presence of Captain Thomas W. C. Smith

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(R.16), his company commander (R.5) and others. The statement was admitted in evidence (R.16) as Prosecution's Exhibit P-1, the defense counsel stating that he had no objection.

Accused, after being advised of his rights, testified in his own behalf (R.30). His testimony, his sworn statement to Lieutenant McCully and his unsworn statement to Captain Higason are substantially in accord as to the slaying and the events which preceded it, except that in his testimony he stated for the first time that he had drunk three bottles of beer while sitting on the bed in his basha, and that when he saw the first sergeant and Corporal Miller talking together, he had no control of himself. "A vim (sic) ran over my face, I just couldn't see anything for a second. I gets my rifle and I loaded it * * * and walks towards the window and I shot my rifle out the window, which struck Corporal Miller, the bullet did". (R.36). He stated that he killed Miller accidentally (R.40). When reminded that he had said that the rifle was aimed at the first sergeant, accused testified, "I just imagine I did aim, I wouldn't say personally that I did, because I was in a struggle, didn't have any control of myself at all, but I do imagine I aimed it" (R.40). Accused had been in the Army since 17 February 1942. He admitted that he had heard AW 92 read to him (R.40).

5. It is but seldom that there is so little dispute about the facts in a homicide case. At the time of the slaying, accused doubtless was in an angry and disturbed condition of mind, following the denial of the pass, and the two altercations between him and the first sergeant. It is clear, however, that a substantial period of time intervened between the expulsion by First Sergeant Hawkins with his "tommy gun" of accused from his office, and the striking by him soon thereafter of accused in the day room, and the firing by accused from his basha of the bullet, intended for Hawkins, which killed Miller. It can not reasonably be said that the court was not warranted by the facts and circumstances in evidence in its conclusion that such period was ample to constitute a reasonably sufficient "cooling time", as it ordinarily is termed, for reflection and deliberation by accused, so as to make the killing murder and not voluntary manslaughter. The question is not so much whether the passions of the accused subsided, but whether the time which intervened between the assault upon him by the first sergeant and the slaying was of such duration as would be a sufficient period for the passions of a reasonable man to cool.

6. The fact that accused intended to shoot First Sergeant Hawkins and actually shot "his best friend", Corporal Miller, does not relieve accused in the slightest of the consequences of his rash act. The overwhelming weight of judicial authority is that a homicide such as this partakes of the quality of the

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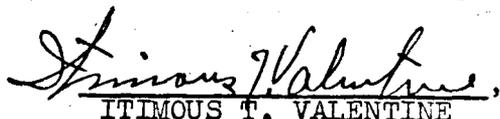
WAR DEPARTMENT
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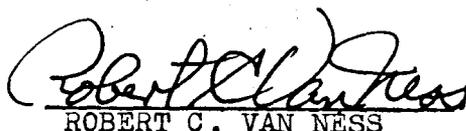
original act, so that the legal responsibility of the slayer is precisely what it would have been had his aim been true and his bullet struck the individual for whom it was intended. The criminal intent and malice of the slayer follow his bullet, and he may properly be found guilty of the murder of one whose death he neither intended or desired, if the circumstances are such as would make him guilty of murder had he killed the person at whom he shot (Ryan v. People, 50 Col. 99, 114 Pac. 306, Anno. Cases 1912B 1232; Mayweather v. State, 29 Ariz. 460, 242 Pac. 864, 865; People v. Aranda, 12 Calif. 2d 307, 83 Pac. 2d 928; Butler v. People, 125 Ill. 641, 18 N.E. 338, 1 L.R.A. 211, 8 Am. St. Rep. 423; Commonwealth v. Caldwell, 223 Ky. 65, 2 S.W. 2d 1055; State v. Batson, 339 No. 298, 96 S.W. 2d 384, 388; People v. Sobieskoda, 235 N.Y. 411, 139 N.E. 558; State v. Dalton, 178 N.C. 779, 101 S.E. 548; Commonwealth v. Lyons, 283 Pa. 327; 129 Atl. 86.). From the facts and circumstances in evidence, the court could, as it did, reasonably find that the attempt to shoot Hawkins was malicious and premeditated, and that since the death of Miller resulted therefrom, accused was guilty of murder.

7. Accused is 30 years of age. He was inducted at Fort Benning, Georgia on 19 February 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed upon the trial. A sentence either to death or to imprisonment for life is mandatory upon conviction of murder in violation of AW 92. Confinement in a penitentiary is authorized by AW 42 upon conviction of murder, since it is recognized as an offense of a civil nature and is punishable by penitentiary confinement under sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454). The Board of Review is of the opinion and accordingly holds that the record of trial is legally sufficient to support the findings and the sentence.


GRENVILLE BEARDSLEY, Judge Advocate


ITIMOUS T. VALENTINE, Judge Advocate


ROBERT C. VAN NESS, Judge Advocate

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New Delhi, India,
26 August 1944.

Board of Review
CM CBI # 222.

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

INDIA - CHINA WING, ATC

v.)

2nd Lt. Robert K. Broome,
O-800317, Station 11, India-
China Wing, Air Transport
Command.)

) Trial on 19 June 1944 by GCM
) convened at -----India.
) Dismissal, total forfeitures,
) confinement at hard labor for
) one year.
) No place of confinement de-
) signated.
)

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates.

1. The record of trial in the case of the above named officer has been examined by the Board of Review, which submits this its holding to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Robert K. Broome, Station 11, India China Wing, Air Transport Command, having been restricted to the limits of his quarters did, at ----- India on or about 11 April 1944, break his restriction by leaving and absenting himself from said quarters.

Specification 2: In that 2nd Lt. Robert K. Broome, Station 11, India China Wing, Air Transport Command, did, at ----- India, on or about the 10th of April 1944, commit an assault upon 2nd Lt. Homer H. Wilson, by wrongfully striking the said Lieutenant Homer H. Wilson on the face and head with his fists and foot.

3. Accused pleaded not guilty to and was found guilty of both specifications and of the charge, and was sentenced to be dismissed the service, to forfeit all pay and allowances due or

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to become due, and to be confined at hard labor for five years. So much only of the sentence as provides for dismissal, total forfeitures and confinement at hard labor for one year was approved by the appointing authority, who forwarded the record of trial to the Commanding General, United States Army Forces in China, Burma and India, for action under AW 48. The confirming authority confirmed the sentence as approved by the appointing authority, and pursuant to AW 50½, withheld the order directing the execution of the sentence. No place of confinement has been designated. The record of trial was forwarded to this office pursuant to the provisions of AW 50½.

4. About midnight on 9 April 1944, accused with Captain Walling and Captain Andrews, after a "promotion party", at which they had gathered with Captain McNelly and several other officers (R. 54,85, 86), went to the quarters of 2nd Lt. Homer H. Wilson, where accused struck Lt. Wilson several times with his fists (R. 18, 30, 38,86), bounced his head up and down against the concrete floor (R.18,30) and kicked him on the head (R.18,30,55), causing him to become unconscious (R.19,30,38), and to bleed from the mouth (R.19,30,38). At the time of the attack, Lt. Wilson had been alerted for a flight. He could not make that flight, and did not operate an airplane for a week. His face was bruised and swollen, and for a time his hearing was impaired (R.10).

5. Several days prior to the assault, Captain McNelly as pilot and Lt. Wilson as copilot had brought their plane down at Sookerating, after flying the hump, en route to their home station. There Captain McNelly consumed intoxicating liquor in such quantity as to cause the operations officer to require that the flight be not resumed until the next day. Upon arrival at Station 11, Lt. Wilson reported the affair to Major Collier, their commanding officer, thereby incurring the ill will of some of the other officers at that station (R. 57,64,67,80). Lt. Wilson did not know accused and had never seen him prior to the assault (R.9).

6. About midnight on 9 April, Captain McNelly, the accused and other officers leaving the promotion party observed Lt. Wilson going to his quarters (R.54,85 86), a short distance away. Captain Walling remarked, "There's Wilson back, the dirty low son of a bitch. Somebody should knock his ears off. I think I will do it." (R.54). Accused suggested that this would be unwise due to the difference in rank between Captain Walling and Lt. Wilson. Captain Walling answered, "Broome, why don't you go over and knock the shit out of him?" (R.55). Accused responded, "I will," and started toward Lt. Wilson's quarters, followed by Captain Walling, Captain Andrews and Lt. Greer (R.55,86). Accused had drunk quite a bit of liquor at the promotion party (R.53).

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7. According to Lt. Wilson, he heard someone behind him in his quarters and, as he turned around, was struck in the face without warning by accused (R.8). Accused then screamed, "I'll knock your head in, you yellow son of a bitch. Take your hands out of your pockets and fight. I am going to beat the hell out of you" (R.9). 1st Lt. William H. S. Morris went to Lt. Wilson's room about midnight, where he found accused urging Lt. Wilson to put up his hands and fight (R.17). Also in the room were Lt. Wilson's roommate, Lt. Fiske, who was in bed, and Lieutenants Baum and Jacobs. At the door were Captains Andrews and Walling (R.17). Accused told Lt. Wilson that he was going to give him a good licking for the Sookerating incident, called him a "son of a bitch", and said that he was "chicken shit for having ratted on another officer" (R.18). Lieutenant Wilson refused to fight. Accused struck him several times, and they rolled to the floor. They wrestled there, and accused struck Lt. Wilson several times. Then accused seized Lt. Wilson by the shoulders and bounced his head against the floor. Bystanders pulled accused away, and as they did so, he kicked Lt. Wilson in the head (R.22,23). As accused was dragged away, he said, "Let me go and I'll kill the cocksucker, I'll kill the son of a bitch" (R.20). Captain Walling and Captain Andrews were the two highest ranking officers present. Captain Andrews said that if anybody interfered in the fight, he would knock hell out of them with a chair (R.24). After the fight, Captain Walling, Captain Andrews and accused with other officers remained in front of the basha (R.25). Lt. Fiske heard someone attempting to enter the basha through the window. Lt. Morris found Captain Andrews behind the window (R.26). He said, "I'll kill you, you son of a bitch, and threw a rock at Lt. Morris. Captain Andrews again entered the basha and threatened to beat "hell out of you, mop up the floor, and gouge the eyeballs out" of Lt Morris (R. 26).

8. The principal differences in the details of the affair as related by the witnesses for the prosecution (Lt. Wilson R.6), Lt. Morris (R.15) and WOJG Munkittrick (R.27)), and those who testified on behalf of the accused (accused (R.85) and Lt. Greer (R.53)), were as to whether the bumping of Lt. Wilson's head upon the concrete floor was unintended and merely incidental to the struggle on the floor, and whether the kicking of his head was unintended and due to the uncontrolled reflex action of accused's foot as he was dragged away from the former's prostrate body. According to accused, "As to bouncing his head on the floor, I never have done that; I definitely did not. If I kicked him, and I don't say I did -- it is possible that my foot struck him when they were pulling me off" (R.86). Lt. Greer did not see accused attempt to bang Lt. Wilson's head on the floor, and did not see a deliberate attempt to kick him (R.55). In the opinion of Lt. Morris (R.18), Warrant Officer Munkittrick (R.30), and Lt. Fiske, (R.38), the action of accused in kicking

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Lt. Wilson on the head while he was lying on the floor was deliberate and intentional.

9. Accused testified that he did not have a direct order from Captain Walling to attack accused, but he merely suggested it. In Lt. Wilson's quarters, he denounced his conduct. "I decided that with the proper provocation he would fight and it would quell the feeling" (R.86). This decision was made after he had asked Lt. Wilson to fight and he had refused. Accused stated that when he first struck him, Lt. Wilson's hands were in his pocket. Accused admitted that he was the aggressor, that he went uninvited to Lt. Wilson's basha for the sole purpose of beating him up, that he knew that it was "entirely wrong" and that he would be subject to disciplinary action (R.89).

10. Accused's own testimony frankly and honestly admitted the substantial allegations of specification 1 of the charge. Although he did not deny the kicking, accused denied having intentionally kicked his victim. His testimony indicates not only that he is guilty, but that he has a most unusual conception of the obligations of friendship to those who have been made the subject of disciplinary action by higher authority. It would be a strange Army, if an officer conscientiously reporting the facts to superiors in respect to derelictions of others, were to be under the necessity of so doing at the risk of being beaten into unconsciousness by any friend of him whose misconduct was the subject of official report.

11. The evidence in support of the specification charging assault and battery leaves no shadow of doubt as to the sufficiency of the proof.

12. As to specification 2 of the charge, the evidence establishes that about hours 0230, 10 April 1944, Major Collier, the station commander, placed accused in confinement in the guard house (R.42). As Major Collier was going away, he left written instructions to restrict accused to his quarters (Pros. Ex. 1), upon being released from confinement. This was done by the Provost Marshal about hours 0630, on the same day (R.43). Lt. Black, the Provost Marshal, took the accused to his quarters and directed him not to leave them, except to go to mess and to the latrine (R.45). The next day, Major Townsend and Lt. Rogers saw accused on the porch of the basha next to that occupied by him, and about 20 feet away (R.49,70,71). When asked by Major Townsend, why he was not in his quarters, the accused replied, "No excuse, sir" (R.86). Accused stated that he did not intend to violate the restriction, that he believed they meant that he was to be around his quarters, that he had always gone to the ditch by the basha next door to wash his teeth, and had become involved in a conversation there after washing his teeth, on the occasion when Major Townsend found him on the porch of the other basha (R.87). While the evidence indicates that the violation

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of the restriction was not deliberate, it is equally clear that the accused did violate the restriction.

13. Evidence offered on behalf of the defendant established that he had previously been a well-mannered officer who did not have the reputation of engaging in fights (R.73), and who had been above average as a pilot and was a qualified first pilot (R.76). He had made 23 round trips over the mountains to China, and had been a good flying officer. (R.77).

14. With one exception, the only questions which arise upon this record are factual, if indeed it can be said that there could have been any question as to the facts after the court had heard the testimony of the accused (R.85-93). Following the cross examination of the accused by the prosecution, the following questions among others were asked by a member of the court, to which questions accused made the following answers:

- "Q. Are you from the South?
A. Yes. Atlanta, Georgia.
Q. In Atlanta, did you have many fights, as a boy?
A. No. I should not say that I was never in a fight as a boy. I was in fights.
Q. In Atlanta, Georgia, of your own knowledge, do they take the law in their own hands and fight things out?
A. No, sir, they do not." (R.93).

Eight officers, other than the personnel of the prosecution and the defense, sat upon the trial of this case (R.2,3). Five of them were of field grade. It is most unlikely that any of them would have been inclined to believe that Americans from any particular section would be more likely to settle differences with their fists than those from other parts of the country, and it is not probable that any such implication was intended. In view of the conclusive nature of the evidence, and accused's testimony, which amounted to an honest and frank judicial confession of guilt under specification 1 of the charge, we do not see how the foregoing examination could have been prejudicial to the accused.

15. Attached to the record of trial are (a) written pleas for clemency submitted by Captain Floyd A. Duncan, 1st Lt. Robert P. Broch, Major John G. McDonald, Attorney Dudley L. Weber and 1st Lt. DeLee Crum, in the form of separate letters; (b) request for clemency signed by 2nd Lt. Andrew J. Feinman, defense counsel, Captain Francis S. Tennant, associate defense counsel, and 1st Lt. Emerson S. Sturdevant, assistant defense counsel; (c) recommendation for clemency, signed by Major William M. Jefferies, a member of the court; and (d) testimonial letters as to the character and ability of accused written by 1st Lt. Robert P. Broch, 1st W. S. Johnson, 1st Lt. Kenneth E. Proctor, Captain Arthur LaVove, and Captain Perry W. Andrews. The contents of these documents has been noted.

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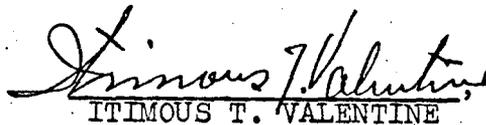
16. At the time that charges were preferred against accused, he was 20 years and 8 months old. He entered the military service on 12 March 1942.

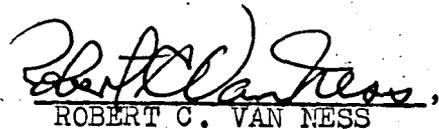
17. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed upon the trial. The sentence, as modified by the reviewing authority, is authorized for the offenses of which the accused was found guilty.

18. The United States Disciplinary Barracks nearest the Port of Debarkation in the United States should be designated by the confirming authority as the place of confinement.

19. The Board of Review is of the opinion and accordingly holds that the record of trial is legally sufficient to support the findings and the sentence, as modified by the reviewing authority and as confirmed by the confirming authority.


GRENVILLE BEARDSLEY, Judge Advocate


ITIMOUS T. VALENTINE, Judge Advocate


ROBERT C. VAN NESS, Judge Advocate

CM CBI # 222 (Broome, Robert K.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USAF, CBI,
APO 885, c/o Postmaster, New York, N.Y., 28 August 1944.

To: The Commanding General, USAF, CBI, APO 885, U. S. Army.

1. In the case of 2nd Lt. Robert K. Broome, O-800317, Station # 11, India-China Wing, Air Transport Command, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM CBI 222).

H. J. SEMAN,
Col. J. A. G. D.

H. J. SEMAN,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 10, CBI, 4 Sep 1944)

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WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

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New Delhi, India,
29 August 1944.

Board of Review,
CM CBI # 223.

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

INDIA-CHINA WING, ATC

v.)

Trial on 8 June 1944 by GCM
convened at -----India.

2nd Lt. Harold T. Ford,
O-674038, Station No. 7,
India-China Wing,
Air Transport Command.)

Dismissal and total forfeitures.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the above named officer has been examined by the Board of Review, which submits this its holding to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

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

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

Specification: In that Second Lieutenant Harold T. Ford, Station Number Seven, India China Wing, Air Transport Command, being on duty as Officer of the Day, did, at -----India, on or about February 19, 1944, absent himself without proper leave from his station.

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

Specification: In that Second Lieutenant Harold T. Ford, Station Number Seven, India China Wing, Air Transport Command, did, at -----India, on or about February 19, 1944, while on duty as Officer of the Day, wrongfully abandon and neglect his duties as Officer of the Day.

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

Specification 1: (Stricken by the court)

Specification 2: In that Second Lieutenant Harold T. Ford, Station Number Seven, India China Wing, Air

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Transport Command, did, at ----- India, on or about February 19, 1944, with intent to deceive the Station Commander, officially report to the Station Adjutant, that he had checked the guard at Station Number Seven, India China Wing Air Transport Command, at 0230 hours, which report was known by the said Second Lieutenant Harold T. Ford to be untrue in that he had not checked the guard at Station Number Seven after 2400 hours.

3. Accused pleaded not guilty to all of the charges and specifications, and was found guilty of all the charges and specifications, except Specification 1 of Charge III, which specification was stricken by the court because of a material variance between the language thereof on the original charge sheet and the language thereof in the copy of the charges and specifications served upon the accused prior to the trial (R.151). He was sentenced to dismissal and to forfeiture of all pay and allowances due and to become due (R.154). The reviewing authority approved the sentence, and forwarded the record of trial to the Commanding General, United States Army Forces in China, Burma and India, for action under AW 48. The confirming authority approved only so much of the findings of guilty of the specification of Charge III and Charge III as involves a finding of guilty of the specification in violation of Article of War 96, and confirmed the sentence. The order directing the execution of the sentence was withheld, and the record of trial was forwarded to this office, pursuant to the provisions of AW 50 $\frac{1}{2}$.

4. The evidence may be summarized briefly, as a not inconsiderable portion of the testimony relates to the stricken specification under Charge III. At hours 1600 on 18 February 1944 (R.7), accused commenced a 24 hour tour of duty as Officer of the Day at ----- (R.7,R.58). Specific written instructions (Pros. Ex. 1) setting out the duties of the Officer of the Day were posted on the Bulletin Board (R.8,R.66,R.85,R.86). These instructions, among other things, required:

- (1) Inspection of the guard at least twice during the hours, once before and once after midnight;
- (2) That the Officer of the Day remain at Guard Headquarters throughout his tour of duty, except when duty required his presence elsewhere;
- (3) That either the Officer of the Day or the Sergeant of the Guard be present at Guard Headquarters at all times.

Between hours 0030 and 0110 on 19 February, at the entrance to the station, the accused and Salisbury, the sergeant of the guard, saw three soldiers drive up in a reconnaissance car (R.16,R.40,R.58), which they had taken from the motor pool (R.16), without any authorization (R.52). The corporal of the guard asked for their trip ticket (R.17). Before any reply could be made, accused

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interrupted, saying: "I bet the boys are going jig jigging" (R. 17). He then inquired of Salisbury whether he would like to go too (R.18). Accused and Sgt. Salisbury got in the car (R.18, R.31), after someone asked if the three soldiers in the car "knew where any 'pussy' was?" (R.30). Just before this, accused had told the corporal of the guard that he and Salisbury were going to the mess hall (R.63,R.75,R.129), but neither of them advised any one that they were leaving the station (R.129, R.130). The car was driven five miles from the post (R.21) to the intersection of a path with the road, near Pabpabbojohn (R.18,R.31), where accused and the four soldiers got out and walked on the path (R.41) about a mile and a quarter (R.18,R.21), (R.32, R.33, R.44,R.60), to a bungalow, known to the surgeon (R.93) and the provost marshal (R.83,R.84,R.85,R.86,R.91,R.96, R.97,R.106) as a house of prostitution. All five were admitted to the resort (R.18,R.28,R.31,R.42,R.43). It was suggested that if three went outside, the other two would have a "better chance" Accused and Salisbury remained in the bungalow, and their three companions went outside (R.19, R.32,R.61). In from 15 to 35 minutes (R.19,R.24,R.32), Salisbury came out of the house, and a little while later the accused came outside. Both said that they didn't get any (R.19), and that they had to get back to the station before anything happened at the field (R.19,R.33). Two of the soldiers remained at the bawdy house, and the third drove accused and the sergeant of the guard back to the post. Accused was absent from the post about an hour and forty-five minutes (R.19,R.25,R.33,R.34,R.46).

5. Between midnight and 0600 on 19 February, accused and the sergeant of the guard made a check of but three (R.64,R.65, R.71,R.72,R.135) of the total of sixteen (R.65) posts. The three posts checked were on the way from the guardhouse to the gate (R.64,R.71). Neither the guard at the headquarters (R.80) nor the guards over the airplanes were checked (R.65).

6. Accused signed (R.9,R.126) a report in writing as Office of the Day (Pros. Ex.2), stating that he had checked the guard at 2300 on 18 February and at 0230 on 19 February.

7. Testifying in his own behalf, accused admitted that the only check of the guard was about midnight at the ammunition dump (R.124) and the gate (R.125) and at one post about 0200 (R.125). When he heard the phrase "jig jig" at the gate, he decided to "see what was going on" (R.125), and made the trip to the house of prostitution in line of duty (R.126). There, he reached the conclusion that it was not a house of prostitution. He denied all knowledge of the written instructions governing Officers of the Day (R.128), but admitted that he had never inquired about them (R.143). He did not know that he was supposed to check every guard (R.127), and denied any

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intent to deceive the station commander by his written report (R.127). The commanding officer, (R.12,R.14), the executive officer, who signed the charges (R.117), the operations officer (R.118) and the assistant operations officer (R.120), all testified that accused was an efficient officer. According to Sergeant Salisbury, some of the other officers of the day had checked all the guards, while others had not (R.20).

8. The station adjutant testified that there was no authority for the officer of the day to investigate off the station for houses of ill fame (R.146), and that the instructions to check the guard meant to check it in its entirety (R.147).

9. The evidence furnishes no basis upon any one could doubt reasonably that accused was absent from his station without leave for nearly two hours and that he failed in and neglected his duties as officer of the day, (a) omitting to make an inspection of the guard once before and once after midnight as required by the instructions, the inspection after midnight being also required FM 26-5, par. 13c, (b) failure to remain at the guardhouse except when required by duty to be elsewhere as required by the instructions, (c) failure to keep the guard informed as to where he might be found as required by FM 26-5, par. 13k, and (d) failure to be at the guard house when the sergeant of the guard was absent therefrom as required by the instructions. It is equally apparent that the report of his tour of duty, which accused signed, was untrue and must have been known by him to be untrue, in that he had not checked the guard at 2300 and 030 as therein stated, the first check having been of but a small fraction of the total number of posts, and the second check never having been made at all.

10. The accused was 25 years and 9 months old at the time of the commission of the several offenses. He served as an enlisted man in the National Guard from 9 May 1934 to 5 June 1936 and in the Regular Army from 19 September 1941 to 17 April 1942, and as an Aviation Cadet from 18 April 1942 to 19 March 1943. He was commissioned a second lieutenant on 20 March 1943.

11. Letters recommending clemency, signed by the president of the court and by accused's individual counsel respectively, are attached to the record. The contents of these documents has been noted.

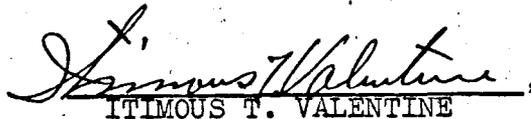
12. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed upon the trial. The sentence is authorized for the offenses of which accused was convicted.

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13. The Board of Review is of the opinion and accordingly holds that the record of trial is legally sufficient to support the findings and the sentence, as modified and confirmed by the confirming authority.


GRENVILLE BEARDSLEY, Judge Advocate


TITIMOUS T. VALENTINE, Judge Advocate

(Disqualified)
ROBERT C. VAN NESS, Judge Advocate

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CM CBI # 223 (Ford Harold T.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USAF, CBI,
APO 885, c/o Postmaster, New York, N.Y., 31 August 1944.

To: The Commanding General, USAF, CBI, APO 885, U. S. Army.

1. In the case of 2nd Lieutenant Harold T. Ford, O-674038, Station No. 7, India-China Wing, Air Transport Command, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order, as follows: (CM CBI 223).

H. J. SEMAN,
Col. J. A. G. D.

H. J. SEMAN,
Colonel J.A.G.D.,
Acting Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 9, CBI, 6 Sep 1944)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
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(293)

APO 885,
1 September 1944.

Board of Review
CM CBI # 224

U N I T E D S T A T E S) AIR SERVICE COMMAND USAF, CBI.
))
)) Trial on 23 June 1944 by GCM
)) convened at APO 690, c/o Post-
)) master, New York, N.Y. To be
2nd Lt. Francis E. Moore,)) dismissed the service.
0-1551469, Ordnance Supply)))
& Maintenance Company (Avn))))
305th Service Group.)))
))

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the above named officer has been examined by the Board of Review, which submits this its holding to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that 2nd Lt. Francis E. Moore, 1670th Ordnance S. & M. Co., Avn., 305th Service Group, was, at APO 690, on or about 1000 hours, 23 May 1944, found drunk while on duty as a company officer.

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

Specification: In that 2nd Lt. Francis E. Moore, 1670th Ordnance S. & M. Co., Avn., 305th Service Group, was, at ----- India, on or about 21 May 1944, in a public place, to wit, Madath Brothers' Restaurant, drunk and disorderly while in uniform.

3. Accused pleaded not guilty to both charges and specifications. He was found guilty of Charge I and its specification, not guilty of Charge II but guilty of a violation of the 96th Article of War and of the specification, guilty, except the word "drunk and", of the excepted words not guilty. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, United States Army Forces in China, Burma

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and India, for action under AW 48. The confirming authority confirmed the sentence as approved by the appointing authority, and pursuant to AW 50½, withheld the order directing the execution of the sentence. The record of trial was forwarded to this office pursuant to the provisions of AW 50½.

4. On the afternoon of 21 May 1944, at about 1700 to 1800 hours, accused, in uniform, and another officer were drinking in the restaurant and bar of Modath Brothers in ----- India. (R.6, 7, 10, 12). The establishment was crowded and the service slow, which incensed accused. Upon receiving an order of drinks, he threw his bill on the floor and yelled "Jao, Jao". (R.8). The proprietor remonstrated with him, and accused said, "If you don't go away, I will shoot you." (R.8). He drew his pistol and pointed it at Madath. A sergeant nearby told accused to put it away (R.8), which he did (R.10,13) after showing him that there was no lead in the chamber of the pistol (R.13). Other witnesses testified to the effect that accused pulled the pistol and stated, "maybe this will get some service", but did not point the gun at anyone (R.10, 13) and that they did not hear him use loud language or see him throw his bill upon the floor. (R.10,11, 14). Accused was drunk, (R. 8), or at least under the influence of liquor (R.11, 13), and not sober (R.11, 13).

5. On 23 May 1944, accused was on duty as a company officer and his hours were from 0630 to 1130 hours and 1430 to 1700 hours (R.16, 23). Lt. Nevergold was acting company commander and saw accused ride out from the company area at 0625 hours (R.16). Lt. Nevergold had asked accused to stay in the orderly room, and at 0915 found him in the mess hall. About five minutes later accused was in a truck ready to pull out (R.17, 19) at which time "his breath was heavy with the odor of alcohol" (R.19). The acting company commander stopped the truck and he took accused to the orderly room (R.16, 17) where he went to sleep (R.17). In front of the orderly room his face was flushed, he was walking as though not sober, and his hat was on backwards (R.23). His speech was heavy (R.17,20); he wobbled (R.17, 18, 19) as he walked; and his eyes were blood shot and red (R.17, 24). He was drunk (R.17). The ambulance was called (R.24), he was helped in and taken to the hospital (R.17, 18). He had to be helped out of his chair in the orderly room to go to the ambulance (R.18) and his breath smelled of liquor (R.18, 24). His mental and physical "facilities" appeared to be affected by liquor (R.18, 21) to such an extent as to affect his physical condition so as he could not perform his ordinary duties (R.18), and to such an extent as to sensibly impair the rational and full exercise of his mental and physical faculties (R.21). He was not kept in the infirmary but returned to his quarters (R.23).

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6. An enlisted man was close enough to the table of accused at Madath Brothers to see and hear what went on. He saw a sergeant talking to accused, but did not see accused refuse to pay a bill or hear any threats against the proprietor (R. 25, 26).

7. At the hospital accused had a definite smell of alcohol on his breath, his speech was thick and slow. No complete medical examination was made. The medical officer noticed no other apparent evidence of intoxication and was of the opinion that, though accused was not sober, yet he was not sufficiently intoxicated to sensibly impair the rational and full exercise of his mental and physical faculties at the time he observed accused.

8. From the foregoing evidence regarding specification 1 of Charge I and Charge I, the vital question is whether or not accused was found drunk. There is no doubt that he was on duty as a company officer at the time. To support a conviction under AW 85, with which accused is here charged, it is necessary to prove intoxication to a degree sufficient sensibly to impair the rational and full exercise of the mental and physical faculties. On this point there is sharp conflict between the evidence adduced by the prosecution and that presented by the defense. The sworn statement of the medical officer was admitted by stipulation. From this it appears that no medical examination was made of accused because a complete examination as to drunkenness cannot be made without certain tests, which it was not possible to perform. Though there was a definite smell of alcohol on accused's breath and his speech was thick and slow, yet the medical officer was of the opinion that there was no other apparent evidence of intoxication, and he did not believe accused was then sufficiently intoxicated so as to sensibly impair the rational and full exercise of his mental and physical faculties at the time of such observation. This is in direct conflict with the evidence as presented by the prosecution, and presents a fact question. It is not our function, in passing upon the legal sufficiency of a record, to weigh evidence or determine controverted questions of fact. That is the function of the court-martial, the reviewing authority, and, as in this case, the confirming authority. There is substantial evidence in the record to support the finding of guilty, and, therefore, we hold the record legally sufficient as to the specification of Charge I and Charge I.

9. The evidence as to the conduct of accused at Madath Brothers in -----, is not substantially conflicting. Some of the testimony of witnesses who were in a position to observe the actions of accused does not corroborate all of the testimony of Hoveep Madath, one of the proprietors of the establishment where accused was drinking on 21 May 1944. The court by

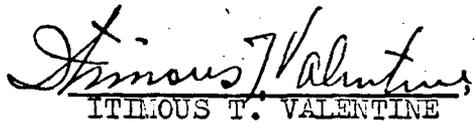
WAR DEPARTMENT
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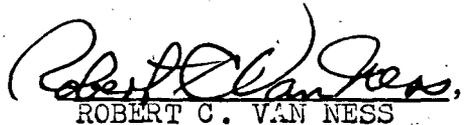
exceptions found the accused disorderly, only, so the only question we need to consider is whether or not there is substantial evidence to support that finding. Taken in its most favorable light towards the accused, we are of the opinion that the conduct of accused was disorderly and of such a nature as to bring discredit upon the military service. Officers of the Army of the United States are enjoined to behave as gentlemen. Especially is this true when in public places. It would indeed be a strange state of affairs if an officer, whose conduct should be of the highest type, could with impunity, pull his pistol and display it in such a manner as to force better service in a restaurant or bar, even though no actual threats may have been made. Such conduct recalls the frontier days when decorum was the exception and men were a law unto themselves. We believe that such actions fall far below the minimum standard of conduct and behaviour that should be observed by officers and as such, constitutes a disorder that greatly reflects to the discredit of the military service.

10. Article of War 85 makes dismissal of an officer mandatory if found drunk on duty in time of war.

11. The court was legally constituted and the sentence is within the authorized limits. The court had jurisdiction of the subject matter of the offense and of the person of the accused. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the findings of guilty and the sentence.


GRENVILLE SEARDSLEY Judge Advocate


ITIMOUS T. VALENTINE Judge Advocate


ROBERT C. VAN NESS Judge Advocate

CM CBI # 224 (Moore, Francis E.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USAF, CBI,
APO 885, c/o Postmaster, New York, N.Y., 2 September 1944.

To: The Commanding General, USAF, CBI, APO 885, U. S. Army.

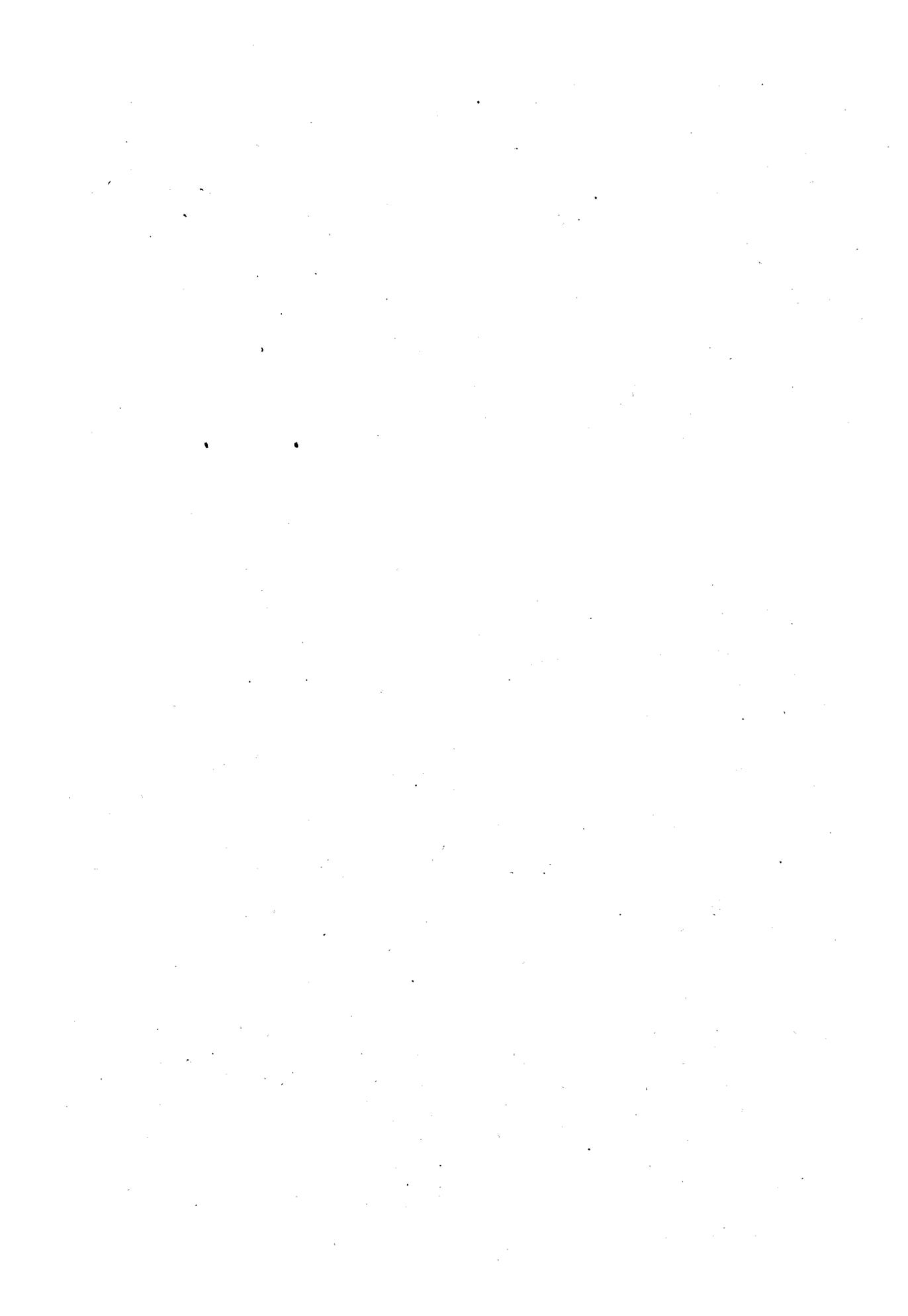
1. In the case of 2nd Lt. Francis E. Moore, O-1551469, Ordnance Supply & Maintenance Company (avn), 305th Service Group, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM CBI 224).

H. J. SEMAN,
Col. J. A. G. D.

H. J. SEMAN,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 6, CBI, 6 Sep 1944)



WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
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New Delhi, India,
30 August 1944.

Board of Review
CM CBI # 225

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

10TH AIR FORCE, USAF, CBI.

v.)

Trial by GCM convened at
-----,-----, India, 10
July 1944, to be dismissed
the service.)

2nd Lt. Allen D. Skinner,
O-857726, 89th Fighter Sq.,
80th Fighter Group.)

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the above named officer has been examined by the Board of Review and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. The accused was tried on the following charges and specifications:

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

Specification: In that 2nd Lt. Allen D. Skinner, 89th Fighter Squadron, did at -----, India on or about 8 June 1944 wrongfully and without provocation strike and beat about the face 1st Lt. Valentine B. Siems Jr. with his fists.

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

Specification 1: In that 2nd Lt. Allen D. Skinner, 89th Fighter Squadron, did, at various and sundry times during the months of March and April 1944, at and about the city of -----, India and the camp area at -----, India, publicly associate with a common prostitute, to the discredit of the military service.

Specification 2: (Finding of not guilty)

3. Accused pleaded not guilty to all charges and specifications and was found guilty of Charge I and its specification. Not guilty of specification 2 of the Additional Charge but guilty

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of the Additional Charge and Specification 1 thereof. He was dismissed the service and sentenced to be confined at hard labor for six months. The Reviewing Authority approved the sentence but remitted the period of confinement, and forwarded the record for action under AW 48. The Confirming Authority confirmed the sentence as approved and modified, and the execution thereof was withheld pursuant to AW 50½ and the record of trial forwarded to The Judge Advocate General's Branch Office for China, Burma and India.

4. First Lt. Valentine B. Siems, Jr., 89th Fighter Squadron, 80th Fighter Group, retired to his bed in his basha at about 11 o'clock on the night of 7 June 1944 and fell asleep. The next thing Lt. Siems knew he was on the floor beside his bed, the accused bending over him and holding his arms. Accused was saying something to Lt. Siems about getting up and fighting (R.6). The witness' nose was bleeding, his jaw was sore, and when he attempted to arise, accused struck him twice in the face, one blow landing on his nose. Lt. Siems got up and made his way out of the basha to the Squadron orderly room (R.6); he also went to the basha of Paul Schwab, USAAF Technical Representative, and entered it covered with blood. Accused followed and attempted to strike Lt. Siems while there but was prevented by Mr. Schwab (R.14). Siems subsequently went to Major William A. Hutchison, the Medical Officer, and was treated for excessive bleeding of the nose and injuries to his face. An x-ray showed a complete transverse fracture of the nasal bone (R. 12, 13). There was adduced some slight evidence (R.8, 9, 10) of minor disputes between accused and Lt. Siems over the manner in which the former performed his duties.

On 9 April (Easter Sunday) a report was received at the Military Police Headquarters in ----- at about 1500 hours. Upon investigation, a Military Police Corporal found accused in a jeep on the main road running east of ----- along the river, in company with an Indian Khasi woman whose privates were exposed. The accused was fondling her and had been drinking (R. 37). This occurred in the vicinity of the house pictured in "Prosecution's Exhibit 2." On the same afternoon, Captain Harold Robbins, 89th Fighter Squadron, saw one of the Squadron jeeps standing empty in front of the house pictured in "Prosecution's Exhibit 2." When the horn of the jeep was blown, accused appeared in the front door with his pants off (R.41) and a Khasi woman was seen peeking around the doorway (R.42). The witness had seen the accused with this Khasi woman on two other occasions, once at the Armament Section of his Squadron, and at another time driving in a jeep. He knew her reputation in the Squadron to be that of a prostitute (R. 41). Lt. Siems and accused occupied the same basha. Prior to the night in which the assault occurred, accused and the woman in question had slept in the same bed in the basha in which Lt. Siems was sleeping and upon

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the night of the assault they were again seen in the same bed (R.14) after having drinks together while she was sitting on the knees of the accused. Accused said the girl's name was "Milliom" (R.7, 8). On the same day, 1st Lt. Hugh E. Rahn, 782nd Military Police Battalion, saw accused at about 1900 hours standing in the yard of the bungalow shown in "Prosecution's Exhibit 2", talking with a Khasi girl who was surrounded by a group of soldiers. Accused caught her by the hand and put her in his jeep and drove to the ----- Planters' Club which they entered and proceeded to have a drink. Complaints had been received by the Military Police about this woman receiving soldiers at her house at all hours of the night, and they called upon the ----- Police to get her out of town. The girl's name, as known to this witness, was "Ellibel." The result was that she left town (R.42,43).

On 16 April 1944 accused took an Indian girl to the Armament Section of the 89th Fighter Squadron and sought to introduce her to the fellows about the Section. This embarrassed them and they went away (R.45). On the same day, accused was seen with the same girl in a jeep outside the house shown in "Prosecution's Exhibit 2". She was pulled out of a jeep, driven by accused, by an enlisted man (R.45; 46). On the night of 16 April, Pvt. Anthony J. Palumbo, 89th Fighter Squadron received an order to bring a vehicle to the officers' bashas and pick up a girl and take her home. The girl he picked up was about five feet, four inches in height, of light complexion, and spoke fair English. She was of Indian extraction. He took her to the Maijan section of ----- to the house shown in "Prosecution's Exhibit 2". This witness drove an alert run through the Maijan Section nearly every night, and he usually saw her standing outside that house; 1st Lt. Edward R. Melton, 89th Fighter Squadron brought the girl out of the officers' basha to the vehicle (R.33, 34). He had received an order from Major Harrell, Commanding Officer of the 89th Fighter Squadron to take a Khasi woman to her home as quickly as possible. She was in the basha occupied by the accused, Lt. Siems, and Lt. Melton. He secured a jeep from transportation, driven by an enlisted man named Palumbo. He knew the girl by the name of "Millicm", and he took her to the Maijan area of ----- to the house shown in "Prosecution's Exhibit 1" and "2". The girl was not known by reputation, or otherwise, to the witness, other than that he had seen her in the basha with Lt. Skinner. She behaved inoffensively on the drive to her home, and his sensibilities were not affected by her presence in the basha (R.30, 31). Bryan H. Routledge, Superintendent of Police, ----- caused certain Khasi women to be arrested pursuant to a request from the United States Army Medical authorities, resulting from the fact that the woman had infected American soldiers. Among the women arrested was one named "Ellibel". Her description was that of a short, light-

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complexioned Indian girl. She was arrested about 18 April 1944, was put in jail, and released upon the condition that she leave the area because she was a prostitute and her actions were "prejudicial to the war effort" (R.23, 24). In the later part of April, under the orders of the Superintendent of Police, -----, the Sub-Inspector of the -----Police arrested a girl of light complexion who spoke English and had a bandage over her arm. She was known as "Milliom." Her full name was "Ellibel Lyngdoh." He had previously seen her frequently with American soldiers, and her reputation was that of a prostitute who carried on a brothel life. The arrest was made on 17 April (R.25, 26). The Inspector of ----- Police was present when the Sub-Inspector arrested the girl on 17 April. Her name was known to him as "Milliom". The description of her is similar to that previously given, and she was identified as living in a house (R.28) at Maijan Masti (R.27) belonging to one Bhudon Loiri, which is the house pictured in "Prosecution's Exhibit 2", at the time of her arrest (R.29).

On 16 April 1944, between 4 and 430 in the afternoon, Major William A. Hutchison heard a jeep pass his basha and a woman screaming. Shortly thereafter, he received a call from the dispensary, and upon going there he found a woman, apparently Indian, with abrasions on her left arm and lacerations on her right forearm. The accused was there at the time (R.10, 11). She informed Major Hutchison that accused had pushed her from his jeep, causing the injuries. A bandage was put on her right arm. Accused stated to the Major that the woman's name was "Milliom." The accused was seen at the ----- Club with a Khasi woman two or three times a week for four or five weeks. She was fair-skinned and spoke English (R.19,22,23).

Bhudon Koiri identified "Prosecution's Exhibit 1" and "2" as pictures of his house at the Maijan Basti, which he rented in April 1944 to a Khasi woman of medium height and pale skin. Her name was unknown to him (R.34). Time after time soldiers came to her house. The neighbors spoke of her as a bad woman and that she was "carrying on a house of prostitution," although the owner never saw her having improper relations with anyone (R.35).

5. Prosecutions witness, Lt. Rahn, was recalled and testified for the defense (R.47,48). Accused elected to take the stand and testify (R.48,49). All of the evidence offered from the accused was directed to specification 2 of the additional charge as to which there was a finding of not guilty. No useful purpose would be served by a recitation or discussion of this evidence.

6. 18 U.S.C. paragraph 455 provides among other things that: "Whoever shall unlawfully strike, beat or wound another, shall be

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fined not more than \$500, or imprisoned not more than six months, or both. The crime here referred to is among those properly cognizable in the administration of Military Law under the 96th Article of War. (MCM 1928 par. 152 (b)). The evidence in support of the specification charging such offense is uncontradicted. There can be no doubt that accused without reason or excuse and without warning assaulted and very severely beat Lt. Siems, his roommate, who had retired and was asleep when first assailed.

The court could not reasonably have done otherwise than to find accused guilty of specification 1 of Charge I.

The evidence in support of specification I of the additional Charge presents some difficulty. To sustain a conviction of accused on this charge it was necessary to prove that the woman with whom he associated at a public place or places, was a prostitute. If the charge had been adultery or fornication the conclusion that accused is guilty would be inescapable. A prostitute may be defined as a woman who engages in promiscuous and indiscriminate sexual intercourse with or without hire, or who submits her body for sexual intercourse for compensation or hire. There can be no doubt that the woman in this case had sexual intercourse with accused and that they bedded up together frequently. However, such evidence alone is not enough to support the allegations of specification 1 of the additional charge. There is other evidence which tends to show that soldiers at all hours of the day and night frequented the house in which the woman lived, that enlisted men congregated around her, and that on one occasion she was snatched by one of them out of the jeep in which she was riding in public with accused. These circumstances tend to brand her as a woman who "peddled her wares". There was also considerable evidence that the general reputation of the woman was that of a prostitute, that is to say, that it was a matter of common knowledge that the woman was a prostitute. That on occasions she went to the basha of accused and, while his roommate was present, she went to bed with him for the night, that she sat in the jeep in a public place with her privates exposed to public view and permitted accused to publicly fondle her, tends to some degree to indicate that she was a prostitute. An officer so associating in public thereby violates the 95th Article of War. MCM 1928, par. 151, lists as an offense which is punishable under AW 95: "Public association with a notorious prostitute; * * * ." Some of the definitions of "Notorious" are: * * * "conspicuous; evident; forming a part of common knowledge; generally known and talked about * * * ." (46 C.J. par. 113). Prostitution may be proved either by direct or circumstantial evidence or by both. It can seldom be proven by direct evidence alone. The very nature of the offense precludes such proof. Under the circumstances of this case, evidence of the general reputation of the woman with whom accused associated

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was competent. Together with proof of lewd and indecent behavior such evidence was sufficient to establish the fact that she was a common or notorious prostitute within the meaning of the law and the pertinent specification.

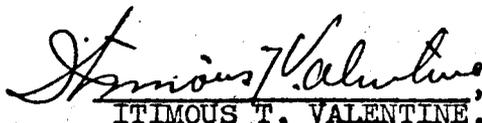
Upon an objection of the defense to a question concerning the reputation of a Khasi woman the law member overruled the objection and improperly added to his ruling this: "The court could almost take judicial notice that all Khasi women are whores." Defense objected to this remark and the law member went on to say: "I didn't say the court could take judicial notice, I said the court could almost take judicial notice that all Khasi women up here are whores." While no such remarks should have been made, it cannot be said, in the light of all the testimony, that the substantial rights of the accused were thereby prejudiced.

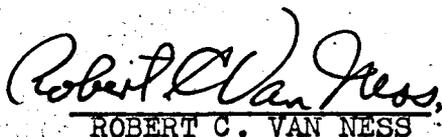
The evidence is sufficient to support the findings of guilty.

7. Major John J. Pridgeon, CAC, defense counsel, has written and caused to be appended to the record an appeal for clemency in which it is requested "that the unexecuted portion of the confinement adjudged be suspended." The reviewing authority having this appeal before him, remitted the period of confinement.

8. The court was legally constituted and had jurisdiction of the person of accused and of the subject matter. No errors injuriously affecting a substantial right of accused were committed during the trial. The punishment imposed is authorized. The Board of Review is of the opinion and, therefore, holds that the record of trial is legally sufficient to support the findings and the sentence.


GRENVILLE BEARDSLEY, Judge Advocate


ITIMOUS T. VALENTINE, Judge Advocate


ROBERT C. VAN NESS, Judge Advocate

CM CBI # 225 (Skinner, Allen D.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USAF, CBI,
APO 885, c/o Postmaster, New York, N.Y., 31 August 1944.

To: The Commanding General, USAF, CBI, APO 885, U. S. Army.

1. In the case of 2nd Lt. Allen D. Skinner, O-857726, 89th Fighter Squadron, 80th Fighter Group, 10th Air Force, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order, as follows: (CM CBI 225).

H. J. SEMAN,
Col. J. A. G. D.

H. J. SEMAN,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 7, CBI, 6 Sep 1944)



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WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

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

Specification: In that Private William F. Cousins, 3502nd Quartermaster Truck Company, did at or near -----, India, on or about 7 June 1944, wrongfully, knowingly, and without proper authority, convert to his own use one (sic) GMC 6 x 4 truck bearing number HOW - 03099, property of the United States of a value of more than \$50.00.

3. Accused pleaded not guilty to all of the charges and specifications, and was found guilty of all the charges and specifications, except Charge II and its specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for ten (10) years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for five (5) years, and designated the United States Penitentiary nearest the Port of Debarkation in the United States as the place of confinement. The order of execution was withheld and the record of trial was forwarded to this office pursuant to the provisions of AW 50½.

4. On 7 June 1944, Lt. Farrie, CLP, received information that some soldiers had on the night before placed some boxes, with markings indicating they were property of the United States, under some straw stacks near the village of ----- (R. 8). Lt. Farrie and four agents proceeded to the spot, which was off the main traveled roads. From the Budge Budge road Lt. Farrie and the agents went for about a mile on a 25 foot road that ends at the Diamond Harbor Road. At the intersection there is another road along which they proceeded for 2½ miles. From there some of the agents proceeded up a village path, and about 350 feet from the road they saw a truck and two negro soldiers (R. 8). The truck was a 2½ ton GMC 6'x 4, # HOW 03099 (R.8,12), value over \$50.00 (R.3) and assigned to the 3rd Truck Battalion at ----- (R. 13). The soldiers had just completed loading some boxes on the truck. When challenged, one ran and escaped and the other, who was the accused, was detained by Lt. Farrie (R.9, 12). Inside the truck were 39 cases of cigarettes. In the area 26 more packages were uncovered at the time and taken to ----- (R. 9). Other agents who remained located stacks of cigarettes covered with straw while searching the jungle nearby (R.9, 11, 12). All together seventy nine cases of Camels (R. 12), nine cases of Lucky Strikes, four cases of smoking tobacco and one case of sewing kits were found (R.9, 12). The Camels were marked Hq-42-QM-ML-39, the Lucky Strikes 59 Hq-42-QM-ML-29, and both marked Bent QM-11 (R.9). These markings indicate the requisitions. The articles had been shipped to the Quartermaster for sale to the Army Exchange Officer for resale (R.2). Camels and Lucky Strikes are valued at \$25.00 per case, sewing kits at \$86.40 per case and smoking tobacco at \$7.20 to \$14.40 per case. Property

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bearing the marking Bent-QM-11 is property of the United States Army (R.2). Storage facilities are not maintained by the Army at ----- . Certain cargo discharged from the ship "Ida M. Tarbell" at shed #4 from 4 June to 9 June 1944 bore the markings Bent QM-11-Hq-42-ML-29 and Bent QM-11-Hq-42-ML-39 and was stored in the shed at the port. When distributed it would be removed upon a Tally Out Sheet in duplicate, one copy remaining at the shed and the other going with the shipment for the officer at the Depot (R.4).

5. Accused had been "grounded", that is, told not to drive trucks any more without permission, and had not been granted permission to drive a truck on 7 June. (R. 5, 6). He left the docks with the truck without authority (R. 16).

6. Accused, after having been warned of his rights, elected to take the stand and testify. He was head dispatcher of the 3502nd QM Truck Company, King George Docks, opposite Shed #2. He left the night of 7 June 1944 to take a check on trucks and warehouses. On the way to Budge Budge he met some trucks. One, with half a load, was creeping and the driver stopped on the side of the road. Accused took the load on to his truck and drove off. He drove half a mile off the main road and a jeep pulled up which he thought was the other driver. Accused was ready to get into his truck and had put some things from there on his truck. These things were stored on the side of the road under a tree, about a city block off the main road where anyone could see it. He was then taken to ----- (R. 14). He had been grounded for a two week period more than two weeks prior to June 7th (R.15). Accused went to the tree, which was off the main road to Budge Budge, on instructions from the other driver in order to load the cigarettes (R. 18).

7. The evidence clearly reveals that accused was found in an out of the way place on a by way, and was seen removing cases of cigarettes, which had been hidden in a straw stack, and loading them on a truck. Nearby were more cigarettes, smoking tobacco and sewing kits concealed under conditions such as to make it self evident that an attempt had been made to hide them in an out of the way place where the likelihood of discovery would be small. Evidence of recent unexplained possession of stolen goods raises a presumption of guilt of larceny. Such possession must be conscious and exclusive, and it is possible for accused to have personal and exclusive possession although the property was secreted on another's premises, if the property was under his exclusive personal control. Possession may be personal and exclusive, although it is in the joint possession of two or more persons, if they are shown to have acted in concert. As to those who are particeps criminis, the possession of one is the possession of all. (36 C.J. p. 869-873). The evidence here tends to prove the property was in the exclusive joint possession of accused and an unknown person whose identity he reluctantly and incompletely divulged. It is true that he attempted an explanation, but this was in itself contradictory and so unreasonable and improbable that the court was justified in deeming it unworthy of belief. It was not

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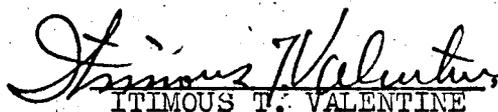
such as to raise a reasonable doubt of guilt. When the accused was apprehended in the night time removing from a well concealed jungle hiding place a large quantity of goods, plainly marked as property of the United States Army, as evidenced by the markings thereon, the facts and circumstances in evidence are sufficient to warrant the conclusion reached by the court that such property was stolen and that accused was the thief.

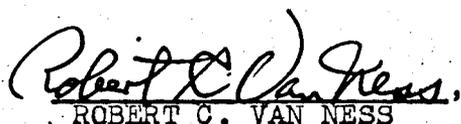
8. Specification 1 of Charge I charges a different aspect of the offense committed by accused. It arose from the same facts upon which specification 2 of Charge I is based. We are of the opinion that it would have been better not to have tried accused on the first specification, but in view of the sentence, as approved by the reviewing authority, accused has suffered no harm thereby.

9. The evidence is also sufficient to support the finding of guilty of the unauthorized use of an Army truck, as alleged in Charge III and its specification.

10. The court was legally constituted and had jurisdiction of the person of accused and of the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the findings of guilty and the sentence.


GRENVILLE BEARDSLEY, Judge Advocate


ITIMOUS T. VALENTINE, Judge Advocate


ROBERT C. VAN NESS, Judge Advocate

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
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New Delhi, India,
6 September 1944.

Board of Review
CM CBI # 239

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

SERVICES OF SUPPLY USAF, CBI.

v.)

Trial by GCM at Hq. Base Section 2,
-----, India, on June 6, 1944.

Pvt. Robert J. Bowles,
33133163, 809th Ordnance
Company.

Dishonorable discharge, total for-
feiture and confinement at hard
labor for three (3) years. U. S.
Disciplinary Barracks nearest Port
of Debarkation in the United States.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the above named soldier has been examined by the Board of Review, and the Board submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. Accused was tried on the following charges and specifications:

CHARGE I: Violation of the 63rd Article of War.

Specification: In that Private Robert J. Bowles, 809th Ordnance Company (Depot) did, at -----, India, on or about 17 July 1944, behave himself with disrespect toward 1st Lt. Edwin G. Meredith, 14th Medical Depot Company, his superior officer by saying to him "You are a no good chicken shit son of a bitch" or words to that effect, the said officer being in execution of this office.

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

Specification: In that Private Robert J. Bowles, 809th Ordnance Company (Depot), having received a lawful command from 1st Lt. Edwin G. Meredith, 14th Medical Depot Company, his superior officer, to roll his sleeves down, did at -----, India, on or about 17 July 1944, willfully disobey the same.

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3. On the evening of the 17th of June 1944 1st Lt. Edwin G. Meredith, MAC., 14th Medical Depot Company at Dum Dum Orphanage (R. 6-5) in ----- was officer of the day (R.6-1, 6-2, 6-4) and as a part of his duty at about 2100 hours was checking enlisted men upon attendance at a moving picture show held in the area (R. 6-4, 6-5) to see that they were complying with the malaria control program. After the show had started and while the checking was still in process accused came up and attempted to enter the cinema. Accused had his sleeves rolled up in violation orders and showed some evidence of intoxication. Lt. Meredith ordered accused to roll his sleeves down and explained to him that he was officer of the day and that this was a part of his duties. Accused answered that he didn't have to do "a damn thing he didn't want to do". The officer of the day then advised the accused that he would not be permitted to see the show unless he obeyed the order, to which accused answered: "he would go any God damn way he pleased and the way he pleased". Upon receiving this answer from accused Lt. Meredith ordered him to the orderly room with a view to getting the matter straightened out. Accused refused to obey this order and refused to go to the orderly room. Two soldiers who were standing by were summoned by the officer of the day and accused was taken to the orderly room where he became very abusive and among other things called Lt. Meredith "a no good God damn low down chicken shit son of a bitch * * * * * " (R. 6-1, 6-3, 6-4, 6-5), and added that if Meredith would take his bars off he would "knock hell out of him". (R. 6-1, 6-2). Lt. Meredith attempted to reason with him but was unable to do so for a period of 15 minutes. Finally Capt. Stanley E. Sparks, 809th Ordnance Company Depot was summoned (R. 6-1, 6-4, 6-7). Capt. Sparks and Lt. Meredith then talked to accused about an hour when he quietened down to some extent and admitted he had been wrong in his behavior and said he was sorry. Lt. Meredith then placed accused under arrest in quarters (R. 6-1). Accused had been drinking but was able to walk and talk coherently (R. 6-1, 6-2). Lt. Meredith did not have accused examined by a medical officer to determine the extent of his intoxication. Sgt. George Levens, 14th Medical Depot Company (R. 6-2) was in charge of quarters on June 17 and was present and heard what was said by accused to Lt. Meredith. Accused had his sleeves rolled down when he reached the orderly room. Sgt. Levens was of the opinion that accused was drunk, although he could walk without assistance. Accused was, in the opinion of Sgt. Levens, not coherent in his talk (R. 6-4). While Capt. Sparks was at the orderly room trying to quieten accused he obtained the impression that the attitude of the accused was that of disrespect to Lt. Meredith (R. 6-5). Capt. Sparks was of the opinion that accused had been drinking but noticed that he was able to move under his own power and without assistance. Accused spoke clearly and was easily understood (R. 6-5).

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Private Pete de Latorre, 809th Ordnance Company Depot, Dum Dum Orphanage saw accused on the night of the 17 June at about 7.30 and said that at that time he showed signs of having been drinking. Witness attempted to induce accused to go to his quarters and retire but accused was "pretty drunk" but could talk coherently and could be easily understood. Accused could also walk. Later on about 10 o'clock that evening accused was lying on the floor by his bed and from that position was helped into bed by Latorre (R. 6-6).

Sgt. Jesse Sincere, 809th Ordnance Company Depot has known accused since June 1943 and since that time has been associated with him as "a fellow soldier" in the same organization (R. 6-7) (R. 6-8). Sgt. Sincere has served as First Sergeant of accused's organization and expressed his opinion of accused in this way: "I would say that Private Bowles when he wanted to be, and under normal circumstances, is a good soldier. On pay nights he is a bad soldier". (R. 6-8).

4. The evidence clearly establishes that on the 17 June 1944 Lt. Meredith, as officer of the day, was in the course of the discharge of his duties, attempting among other things to enforce the malaria control program. This was an important duty. Malaria not only produces great suffering and discomfort but impairs the ability of the personnel of the armed forces and interferes with the performance of their duties. As a part of his duty Meredith was inspecting a moving picture held for enlisted men at the Dum Dum Orphanage when accused attempted to enter the show somewhat intoxicated and with his sleeves rolled up. He paid no attention to a request of Lt. Meredith to roll his sleeves down but indicated a fixed purpose to defy the exercise of any authority. Lt. Meredith then gave him a direct and specific order to roll his sleeves down. This he refused emphatically to obey. While there is some evidence of accused's intoxication nowhere does it appear in the record that he was intoxicated to such an extent as to render him incapable of knowing right from wrong and of being unable to cleave to the right. Ordinarily voluntary intoxication is not a defense to the commission of a crime. It may, however, be used successfully as a defense where the accused is intoxicated to such a degree that he is unable to distinguish between right and wrong and unable to adhere to the right. When accused of crime a necessary element of which is a specific intent such as a wilful disobedience of a lawful order of a superior officer under the 64th Article of War, the court may properly acquit only if the evidence justified a finding that the accused at the time in question was so intoxicated that he did not know the difference between right and wrong and that he did not retain the mental capacity to adhere to the right. The rule is well stated:-

"The mere fact that defendant was intoxicated at the time the act was committed will not necessarily have the effect of lessening the degree of the crime

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charged, or of authorizing an acquittal, even where a specific intent or particular mental state is required, for a person who is intoxicated may nevertheless be capable of deliberation and premeditation, or of a specific intent; and a drunken man who commits a wrongful act willfully and premeditatedly is as guilty in the eyes of the law as if he had been sober. Therefore, in order to render such defense available, the general rule is that the intoxication must be so great and so complete that defendant was, at the time of committing the act, incapable of knowing right from wrong, and incapable of forming and entertaining such an intent as is required for the crime charged; and if he had enough control of his mental faculties, notwithstanding his intoxication, to know right from wrong or to form or entertain an intent, his intoxication will not excuse him from the ordinary and usual presumption that is attached to the acts and conduct of sober men."

(16 C.J., par. 84(2))

In the present record, however, there is an utter failure of proof of that degree of intoxication necessary to exculpate accused under the law. Moreover, the evidence here shows that accused not only could walk without assistance and talk coherently but could express himself cogently. He recognized Lt. Meredith as an officer and invited him to remove his bars so that he could "knock hell out of him". There can be no doubt that accused, although somewhat intoxicated, was in sufficient possession of his mental faculties to make him responsible for his conduct within the meaning of the law.

It is to be regretted that an officer should attempt to reason out a difficult situation with an intoxicated subordinate. If a crime of sufficient gravity has been committed by an intoxicated soldier the officer, charged with the duty of handling the situation, should order appropriate detention and discuss the matter only after there has been a complete recovery from the effects of the strong drink or drug. Any other course is apt to produce forensic horseplay, with attendant headaches, heartaches, embarrassment and additional punishment.

The evidence discloses that accused's sleeves were rolled down when he was in the orderly room that evening. It is undoubtedly probable that he ultimately met the requirements of the order of Lt. Meredith. Under some circumstances it has been held that alacrity and promptness are not the essence of a lawful command and that where there is no necessity for haste and in obedience to an order, a tardy and reluctant compliance is not such a wilful disobedience as contemplated by AW 64. (Bull. JAG. August 1943, page 308) (CM CBI 196). It has also

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been held that when a direct order is given by a superior officer it is ordinarily the duty of the inferior to obey without hesitation, with alacrity and to the full. He must obey promptly and implicitly (CM CBI 196). It is a well known fact that in -----, India, as in many other tropical places, in the early part of the evening malaria laden mosquitoes get in their deadly work and to expose unnecessarily any part of the body to this hazard is not only unnecessary, unwise and inexpedient, but should be remedied as quickly as attention is directed to it. This put upon accused the duty of complying quickly and completely with the order of Lt. Meredith, and his defiant failure to do so brings him clearly within the definition of the crime with which he is charged. There was abundant evidence upon which the court was justified in finding the accused guilty of a wilful disobedience of a lawful order from a superior officer, as alleged in the pertinent specification.

It is a violation of AW 63 for a person subject to military law to behave himself with disrespect toward a superior officer. The commission of this crime may be accomplished either by actions or words or both. It is difficult to see how a soldier could behave himself with greater disrespect toward his superior officer than by the employment of such language directly toward a superior officer as accused used upon this occasion. Despite the fact that he was intoxicated, or if he had been so inebriated as to render him incapable of distinguishing between right and wrong, he would yet have been guilty of a violation of this article by the use of such language as the evidence disclosed he employed in his rage against Lt. Meredith, and the court was abundantly justified in reaching a conclusion that accused was guilty of a violation of Charge I and its specification.

During the course of the cross examination of Sgt. Sincere, a defense witness, this transpired:-

"Questions by the Prosecution:

- Q. Sergeant Sincere, do you know how many times Private Bowles has been AWOL?
A. Twice to my knowledge.
- Q. How often does he get that way when he is not a good soldier?
A. Not at all times, I know one case an AWOL case.

Defense: I object to AWOL questions and answers.

TJA: I would like to state that it is believed that the Sergeant was brought in as a character witness.

Defense: The defense objects on the grounds that this is an inappropriate time during the trial to consider past allegations and records.

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TJA: Is it legal to impeach such character evidence since defense has brought in a character witness?

Law

Member: Objection overruled.

Q. Is accused one of the type of soldier who habitually gets drunk after pay day?

A. I would not say habitually, no.

Q. Do you think accused is a good soldier, has a good record?

A. No I would not say he has a good record." (R.6-8)

"A fundamental rule is that the prosecution may not evidence the doing of the act by showing the accused's bad moral character or former misdeeds as a basis for an inference of guilt. This forbids any reference to his bad character in any form, either by general repute or by personal opinions of individuals who know him, and any reference in the evidence to former specific offenses or other acts of misconduct, whether he has or has not ever been tried and convicted of their commission." (MCM 1928, par. 112 (b))

Again it is said:

"Evidence relating to an offense not involving moral turpitude or affecting the credibility of the witness should be excluded." (MCM 1928, par. 124 (b))

It was entirely incompetent and improper for this witness to be asked concerning specific instances in the life and behavior of accused. Such questions could not have been properly put to accused if he had himself been the witness, although the court in the exercise of its discretion may allow a wider latitude in the cross examination of the accused than of other witnesses. It is improper and incompetent to attempt to elicit from accused instances of specific crimes of which he has been convicted, unless the crime involves moral turpitude or its commission would lessen the credibility of the witness. (CM CBI 168). Upon the cross examination of a character witness it is never competent to ask him if he knows of specific crimes committed by the accused (20 A.J. par. 326). This examination must be confined to general reputation of traits or habits and these habits or traits must have some fair relationship to the crime charged (Ibid Par. 327). It is clear from all the authorities that the cross examination of Sgt. Sincere concerning the number of times that accused had been AWOL was entirely improper.

However, using the entire record as a measurement it does not appear that a substantial right of accused was effected by this improper course of examination.

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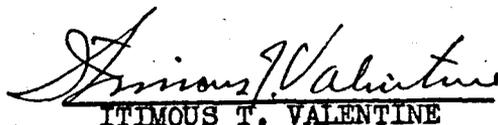
The Board of Review is of the opinion that there was ample competent evidence to sustain the findings of the court upon all the charges and specifications.

The affidavit upon the charge sheets does not show that accuser swore to the charges as well as to the specifications. The rule is "charges and specifications will be signed and sworn to substantially as indicated in the form". (Par. 31, MCM 1928) (CM CBI 177):

At the time the charges were preferred accused was 27 years of age. He was inducted 19 February 1942 for the duration plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person of the accused and the subject matter of the crime. The sentence is well within the limits of the law. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion and it accordingly holds that the record of trial is sufficient to support the findings and the sentence.


GRENVILLE BEARDSLEY Judge Advocate.


TIMOUS T. VALENTINE Judge Advocate

(On leave)
ROBERT C. VAN NESS, Judge Advocate



WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

(319)

New Delhi, India.
14 September 1944.

Board of Review
CM CBI # 240.

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

SERVICES OF SUPPLY, USAF, CBI.

v.

1st Lt. George C. Harvey,
O-925015, Transportation
Corps.

) Trial by GCM, convened at -----,
) India, on 4 July 1944. Dismissal,
) total forfeitures and confinement
) at hard labor for 5 years. No place
) of confinement designated.

HOLDING by the BOARD OF REVIEW
BEARDSLEY, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the above named officer has been examined by the Board of Review, which submits this, its holding, to the Acting Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office for China, Burma and India.

2. Accused was tried on the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that George C. Harvey, 1st Lieutenant, Transportation Corps, AUS., Rail Transportation Officer, Base Section 2, did, at -----, India, on or about 21 April 1944 with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill William Rowson, Sergeant, British Army, a human being by shooting him with a pistol.

3. Accused pleaded not guilty to the charge and specification and by exceptions and substitutions was found guilty by the court of manslaughter, in violation of the 93rd Article of War. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for 5 years. The reviewing authority approved the sentence and forwarded the record to the Commanding General, USAF, CBI, for action pursuant to AW 48. The confirming authority confirmed the sentence. The order of execution was withheld and the record of trial was forwarded to this office pursuant to AW 50½. No place of confinement has been designated.

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4. Sgt. William Rowson of the British Army was shot five times by accused early in the morning of 21 April 1944 and died of such wounds on 28 April 1944 (R. 26). The evidence is in sharp conflict on two points:

(1) Whether the shooting was accidental or intentional

and

(2) whether at the time of the shooting accused was so free from mental disease, mental defect or mental derangement as to be able to distinguish, and to choose between, right and wrong.

The findings of the court necessarily imply that the slaying was culpable, although not premeditated, and that accused possessed mental capacity sufficient to enable him to distinguish right from wrong and to adhere to the right.

5. The tragedy occurred at -----, India, where accused had been American R.T.O. since 1 March 1944. Under his command were 2nd Lt. Richard W. Lutz, T.C., and 8 enlisted men (R. 152). These two officers and 8 soldiers lived together in one room on an upper floor of the Bengal & Assam railway station. The deceased was in charge at night of the British R.T.O. on the ground floor of such station (R. 43). Contacts between deceased and the members of the American Detachment were not only frequent but at times were quite irritating, especially to accused.

6. The evidence indicates that deceased was a physically vigorous young man of the ebullient, practical joker type; a somewhat rough and quite boisterous extrovert. One witness referred to him as a "smart aleck" (R. 43). Accused was 52 years of age, weak physically in comparison with deceased, a quiet man given to brooding and inclined to live within himself: in short, an introvert.

7. Deceased had been a frequent and somewhat unwelcome visitor in the quarters of the Americans. His tour of duty ended daily at hours 0700. It was his habit to go upstairs and awaken the Americans by slapping them not ungently on the buttocks (R. 84). This matutinal familiarity was received without enthusiasm by all. It was resented by accused (R. 84). Deceased was familiar with ju-jitsu and took delight in slipping up behind the Americans and pinning their arms to their sides and holding them helpless until he felt like releasing them (R. 51). On one occasion he tied accused to the chair in which he sat (R. 43, 51, 52). Accused was annoyed by all this (R. 52). On the day prior to the shooting, he mentioned his determination to secure other

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quarters where the detachment would be free from unwelcome visits and undue familiarity (R. 89). On 19 April 1944, deceased commented on the size of the private parts of accused (R. 44), and inquired how many children he had (R. 154). Accused answered that he had one (although in fact he was the father of four). Deceased remarked that with such a "little tool" he did not see how accused could be a father, and that accused must have "awfully good neighbours" (R. 44), or that his wife "had a good friend in the iceman (R. 154), or something to that effect. At the moment accused did not seem to be irritated and did not reply (R. 44).

8. The evening of 20 April, Lt. Lutz returned from ----- (R. 34). He brought a bottle of Liquor for Lt. Harvey (R. 35), who opened it, took one drink and shared the contents with Lt. Lutz and others. Accused went to bed about hours 1100, as did the others. About 2 hours after midnight Lt. Lutz awakened and discovered that accused was getting dressed (R. 35). Accused said, "Don't get frightened, I just shot the 'so-and-so' ('son-of-a-bitch' R. 47), who called my wife a dirty whore" (R. 35, 36). He added that he was going to visit the Covers, a family of missionaries with whom he was acquainted, who lived at Bogra, about 25 miles north east. Accused went downstairs, where he stood behind some meter gauge cars (R. 37). Accused seemed then to be calm and collected (R. 41). Lt. Lutz thought that accused was having a nightmare or a "talking jag" (R. 36). About a half hour later, he heard people walking on the concrete floor in the waiting room below, and then a knock on the door (R. 37). Two British MPs entered. They said that Sgt. Rowson had been shot. They went to accused's bed and then asked Lt. Lutz to go downstairs. There he saw a .45 automatic pistol in a blanket on a charpoy (Indian string bed or a cot). There were spots of blood on the end of the barrel. One cartridge was in the chamber and one remained in the clip. After removing the cartridges, he accompanied the MPs to the hospital about 200 yards south of the station.

9. While dressing, accused played his flashlight on Sgt. Louis J. Kalscheuer's face, and called to all present to get up (R. 47). Kalscheuer asked what the trouble was and Lt. Harvey said, "I flattened out that son-of-a-bitch that insulted my wife". He asked Kalscheuer if he had heard anything and to the latter's answer, "no"; responded, "Tek Hai" (a Bengali expression, meaning "quite all right"). Accused asked if Kalscheuer had heard Sgt. Rowson ask how many children he had. Upon receiving an affirmative answer, he said: "No black son-of-a-bitch is going to insult my wife and get by with it". He said that he had shot him and had dropped the gun (R. 48), and remarked that it was not charged to him (R. 48). Accused stated that he was "going", and asked Kalscheuer to drive him in a jeep to Bogra. Kalscheuer refused (R. 47). T/5 Harold J. Baker heard accused saying, "Get up boys, get up, you might as well know about it. I went down and bumped off the one who insulted my wife". Accused said the Sergeant had

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made one crack too many (R. 56).

10. About hours 0900 Lt. Lutz saw accused in a meter gauge passenger car a few yards north of the connection between the broad gauge and meter gauge lines (R. 38). He placed him under arrest and brought him back to his quarters. Accused then referred to the British in derogatory terms (R. 38).

11. One witness asserted (R. 91) and another denied (R.90) that at about hours 0800 on 21 April after his arrest, accused remarked that he wished he had killed the son-of-a-bitch and he would be done with it.

12. N.G. Mukutmani was on the veranda of the station about hours 0200 on 21 April 1944 and saw a sahib (Bengali for "lord", commonly used by Indians to designate a white man of standing) enter the R.T.O. (R. 60). He heard a conversation in English but could not distinguish the words, which were followed by the sound of gun fire (R. 61). He fled. Gurubachan Singh, Indian Army General Service Corps, was assigned as messenger to deceased on the night of April 20th. Sgt. Rowson, Singh and the tally clerk laid down to sleep about 11.30. Singh was awakened by a shot. Accused and Rowson were both standing by deceased's charpoy. With his left hand accused held Rowson's sleeve, and in his right hand was a pistol. Singh saw accused shoot again. Rowson fell to the floor. Singh fled (R. 170). Prior to this second shot the two men were struggling. Lt. Harvey then was dressed in his pyjamas.

13. Signalman Ralman E. Pettipher, Royal Signals, received (R. 69) a telephone call from deceased at hours 0230, 21 April. After hearing Rowson's message, he aroused Lance Corporal Edwards, British Military Police, and notified the hospital. Corporal Edwards went to the station (R. 70), where he found Rowson lying on the charpoy. He was bleeding badly and seemed very weak. With several coolies, Edwards carried him to the hospital and then went to the American R.T.O. quarters. As a result of what deceased had said to him he looked for Lt. Harvey. At a table in the R.T.O. was a pistol. It contained two rounds of ammunition. There was blood on it. About hours 0830 Corporal Edwards found accused sleeping in a railway coach (R. 72). He notified Lt. Lutz, who came and placed accused under arrest.

14. Lt. G.M. Waldron (Nursing Sister, Q.A.I.M.N.S., at the Military Hospital in -----, who attended deceased) and Captain Dines and Sgt. Hawman were present on 27 April 1944 when Major I. Schalit, RAMC, visited him. Major Schalit told deceased that he was in a dying condition and that he had no hope of recovery (R. 27). Deceased stated that he knew this (R. 29). Major Schalit then asked who shot him. The dying man replied that it was Harvey (R.30), the American R.T.O. (R. 27). Deceased stated

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that he remembered a statement that he had made previously and that he agreed to such statement (R. 29). Deceased's mind was clear at the time (R. 30). Captain D.J. Fitts, C.M.P. reduced the statement (Pros. Ex. 6) to writing (R. 31).

15. Captain DeSousa, I.A.M.C., examined Rowson about hours 0300, 21 April (R. 21). He was suffering from five major wounds, one at the right on the pit of the stomach, another in the right groin, a third in the left groin, a fourth in the left of the right side of the chest and a fifth on the back under the left side. There was a minor injury along the right forearm (R. 22). Major Horace Petit, MC, 112th Station Hospital, performed an autopsy on the body (R. 30) of Sgt. Rowson on the 28 April 1944. Death was caused by gunshot wounds (R. 31).

16. The pistol found in the R.T.O. was Lt. Harvey's. On the floor there were found also a pair of bedroom slippers which belonged to him, and two buttons from accused's pyjamas (Pros. Ex. 15). His pyjamas were left in the sleeping quarters. They had been torn and the buttons were missing. The pistol was tested on 3 July 1944 (R. 94) and the safety was found to be defective (R. 93). It was not, however, a "runaway" weapon and would not fire continuously while the trigger was held back, but it was necessary to pull the trigger before each shot.

17. An examination was made of the room where the shooting took place by 2nd Lt. Paul Koontz, C.I.D. (R. 99) who had had four years experience as a police detective in Columbus, Ohio (R. 102). He found 3 bullet holes in the room (R. 100). From the position of the bullet holes it was his opinion that three shots were fired from one point in the room (R. 103).

18. Accused was examined at the 112th Station Hospital on 22 April 1944 (R. 138). This examination disclosed an abrasion about 1 inch in diameter on the dorsal surface on the right second toe, with swelling due to hemorrhage within the skin and subcutaneous tissue. On the right leg just below and to the right side of the knee there was an abrasion of the skin about 1 cm. in diameter with an area of inflammation about it for approximately 2 cm. and the whole surface of the leg down to the lower third showed evidence of hemorrhage beneath the skin. There was an abrasion about $\frac{1}{2}$ cm. in diameter just to the left of the sixth dorsal vertebra.

19. Major Marshal L. Oliver, I.G.D., under AW 70 investigated the charges (R. 62). On 2 May 1944 he questioned accused, after warning him of his rights under AW 24 (R. 63). Neither leniency was promised nor coercion offered. Accused talked freely. Accused read the statement which was reduced to writing, stated that it was substantially what he said (R. 64), but did not sign it. He asked Major Oliver whether he felt that he should. As accused seemed

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completely bewildered, Major Oliver did not press him to sign the statement. Accused told Major Oliver (R. 65) that he went to bed about 11 o'clock but was not sleepy. He had had one drink of liquor. Thinking of home, he became nervous and got up and took another drink. Unable to sleep, he got up a second time, took a third drink and again laid down. Since he could not sleep, he decided to go to -----, if a train were running. He went downstairs to inquire. It was necessary to go out on the veranda and down an outside stairs. As he had heard a noise on the veranda, he took his pistol. Deceased was asleep on a charpoy. An Indian messenger was asleep in a chair. Accused tapped deceased's foot and said, "Wake up, Bill, no sleeping on duty". Deceased told him that no train was running, and to go back to bed. Accused started away, then it occurred to him that the time was opportune to caution deceased about his growing familiarities and to ask whether he did not think he had been disrespectful and uncharitable. Deceased replied, "To hell with you and your wife". Accused stated that he would report him to his Commanding Officer. Deceased suddenly lunged forward. Accused stepped backward and bumped into the door on the left. The pistol was discharged. This so frightened accused that he could think of nothing but to drop it. Everything went black. He could recall nothing that happened thereafter until after he had been in the 112th Station Hospital for some days (R. 65, 66).

20. Accused was warned of his rights and took the stand as a witness. In general, his testimony was to the same effect as, and in some instances in almost the same language employed in, the statement to the investigating officer. He testified that when he told deceased that he would report him to his commanding officer (R. 159), deceased became "venomous" and frightened him (R. 162). He "made a lunge at me" and jumped on accused's foot. Accused staggered back against the wall. The gun was discharged. "I was completely horrified. I was so surprised. I had no idea that the gun had anything in it. I had never used it. Then everything seemed to go black". Later he learned that he was in a hospital (R. 152). Accused testified that he had no conscious desire to kill deceased and that he did not consciously and deliberately pull the trigger of the pistol, although he was frightened when deceased lunged at him (R. 152).

21. The statement of accused immediately after the shooting that he had just shot the so-and-so who called his wife a dirty whore, and the statement after his arrest that he wished he had killed the son-of-a-bitch, both are indicative of express malice. These statements are inconsistent with the explanation of the shooting, which accused made as a witness at the trial, and upon the investigation. However, the physical facts and circumstances are consistent with his contention that the pistol was accidentally discharged in a struggle, except in two respects: (1) the fact that five shots were fired; and (2) the opinion of Lt. Koontz

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as to the position from which at least three of the shots were fired.

22. The number of shots is a physical fact about which there can be no dispute between reasonable persons. The position from which the weapon was fired is a matter of opinion, depending to some extent upon speculation. The pistol was defective and could have been discharged in a struggle without any intent on the part of accused to pull the trigger.

23. It seems quite likely that there was a struggle. Gurubachan Singh swore that he saw it (R. 170). The torn pyjamas (Pros. Ex. 14), the buttons on the floor, and the bruises upon accused's foot and leg all tend to indicate that there was a struggle. However, the struggle for the possession of the pistol might have followed and not preceded the first shot. The bullet holes at about the same distance from the floor, both in the body of accused and in the walls of the room, form a pattern which is more consistent with the aiming of the pistol than with aimless squeezing of the trigger in response to involuntary reflexes during a struggle for its possession.

24. It was the province of the court to weigh the evidence, to determine the probative value of the testimony and to draw inferences from the facts and circumstances in evidence. It was for the court to determine which of the possible conflicting inferences generated by the evidence should be accepted and which should be rejected.

25. Substantial and persuasive evidence strongly tends to support the court's conclusion that the weapon was discharged in a sudden struggle without malice or intent on the part of accused to kill the deceased. If the members of the court so believed, after that solemn consideration of the evidence which their oaths required, it was not only within their province, but it was their duty to find the accused guilty of the lesser included offense of voluntary manslaughter.

26. When one kills another by the grossly careless use of a firearm the offense has been held to be voluntary manslaughter, although he did not act maliciously and had no intention to kill. Where one carelessly handled a loaded pistol, and it was discharged in a struggle and killed the person seeking to disarm him, the offense might be considered as voluntary and not involuntary manslaughter. (Ewing v. Commonwealth, 129 Ky. 237, 242, 111 S.W. 352; Selby v. Commonwealth, 25 Ky. L. 2209, 80 S.W. 221; CM CBI 163, Anderson).

27. If accused was sane and legally responsible for his acts at the time of the shooting, and if the proceedings are free from prejudicial error, the record of trial must be held to be legally sufficient to support the findings of guilty of the lesser included

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offense of manslaughter in violation of AW 93. We now pass to the consideration of these two questions.

28. Numerous witnesses gave testimony with respect to the mental condition of accused during the months immediately preceding the shooting. Some of these witnesses were laymen, others were medical men. Some of the latter were experienced in, and the others were not experienced in, the treatment and care of the insane. The testimony of these professional witnesses is irreconcilably in conflict.

29. Four of the witnesses, two of them being medical officers, were on the transport with accused during the voyage from the United States to India. These witnesses related numerous instances of conduct on the part of accused which, in their opinion, indicated that his mental condition was not normal. Some of the witnesses knew accused at Fort Slocum, New York. There (R. 124) and in India (R. 128) he did not "fit in", but seemed to be unable to adapt himself to military life. He appeared to be completely lost as to what to do and how to proceed (R. 124). He broke into tears when he learned that he had been selected to drill in front of spectators on the parade ground (R. 125). On the ship he was exceedingly afraid of contact with submarines and continually watched the skies for air protection. Any unusual noise in the boiler room or kitchen caused him concern (R. 126). He was depressed and morose (R. 129A). At one time it looked like he was going to pieces. When a collision with another ship seemed imminent, accused was all over the deck trying to tell everyone what to do and what not to do. It was impossible to quiet him. "It is hard to describe how wild he was". (R. 126). He was constantly on the lookout and was always trying to direct the activities (R. 131) of the ship so that he was referred to as the "Admiral" (R. 127), or as "Granpa" (R. 134). In ----- he seemed to be in a fog (R. 129). In the opinion of Captain Edward C. Neidballa, M.C., accused was not up to the army's preinduction psychiatric standards, and he regarded an officer with his makeup as a hazard overseas (R. 131). Captain Joseph J. Reichman, M.C., was of the opinion that accused displayed unusual apprehension, fear and eccentricity (R. 116A). He believed that accused was not up to the army's psychiatric standards and was emotionally unstable (R. 119).

30. 1st Lt. John Murphy, T.C., knew accused for 19 years in Indianapolis, where both had been employed in the railroad yards, but did not see him between 1939 (R. 135) and 16 April 1944, when they met at Parbatipur. He then did not recognize accused, who did not seem to be the man he had known, but had become an old man with grey hair, with "humped" shoulders, and reduced to skinniness (R. 136). From boyhood, T/4 Thomas Griffin, 28 Air Depot, had known accused, over a period of about 20 years, and was frequently in accused's home. Accused was a "swell guy" and always timid. His mother was placed in a private sanitarium (R. 149).

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31. From 20 January to 14 February 1941, accused was treated by Dr. Roger J. Anderson in a hospital in Indianapolis for prostatitis narceleptic, drowsy paraesthesia of hands and arms, tinnitus and loss of libido (Def. Ex. C).

32. At Santahar accused seldom went out at night (R. 34). He was afraid of the natives (R. 44, 49). He was always homesick (R. 39). He was disgusted with the railroad and did not like India (R. 49). He seemed high strung and was bothered by the whistling of the locomotives (R. 50). Sgt. Louis J. Kalscheuer and Technicians 5th Grade Harold J. Baker and Frank J. Pikul were members of the detachment commanded by accused at Santahar. Kalscheuer did not think that accused was "in his right mind" at the time of the shooting (R. 53). Although accused seemed to become "blue" (R. 59) at night, he did not impress Baker as being "crazy" (R. 58). He was always talking about his family and about the mail which did not come. Baker had wondered whether or not accused was "slightly unbalanced" (R. 59). Pikul testified that he had taken over many of accused's duties, because he seemed to be unable to attend to his correspondence and supervisory duties at Santahar (R. 83). Accused didn't like the railroad and was always talking about deceased (R. 89). He dictated many letters to Pikul, which the latter would never have written in the words used by accused (R. 83).

33. Captain John J. Stoskopf Jr., C.I.D., questioned accused at ----- about hours 2100 on 21 April (R. 80). Accused was mentally and physically tired, and seemed to be worried. In this witness' opinion, accused's actions were apparently normal and he seemed to be rational and clear mentally (R. 80).

34. Captain Irving Beiber, MC, was chief of the Neuropsychiatric Section, 112th Station Hospital, in which section accused was under his observation for about three weeks. This witness had practiced psychiatry since January 1933. He had been an instructor in neurophysiology in a University Medical School and for 2½ years was assistant alienist at Bellevue Hospital, New York, and at the same time an assistant in psychiatry at the College of Medicine, New York University. From 1936 to 1942, he practiced neurology and psychiatry, and during this time was instructor in neurology in Columbia University and Adjunct Neurologist on the staff of Mount Sinai Hospital. He is a member of several learned societies (R. 140). Captain Beiber defined prostatitis as inflammation of the prostate gland, a narcoleptic as one addicted to drowsiness, and tinnitus and loss of libido as the loss of sexual desire and impotency. The personal history of accused (R. 141, Ex. B) indicated that in the probable course of his life he would have snapped mentally over some real or imagined crisis. In witness' opinion, accused was incapable of differentiating between right and wrong (R. 142), and at the time of the trial was still in need of psychiatric treatment (R. 146).

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35. Colonel Charles L. Leedham, MC, Major Thomas J. Morrison, MC, and Major William F. Fuller, MC, were designated by the reviewing authority as a Board of Officers to determine the sanity of the accused. Their report was received in evidence (R. 7, Pros. Ex. 1). The Board found that accused was of sound mind and capable of realizing the difference between right and wrong at the time of the alleged offense and that at the time of the examination he was of sound mind and his mental ability to assist in the preparation of his defense was good (Pros. Ex. 1). All the members of the Board testified as witnesses at the trial. Major Fuller studied psychiatry at medical school and had a few psychiatric patients while an interne. Since then, he had not practiced psychiatry (R. 8). In his opinion, when accused was suddenly jumped upon, he lost all reasoning due to fear. Such temporary loss of reasoning was not a form of insanity (R. 8). This witness had lost his temper and reasoning power lots of times and considered such loss no evidence of insanity (R. 9). The examination by the Board of Lt. Harvey occupied one hour and fifteen minutes (R. 8). The Board took into consideration the report of Capt. Beiber (Def. Ex. B) in making its determination (R. 10). Accused's fears and reactions referred to in the testimony and in the report of Capt. Beiber were not abnormal (R. 10). An act committed during temporary loss of reason could be involuntary (R. 10) and might be deliberate (R. 11).

36. Major Morrison, specialized in psychiatry from 1928 to 1935, and was resident psychiatrist in a private sanitarium at Beacon, New York (R. 12). From 1935 until entering the army in 1942 he was an Assistant Neurologist at the Vanderbilt Clinic. He is a qualified psychiatrist and lunacy examiner in the State of New York. He made an independent examination of accused, during 9 hours on three successive days (R. 12). He studied the case history prepared by Capt. Beiber and took into consideration his report and findings (R. 12). Major Morrison prepared a report for the Commanding General, SOS, USAF, CBI, which was received (R. 12) in evidence (Pros. Ex. 2). His conclusions therein were that accused was not psychotic, that his ability to assist in the preparation of his defense was good, that he was able to distinguish between right and wrong, and that he was capable of realizing the physical and moral consequences of any act (Pros. Ex. 2). In Major Morrison's opinion the mental aberration of accused indicated by his amnesia was the result, and not the cause, of his act. His examination of the accused was complete in all the various aspects of the mind (R. 13). Accused had a remarkably clear memory for events right up to the moment of the incident. Although accused's amnesia was an abnormality, Major Morrison found no evidence of any active disease affecting the brain of the accused. In his opinion, accused had not adjusted himself adequately (R. 15) from his civilian status to the military status overseas, but his mental condition was such that he could exercise control over his will or

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volition, so as to avoid shooting Sgt. Rowson (R. 16). At the time of the shooting he was capable of entertaining a criminal intent and of distinguishing right from wrong (R. 17); and accused's body was under his mental control. Accused was sane at the time of the act. The physical contact when accused was pushed by the sergeant might have affected his ability to distinguish right from wrong, "setting off in him a reflex of doing the actual shooting. It was an automatic action on his part" (R. 18). He may not then have had any control over himself. He might have been insane at the time he pulled the trigger (R. 18). The period of physical contact was too instantaneous to determine whether or not accused knew right from wrong at the actual time of pulling the trigger. It certainly would not have been long enough for accused to think over the consequence (R. 19).

37. Col. Charles L. Leedham, MC, received his degree in 1928 and was a post graduate at the Army Medical School in 1930 (R. 110). He had four years training at the Walter Reed Hospital. At the Army Medical School and at Walter Reed he had had training and experience in psychiatric work. In his opinion accused was sane and of sound mind, and was able to distinguish right from wrong up to the time of the shooting. Up to the moment of shooting, accused's actions were under his control. He was in such mental condition as to know the probable consequences of a criminal act and had full control of his faculties (R. 111). This witness personally examined accused for one to one and a half hours. Accused was sane up to the time of the shooting, but Col. Leedham had no idea "what he was" at the time of the shooting (R. 113). Anger or fear may cause something to snap in the human mind in a space of a second or two. In his opinion anger and fear are exaggerated normal actions and extreme anger and extreme fear do not constitute insanity. Amnesia is not considered evidence of insanity but as a reaction frequently seen after an unpleasant experience. In this witness' opinion the shooting was "a reflex action" (R. 114).

38. Both the Board of Medical Officers and the court were confronted with two questions: first, whether accused was sane and legally subject to trial; and second, whether at the time of the shooting he was sane and legally responsible for his act. The Board of Medical Officers found that he was sane at the time of the shooting and hence responsible for his acts, and sane at the time of the examination and hence subject to trial. Such findings were prima facie evidence of sanity. Indeed the law presumes one is sane and legally responsible for his acts, which presumption is rebuttable. A man is generally held to be sane so as to be legally subject to trial if at the time thereof he possesses sufficient soundness of mind to appreciate the nature of the charges against him and of the proceedings thereon, so as to enable him to cooperate in and to present his defense (23 C.J.S. 240). MCM 1928, par. 35c authorizes an appointing authority to suspend action on charges pending consideration of a report of the medical officer or the report of the

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Board convened under AR 600-500 in a case where that regulation applies and when it is practicable to convene such a Board. MCM 1928, par. 63 requires a court to inquire into the existing mental condition of the accused whenever it appears to the court that such an inquiry should be made in the interest of justice, and requires that priority be given to the determination of the question of sanity.

39. The court gave priority to the determination of the question whether accused at the time of the trial was sane and legally subject to trial. After the examination and cross-examination of Major Fuller and Major Morrison on that issue, and the admission in evidence of the report of the Board and of the report of the psychiatric examination by Major Morrison, the court held that the accused was sane then and at the time of the commission of the act, but that the defense had the right at any time during the trial to raise the question of sanity and to introduce any evidence it saw fit on that question (R. 20). The preliminary ruling that accused was sane at the time of the commission of the act charged was unnecessary. It could not have prejudiced accused since the law presumed him to be sane, which presumption could have been overcome only by evidence sufficient to raise a reasonable doubt as to his sanity.

40. The ruling of the court that accused possessed mental capacity necessary to render him legally subject to trial was correct. It accorded with the established practice both before military tribunals and in civil courts. It seems obvious that the accused thoroughly understood the nature of the charge with which he was confronted, as well as the nature of the proceedings thereon. It would appear that the testimony of the accused (R. 150-167), clearly so demonstrates. His testimony appears to be that of a witness well oriented as to time and place, alert, normal in his mental processes, and possessed of an excellent memory.

41. The rules governing the determination of the mental responsibility for his acts, of an accused, are laid down in MCM 1928, pars. 75a and 78a in the following language:-

"If the court determines that the accused was not mentally responsible it will forthwith enter a finding of not guilty as to the proper specification."

(MCM 1928, par. 75a)

"Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused cannot legally be convicted of that offense. A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right."

(MCM 1928, par. 78a)

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Special findings on the issue of mental responsibility are not authorized, but the court must find the accused not guilty, if the evidence is such as to raise a reasonable doubt whether at the time of the commission of the offense he was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to choose to adhere to the right. The language of the Manual for Courts Martial necessarily implies that, if after consideration of the evidence the court believes that the accused has been proven guilty beyond reasonable doubt, and if the evidence is not such as to raise a reasonable doubt as to the mental capacity of the accused to distinguish right from wrong and to choose the right, it then becomes the duty of the court to find the accused guilty. By the findings of guilty, the members of the court in effect state not only that the accused was guilty of manslaughter, but also that at the time of the commission of the act he possessed the mental capacity to distinguish right from wrong and to choose the right. The testimony of Colonel Leedham, Major Fuller and Major Morrison is substantial evidence, which supports these implications of the court's findings.

42. Although the Board of Medical Officers found that accused at the time of the commission of the act was of sound mind and able to distinguish right from wrong, it made no express finding that he was or was not able to choose between right and wrong. The requirement that such a Board should make such a finding seems to be implicit in the language of MCM 1928, pars. 36c, 63, 75a and 78a. In view of these provisions, it would seem that the finding of the Board that at the time of the commission of the offense and at the time of the examination the accused was "of sound mind" is equivalent to stating: (1) he now understands the nature of the charge and can conduct his defense, (2) with reference to the particular act charged, he was (a) able to distinguish between right and wrong, and (b) able to choose the right. Although it would have been the better practice for the Board to have made an express finding that, with reference to the particular act, accused possessed mental capacity sufficient to enable him to adhere to the right, as well as that he was able to understand the difference between right and wrong, it seems to be inconceivable that experienced medical officers, whose duty it is to be familiar with the applicable provisions of the Manual for Courts-Martial, would have submitted a report that accused was of "sound mind", if in their opinion he did not possess the power to choose, as well as the power to distinguish, between right and wrong at the time of the commission of the offense. In any event, an express finding as to accused's mental ability to adhere to the right, with reference to the act charged, would be only prima facie evidence on that point and would not be conclusive upon the court, where, as here, there is other evidence bearing upon that very question (CM 205621 Curtis, VIII B.R. 207, 221-226; CM 225837, Gray, XIV B. R. 339, 345-347).

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In the case last cited, the Medical Board found the accused to be mentally deficient and, although able to distinguish right from wrong, to be incapable of adhering to the right. There, as here, there was other evidence bearing on such question, and the court found the accused guilty of rape and sentenced him to life imprisonment. The record of trial in that case was held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence (XIV B.R. 347). To the same effect was the majority opinion of the Board of Review in CM 204790, Hayes, VIII B.R. 57, 73-81. The opinion of the Board of Review in CM 223448, Riesenman, XIII B.R. 389, 393-403, that where a Medical Board finds that an accused lacks mental capacity to adhere to the right and there is no evidence to the contrary, a record of trial is legally insufficient to support the findings of guilty and the sentence, is of course readily distinguishable. That opinion is not applicable to the facts of this instant case, where there was at least the implication in the conclusions of the Medical Board that accused could adhere to the right, as well as voluminous testimony which furnished a substantial basis from which the court could reasonably conclude that the accused at the time of the shooting possessed the mental capacity both to distinguish between right and wrong and to adhere to the right.

43. It seems to us to be clear, from the questions put to the various witnesses both by counsel and by members of the court, and from the arguments of counsel for both sides, that the provisions of the Manual for Courts-Martial respecting insanity as a defense were well known to and well understood by all concerned. There seems to have been no confusion on the part of anyone, as to the standards by which the mental capacity of the accused was to be tested.

44. Objections were urged by the Trial Judge Advocate to questions calling for the opinion of lay witnesses as to the sanity or insanity of the accused. The Law Member properly ruled that a witness, who knew the accused and who had testified to facts bearing upon his mental capacity, was permitted to state whether or not in his opinion the accused was sane or insane.

45. No objection was made to the admission in evidence of the statement made by the deceased on the day of his death, after he had stated that he knew that he was about to die and had no hope of recovery. The contemplation of impending death is regarded as a sufficient guaranty of the reliability of a statement made by one who has lost all hope of recovery, as in the presence of impending death a person is without any motive to make a false statement. Earthly considerations have lost all significance to one about to die. If the declarant's faculties are clear and unclouded, the approach of death exercises such a powerful and solemnizing influence on the mind as to prompt a careful regard

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for the truth. In an early case on this subject, decided in 1784, it was said:

"The principle upon which this species of evidence is received is that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that with which it is presumed to feel by a solemn appeal to God upon an oath. The declarations therefore of a person dying under such circumstances are considered as equivalent to the evidence of a living witness upon oath."

(Rex v. Drummond, Leach, Crown Cases 337)

Deceased, at the time of the making of the declaration, knew that his wound was mortal and that recovery was impossible. The witnesses agree that his mind was clear and not cloudy. The declaration (Pros. Ex. 38) was therefore properly admitted in evidence. We note that in such declaration reference is made to an earlier statement which the dying declarant asserted to have been true. Such earlier statement thus was incorporated by reference in the dying declaration. It might properly have been offered in evidence as a part thereof. No objection was made concerning its omission. The failure to offer the earlier statement does not appear to have been prejudicial to accused. Probably it operated in his favor, and he was aided and not unjured.

46. All but one of the members of the court who sat upon the trial of this case, and the defense counsel, have submitted letters recommending that clemency be extended. These letters are appended to the record of trial. We have carefully noted the contents of these letters. The fact seems worthy of remark that, although the mental capacity of accused is made the subject of comment by five of the seven members of the court submitting such letters, only one of the five regarded accused as having been insane at the time of the shooting.

47. Accused was appointed a First Lieutenant, AUS, on 8 July 1943 and at the time of the commission of the offense was 52 years of age. He appears to have been on active duty since 22 July 1943.

48. The court was legally constituted. The case was ably presented by experienced counsel both on behalf of the prosecution and on behalf of the accused. The trial was fair in all respects. No errors intervened to the prejudice of any substantial right of the accused. The sentence imposed is authorized for the offense of which accused has been found guilty.

49. Voluntary manslaughter is recognized as an offense of a civil nature and is made punishable by penitentiary imprisonment by sections 274 and 275 of the Criminal Code of the United States

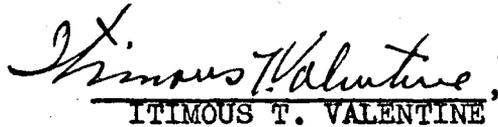
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(18 USC 453, 454). Confinement in a penitentiary is therefore authorized by AW 42. However, in view of the evidence as to the mental condition of the accused, it would appear that the U.S. Disciplinary Barracks nearest the port of debarkation in the United States should be designated by the confirming authority as the place of confinement in accordance with the provisions of par. 5c (2) (d) 3 and 5, AR 600-375, and par. 2b (2) (d) 3 and 5, AR 600-395.

50. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the findings and the sentence.


Grenville Beardsley, Judge Advocate
GRENVILLE BEARDSLEY


Timous T. Valentine, Judge Advocate
TIMOUS T. VALENTINE

(On detached service), Judge Advocate
ROBERT C. VAN NESS

CM CBI # 240 (Harvey, George C.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USAF, CBI,
APO 885, c/o Postmaster, New York, N.Y., 18 September 1944.

To: The Commanding General, USAF, CBI, APO 885, U. S. Army.

1. In the case of 1st Lt. George C. Harvey; O-925015, Transportation Corps, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM CBI 240).

H. J. SEMAN,
Col. J. A. G. D.

H. J. SEMAN,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 12, CBI, 18 Sep 1944)