

John G. Bryer, Jr.
HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

CHINA-BURMA-INDIA INDIA-BURMA THEATER



VOLUME 2 B.R. (CBI-IBT)

CM CBI 245 - CM CBI 249

CM IBT 282 - CM IBT 485

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

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

CHINA-BURMA-INDIA
INDIA-BURMA THEATER

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7 October 1944.

Board of Review
CM CBI 245

UNITED STATES)

SERVICES OF SUPPLY, USAF, CBI.

v.)

) Trial by GCM convened at APO 629,
) % Postmaster, New York, N.Y. on

John Francis, Robert W.
Cornelius, Curtis H. Anderson,
William T. Williams, Edward
A. Lane, Lee L. Huggins and
Earl Wilson, all of whom are
T/5's of Co. B, 848 Engineer
Aviation Bn.)

) 29 June 1944. 20 years as to all
) except Huggins and Wilson, and 10
) years as to them. U.S. Penitentiary
) nearest port of debarkation in U.S.
) as to all except Huggins and Wilson;
) U.S. Disciplinary Barracks nearest
) port of debarkation in U.S. as to
) them.

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 Assistant Judge Advocate General in charge of the Branch Office for China, Burma and India.

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

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

Specification: In that Technician Fifth Grade John Francis, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Robert W. Cornelius, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Curtis H. Anderson, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade William T. Williams, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Edward A. Lane, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Lee L. Huggins, Company B, 848th Engineer Aviation Battalion, and Technician Fifth Grade Earl Wilson, Company B, 848th Engineer Aviation Battalion, acting jointly, and in pursuance of a common

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intents did, at ----- India, on or about May 6, 1944, forcibly and feloniously, against her will, have carnal knowledge of Mahar Mayn.

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

Specification 1: In that Technician Fifth Grade John Francis, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Robert W. Cornelius, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Curtis H. Anderson, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade William T. Williams, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Edward A. Lane, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Lee L. Huggins, Company B, 848th Engineer Aviation Battalion, and Technician Fifth Grade Earl Wilson, Company B, 848th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at -----, -----, India, on or about May 6, 1944, unlawfully enter the dwelling of Modhu Man Thapa, with intent to commit a criminal offense, to wit, kidnap his wife, Mahar Mayn, therein.

Specification 2: In that Technician Fifth Grade John Francis, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Robert W. Cornelius, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Curtis H. Anderson, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade William T. Williams, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Edward A. Lane, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Lee L. Huggins, Company B, 848th Engineer Aviation Battalion, and Technician Fifth Grade Earl Wilson, Company B, 848th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at -----, -----, India, on or about May 6, 1944, with intent to do him bodily harm, commit an assault on Modhu Man Thapa, by striking on the back of the neck with a dangerous instrument, to wit, a bamboo pole.

Specification 3: In that Technician Fifth Grade John Francis, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Robert W. Cornelius, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Curtis H. Anderson, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade William T. Williams, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Edward A. Lane, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Lee L. Huggins,

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Company B, 848th Engineer Aviation Battalion, and Technician Fifth Grade Earl Wilson, Company B, 848th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at -----, India, on or about May 6, 1944, with intent to do him bodily harm, commit an assault on Te Singh Lepcha by willfully and feloniously threatening the said Te Singh Lepcha with a rifle (No. 624444) and firing said rifle in a manner as to put said Te Singh Lepcha in fear of bodily injury.

Specification 4: (Finding of not guilty as to all accused)

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

Specification 1: In that Technician Fifth Grade John Francis, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Robert W. Cornelius, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Curtis H. Anderson, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade William T. Williams, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Edward A. Lane, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Lee L. Huggins, Company B, 848th Engineer Aviation Battalion, and Technician Fifth Grade Earl Wilson, Company B, 848th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at -----, India, on or about May 6, 1944, wrongfully and without permission or authority, take and use a certain truck, to wit, GMC Truck No. 4141938, property of the United States, of a value of more than \$50.00.

Specification 2: In that Technician Fifth Grade John Francis, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Robert W. Cornelius, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Curtis H. Anderson, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade William T. Williams, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Edward A. Lane, Company B, 848th Engineer Aviation Battalion, Technician Fifth Grade Lee L. Huggins, Company B, 848th Engineer Aviation Battalion, and Technician Fifth Grade Earl Wilson, Company B, 848th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at -----, -----, India, on or about May 6, 1944, unlawfully and feloniously abduct and by force and violence against her will, and without her consent, take and carry away from her domicile, and from Modhu Man Thapa, her husband, one Mahar Mayn, for the purpose of illicit sexual intercourse.

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3. Each of the accused was found not guilty of Specification 4 of Charge II and guilty of all other charges and specifications.

Each of accused pleaded not guilty to all of the charges and specifications. The court found each accused not guilty of Specification 4 of Charge II but guilty of all other charges and specifications and sentenced each of them to dishonorable discharge, to total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence as to each accused, but reduced the period of confinement to 20 years as to Francis, Cornelius, Anderson, Williams and Lane, and to 10 years as to Huggins and Wilson. The United States Penitentiary nearest the port of debarkation in the United States was named as the place of confinement for Francis, Cornelius, Anderson, Williams and Lane, and the United States Disciplinary Barracks nearest the port of debarkation as the place of confinement for Huggins and Wilson. The order of execution 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.

PROSECUTION'S EVIDENCE

4. For convenience in distinguishing between accused, each will hereafter be designated and referred to respectively by his last name.

On the evening of 6 May 1944 between 1800 hours and 1950 hours, Francis obtained a trip ticket (Pros. Exs. C, D, E, F, G, H, I) for a six by six, two and a half ton truck, American Motor Vehicle No. 4141938 (R. 33) which was furnished and intended for military use of the United States Government (R. 55) for the purpose of going some 6 to 10 miles to Oakland Motor Dispersal Area to pick up the clothing, barracks bag and other equipment of Anderson (R. 56) (Pros. Exs. C, D, E, F, G, H, I). There was no permission to use the truck for any other purpose or drive it any further (R. 55, 58). All five of accused then got together at that station and rode in the truck out to the designated place and according to plan picked up the clothing, barracks bag, other equipment and the rifle belonging to Anderson. On the way out from their base something was said by one or more of accused about going to get "jig-jig" (Pros. Exs. C, D, E, F, G, H, I). From the dispersal area instead of going back to the base, they drove out near the town of Tinsukia in search of jig-jig (R. 59, 63, 70). Along the road they found an Indian man from whom they sought to find the desired commodity. Upon failing to get a clue here, they traveled to -----, in the District of ----- (R. 7, 22) where three or more (Pros. Exs: E, H) entered the compound of the home of a farmer who lived by the side of the road. In the house (R. 22) at the time the truck drove up were Modhu Man Thapa, the farmer, Mahar Mayn, his wife, Te Singh Lepcha, her brother,

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(R. 22) and an old man (R. 8, 14). One of accused flashed a torch into the house of Modhu Man Thapa and saw a woman in bed (R. 8) (Pros. Ex. F). Accused were recognized as seven or eight colored American soldiers (R. 8-9-10, 15). The family of Modhu Man Thapa was having supper at the time, (R. 8, 14, 22) about 8 P.M., 6 May 1944 (R. 8). Cornelius, who was armed with the M1 rifle, with Williams and Anderson went nearer the house where they encountered the husband of the victim, Modhu Man Thapa and Te Singh Lepcha (Pros. Ex. F). When Te Singh Lepcha asked the coloured American soldiers, who were then in the compound, "What do you want?", they shined the torch light and one of them said, "I'll kill you", and added, "Don't talk too much or I'll shoot", and "Don't move". Accused were then only 18 or 19 feet away and the rifle with which they were armed could be seen (R. 15). Then one of the soldiers pointed the rifle at Te Singh Lepcha and four or five of them surrounded him (R. 16). Te Singh Lepcha was forced at the point of the rifle to go around the hut and into it. As he entered the hut he was kicked on the thigh and slapped on his head immediately in front of his ear (R. 16). He was frightened when the rifle was fired. Inside the house or but one of accused pushed Te Singh Lepcha in the back with the rifle while two others caught a hold of his hands. Some of the soldiers took Mahar Mayn out of the house, while the others with the gun restrained Te Singh Lepcha. Mahar Mayn's husband was then lying in the compound (R. 17). Te Singh Lepcha followed the truck on foot and spread the alarm (R. 18).

At the trial, Te Singh Lepcha identified Francis as one of the soldiers involved in the altercation on 6 May 1944. Francis was the first to talk to and threaten Te Singh Lepcha. He told him to "Go inside the house or I'll kill you" (R. 18). When the rifle was fired, it was pointed toward Te Singh Lepcha but the bullet did not hit him (R. 19). No money was paid to Te Singh Lepcha by accused (R. 19). The torch and rifle was pointed at Te Singh Lepcha a distance of 18 or 19 feet away (R. 19-20). One of the accused struck Modhu Man Thapa on the back of his neck (R. 9-10-11-12-13) with a piece of bamboo and knocked him unconscious in which condition he remained until his wife had been taken away by accused (R. 10). Modhu exclaimed, "I'm dying". (R. 23). Another one of accused assaulted Te Singh Lepcha by pushing him with the barrel of the gun (rifle) (R. 9), kicking him on the thigh (R. 10), and fired the rifle in the direction in which he was standing after having ordered him to "shut up". Two of the accused then went into the bedroom where they grasped Mahar Mayn, the 20 year old wife of Modhu Man Thapa, (R. 22) pulling her forcibly out of the house (R. 17) as she struggled to prevent it, and with the aid of a third one of the accused, the three conducted her to and forcibly put her in the truck (R. 23). Mahar Mayn yelled, (R. 23) struggled and tried to remain in the house as she was dragged outside. One soldier put a handkerchief in her mouth to stop her cries. Two others carried her by the legs

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and by the back. They laid her on her back in the truck. There were at the time seven or eight men in the truck. All this was against her will and over her resistance (R. 23). There were spots of semen on her clothes after the rape (R. 25). She was offered money but did not take it (R. 27). They held her down on the floor of the truck as she struggled to get up and free herself. One man pressed her legs and another held her head down. She was afraid they were going to do her wrong or kill her (R. 24). These men then by force and against her will raped her (R. 24) after driving the truck some distance away. After the first act of rape she was in fear of death and trembling (R. 24). During the third or fourth coition she became unconscious and remained so until the M.Ps stopped the truck (R. 25-26). When she regained consciousness, she was suffering pain "In my belly and inside the vagina". Her legs hurt. She was not paid by accused nor had she ever had sexual intercourse for hire (R. 25). Mahar Mayn is not a prostitute but a woman of good character (R. 113, 122). While Mahar Mayn was being physically carried by force and against her will from the house to the truck, one of her abductors put a handkerchief in her mouth to keep her from making a noise (R. 23). The other accused remained in or around the truck while this altercation occurred, and when a woman screamed or yelled or hollered, Huggins got in the truck and drove off (Pros. Ex. F). Some other of the accused called for him to back up and when this was accomplished, Mahar Mayn was put in the back of the truck (Pros. Ex.F). Four of the accused then got in the back part of the truck with the victim and three got in the driver's seat. Huggins drove the truck on toward the base and on the way several of accused had sexual intercourse with Mahar Mayn. The truck was stopped and some others of the accused had sexual intercourse with her (Pros. Ex. I). They changed drivers and the truck was then driven on some few miles and off the road into a tea patch where accused Francis, Cornelius, Anderson, Williams and Lane each had sexual intercourse with Mahar Mayn. Accused then decided to take the victim back to within walking distance of her home or some point in ----- . One of accused held her when she was first raped, and then himself had sexual intercourse with her, while another of the accused held her (R. 24). After the third or fourth act of intercourse, Mahar Mayn became unconscious and knew nothing further until the military police stopped the truck (R. 25). The accused on the way from the point where the last acts of sexual intercourse were committed, detoured so as to miss the traffic control station but soon afterwards met Sergeant Marvin Null, Corporals Anthony G. Novakauskas and Blonville R. Duke, all of Company D, 782d Military Police Battalion, who had already received a report from the villagers and other people (R.10) and were on their way to apprehend accused. The truck was stopped and it was discovered that the seven defendants and the victim were in the truck. The accused were relieved of the M1 rifle and then taken back to Military Police Headquarters (R. 32-33, 37). When Mahar Mayn found herself at police headquarters she appeared to be afraid

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to get out of the truck. When helped out she appeared to be very tired. She related what had happened. All of accused but two admitted having had sexual intercourse with her but said they had paid her a total of 14 rupees, and that it was entirely satisfactory and that no resistance was offered whatever (Pros. Exs. C, D, E, F, G, H). Mahar Mayn said that one of accused had tried to make her take some money after he had raped her but that she refused (R. 112). Each of accused was searched but no one had 14 rupees.

On the morning of 7 May 1944, Dr. B. Bora who is Sub Assistant Surgeon at S and J Hospital in -----, India, examined Mahar Mayn (R. 20, 28-29) and found an old rupture of the hymen with hypermia or redness of the labia all around the opening. There was also blood clot. She complained of pain on the posterior wall of the vagina and the opening. She complained of pain in both thighs (R. 29-30). She told Dr. Bora, at that time, that she had been raped (R. 29). The condition found by Dr. Bora would be caused by a male organ (R. 29). His examination disclosed pain on the posterior caused by forcible penetration and by the length of a penis which was longer than the vagina (R. 29). Dr. Bora could not say that the intercourse was not voluntary but did say that where there is pain, a woman would not voluntarily consent to intercourse with anyone (R. 29). The pain in the thighs of Mahar Mayn could have been caused by a person holding that part of her body in a rough manner for a long time. A normal act of sexual intercourse would not cause such trouble (R. 31). The cause of the pain was the pressure of the man on her thighs. At the same time Dr. Bora examined the witnesses, Modhu Man Thapa and Te Singh Lepcha (R. 10, 17). On Modhu there was a swelling two inches in diameter on the middle of the back of the neck, a swelling one inch in diameter on the right side of the cheek an inch and a half from the right ear, accompanied by pain on the right side of his chest. Te Singh had a swelling three inches in diameter and an abrasion on the back of his thigh four inches above the knee joint (R. 30). The injuries found on the two men examined could have been produced by a blow, a kick or by the butt of a gun or any blunt instrument (R. 30-31).

5. Each of the accused elected to go on the stand as a witness. According to their evidence, on the day in question the seven accused went out to the dispersal area for the purpose of picking up clothing of Anderson. In addition to the clothing they got his rifle. From the dispersal area they traveled in the truck toward ----- on a back road. On the way they met two Indian men and stopped the truck. They asked where they could get jig-jig. They drove on for a while until they came to another Indian standing near the road, where Francis stopped the truck and talked with the Indian for a while. Francis then went into the yard of the

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Indian's home and there was heard to say something about 10 rupees to Modhu Man Thapa. In the meantime, Cornelius, Francis and Williams decided to buy some jig-jig and following inclination they went into where Francis and the Indian were talking in time to hear this debate as to whether the price would be 20 rupees. Cornelius then said, "Give him 20 rupees" (R. 59). The Indian then led Francis into the house from which he emerged with the woman. The woman then went to the lorry and somebody gave her a lift into the truck and Francis paid the Indian some money. Another Indian then came out of the house talking very loud in the Indian language. The two Indians would not shut up when ordered to do so and Cornelius fired the rifle. As the Indians continued to talk, Williams picked up a stick and hit one of the men and he fell. Cornelius then directed the way and Huggins drove the truck away turning first left, then right, until they hit the main road which they traveled about three miles from ----- where they stopped the truck and all of accused got out with the exception of Francis. Francis had the woman at that time. Some of the men were peeking in the truck. Williams then had intercourse with the woman (R. 60). It then became Cornelius's turn and he climbed in the truck and had intercourse with Mahar Mayn (R. 60). Each of the accused who admitted having sexual intercourse with Mahar Mayn insisted that she did not resist but yielded freely and voluntarily, and that she accepted money from each of the defendants (R. 61). Accused agreed among themselves, after the last man was through having sexual intercourse with her, to take her back within walking distance of her house (R. 60) but the M.P.s intercepted them, stopped the truck, took the rifle and took the accused into custody and drove them back to headquarters. Cornelius claimed that, when Mahar Mayn was questioned at Military Police Headquarters by an Indian police inspector, she admitted receiving a total of 14 rupees from those of accused who had had intercourse with her and that the money had been taken away from her by a man who looked like Anderson (R. 62).

Each of the other accused, after being warned of his rights, went on the stand as a witness in his own defense and the testimony of each was in substantial corroboration of the testimony of Cornelius insofar as it relates to the essential elements of the crimes involved (R. 59-60, 70, 79-80, 89-90, 91, 99-100, 105-106, 108-109, 110). The statements of accused, (Pros. Exs. C, D, E, F, G, H, I) were freely and voluntarily made and after full and fair warning as to their rights had been given (R. 113-114, 116).

6. Whatever the origin of the term "jig-jig", in the parlance of the American soldiers in India, it has come to mean sex gratification by copulation.

In effect, the allegations of each of the specifications charge that the accused committed the offenses charged in further-

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erance of and as a result of a conspiracy. A conspiracy is defined:

"Conspiracy at common law is a combination between two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. * * * A conspiracy once formed, continues to exist until consummated, abandoned, or otherwise terminated by some affirmative act". (15 C.J.S. p. 1057 (35)).

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 in par. 1039, 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".

"The least degree of consent or collusion between the parties to an illegal transaction makes the act of one of them the act of another." (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 Maryland 17, 22)

"Rape is a felony at common law. It consists in having unlawful carnal knowledge of a woman by force and without her consent". (Clark and Marshall, Crimes, Fourth Edition, p. 363, par 292)

"Any man who has unlawful carnal knowledge of a woman by force and without her conscious consent or permission,

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is guilty of rape, both at common law and under the statute." (Clark and Marshall, Crimes, Fourth Edition, p. 363, par 293)

The crime of rape by its very nature necessitates individual action and there must be a penetration, however slight, of the male organ into the vagina of the female. A joint rape is physically impossible. It is a well established principle of law that all such persons who are present at the commission of a rape and who aid and abet in its perpetration are guilty as principals and punishable equally with the principal. Where a defendant is present and aids, abets and assists another in overcoming the resistance of the woman, such aider and abetter is guilty of rape, and the fact that such person did not have intercourse with the victim is immaterial. (People v. De Stefano, 332 Ill. 634) When three men hold up and rob a man and woman and two of the men rape the woman while a third prevents the man from interfering by holding a gun against him, all three are guilty of rape. (People v. Macchiaroli, 54 Cal. App. 663, 202 Pac. 474)

The rule has been thus stated:

"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 or abetter, 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 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 participancy, or the doing of some act, at the time of the commission of the crime, in furtherance of the common design." (44 Am. Jur. p. 921, par 33)

Clearly when the accused have entered into a conspiracy to commit the crime of rape, each one who does the least act of counsel or encouragement or any other thing in furtherance of the conspiracy would be guilty as a principal.

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In this case there was ample evidence to sustain a finding that all of the accused combined in an agreement either expressed or implied to go in search of sex gratification, even before they had reached the motor dispersal area about six miles from their base. It is equally clear that as they went toward the village of ----- where they found their victim, they all entertained the set purpose to have sexual intercourse at any risk and by overcoming any obstacles and all resistance. The evidence shows that they tried to locate a woman with whom they could have sexual intercourse a short distance before they entered the house of Mahar Mayn, and that when they reached the compound, they were met by her husband and brother who attempted to thwart their purpose. Some one of accused flashed a light into the bedroom of the victim and upon seeing a woman there, set themselves to the task of taking her away by force. When their purpose to do this was challenged, one of them assaulted her husband with a piece of bamboo knocking him unconscious and another assaulted her brother with the rifle. The proof conclusively shows that they then took their victim away from her home over her protests and some distance down the road to a tea patch where all of accused except Huggins and Wilson had sexual intercourse with her by force and against her will. And Wilson was "on the woman" when the M.P.s interfered. The strain of this ordeal was so great that she fainted and became unconscious upon the third or fourth copulation. Although the evidence does not show that Huggins actually had sexual intercourse with the victim, he was with them all the time and took part in everything leading up to the assault and rape, and drove the truck away from her home, with Mahar Mayn in it. Wilson took some part in all that was done. He was lying on the woman, when the M.P.s stopped the truck. There is therefore, no doubt that each of the accused either himself actually raped Mahar Mayn, or was an aider and abetter of those who did rape. Hence all are legally guilty of rape.

In Specification 2 of Charge I, accused are charged with housebreaking. MCM 1928, Par. 149e defines such offense as follows:

"Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein.

The offense is broader than burglarly in that the place entered is not required to be a dwelling house; it is not necessary that such place be occupied; it is not essential that there be a breaking; the entry may be either in the night or in the daytime; and the intent need not be to commit a felony. The intent to commit some criminal offense is an essential element of the offense, and must therefore be alleged and proved, in order

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to support a conviction of this offense. The term 'criminal offense' includes any act or omission violative of the Articles of War, which is cognizable by courts-martial, except acts or omissions constituting purely military offenses".

In a specification charging housebreaking, the intent accompanying the entry must be specifically charged.

"It is not enough to allege generally an intent to commit 'a felony' or 'an offense' but it is necessary, in order that the charge may be certain, to state the particular felony or other offense intended." (9 C.J. p. 1050, par. 92)

"The intent must be proved as laid in the indictment. An allegation of breaking and entering with an intent to commit a particular felony is not sustained by proof of a breaking and entering with intent to commit some other felony." (Ibid, p. 1063, par. 118)

"As a general rule the state may prove any conduct on the part of defendant, or other facts or circumstances, by competent evidence, which tends to show that accused broke and entered with the felonious intent alleged in the indictment, for generally the intent can only be shown by circumstantial evidence." (Ibid, p. 1068 par. 125)

It was necessary in this case for the prosecution to show that one or more of accused entered the house of Modhu Man Thapa with intent to commit the crime of kidnapping.

"Kidnapping, at common law, is the forcible abduction or stealing away of a man, woman, or child from their own country, and sending them into another." (Clark and Marshall, Crimes, Fourth Edition, 222)

Hence, at common law, an essential element of the crime of kidnapping is that the person kidnapped is taken to another country. In Section 22-2101, Code of the District of Columbia, both kidnapping and abduction are denounced but in order to convict under this statute it must be alleged and proved that the victim was kidnapped or abducted for ransom or reward. To the same import is the "Lindberg Act". (Title 18, Sec. 408a, U. S. Code) There is no evidence in this record from which the inference can properly be drawn that at the time the three men entered the house of Modhu Man Thapa and carried by force therefrom, Mahar Mayn, they intended to take her to any country other than her own or to collect a ransom or reward from any person. On the contrary, it is evident that all seven of these men were in search of sexual intercourse and their purpose clearly appears from the evidence. They were not interested in ransom but in coition.

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Since the proof fails to establish an essential element of the offense charged the charge of housebreaking fails. (Dig. Ops. JAC 1912-40, Sec. 451 (34)) (N.A.T.O. 2481, Conrad et al.) The record of trial is not legally sufficient to support the finding of guilty of Specification 1, of Charge II.

As to Specification 2, Charge II:

"An assault is an attempt or offer with unlawful force of violence to do a corporal hurt to another. Raising a stick over another's head as if to strike him, presenting a firearm ready for use within range of another, striking another with a cane or fist, assuming a threatening attitude or hurrying toward another, are examples of assault". (MCM 1928, par 149L)

The manual goes on to say further in this connection:

"Weapons, etc., are dangerous when they are used in such a manner that they are likely to produce death or great bodily harm". (MCM 1928, par 149m)

The charge here is abundantly sustained by the evidence. When Modhu Man Thapa was attempting to defend his home and his wife from the vicious and humiliating actions of accused, he was hit by Williams on the back of his neck with a piece of bamboo with sufficient force and power to render him unconscious. The proof could not possibly have been more convincing.

Specification 3, Charge II: The rifle with which Te Singh Lepcha was assaulted was taken by defendants in the truck all the way from the motor dispersal area to the Village of ----- and removed by one of accused from the truck and carried as they invaded the home of their victim. When Te Singh Lepcha attempted to interfere in behalf of his sister, Mahar Mayn, and her husband, he was told to stop or he would be killed. The rifle was pushed against his body in a threatening manner and fired from a distance of 18 or 20 feet of Te Singh Lepcha and while it, together with the flashlight, was pointed in his direction (R. 19). The evidence here fulfills every requirement of the law with respect to the allegations of this specification.

Specification 1 of Charge III: Francis was given permission to use the truck to go out to the motor dispersal area but had no permission to use the truck for any other purpose or to go to any other place. After the mission upon which they were sent was performed, they did not return to their station but went a distance of approximately 35 miles to the home of Modhu Man Thapa near the Village of ----- . This they had no right to do.

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In a recent case, Private Clarence A. Barnes, GCM, CBI, 114, the Board of Review in speaking to this question said:

"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 use, by appropriating, without consent, such property for his own personal use and benefit is an offense under AW 96".

That is exactly what occurred in this case. Accused had permission to use the truck for a specific purpose but in addition to the discharge of that duty, they entered into a combination or conspiracy to go in search of "jig-jig" and traveled with the truck a distance of 35 miles or more for which they are clearly amenable for violation of AW 96.

In Specification 2, Charge III accused are charged with the abduction of Mahar Mayn from her domicile and from her house for the purpose of illicit sexual intercourse. Bouvier's Law Dictionary, on page 84 thus defines abduction: "Forcibly taking away a man's wife, his child, or his ward". (3 Bla. Com. 139-141. State v. George 93 N.C. 567) All of the evidence which delineates the occurrences during the trip of accused on the night in question agrees on the proposition that Mahar Mayn was carried away from her home that night by the seven accused. The conflict in the evidence arises out of the denial by accused that they took her away by force or against her will or that they did any other unlawful act in the course of that evenings performances. On this point the evidence is in sharp conflict. The testimony of Mahar Mayn, her husband, Modhu Man Thapa, and Te Singh Lepcha, is to the effect that force and violence were used in taking her from her residence and from the control of her husband. The assaults as well as all surrounding circumstances are wholly inconsistent with peacable consortion and the peacable acquisition of sexual intercourse. Her testimony is that she made outcries in the house and yard at her home until one of the accused muffled her shrieks by putting a handkerchief over her mouth. Francis, Cornelius, Anderson, Edwards and Lane all admitted having sexual intercourse with Mahar Mayn in the truck where it was parked in a tea patch by the side of the road, but insisted that this intercourse was not unlawful because she consented. Her testimony discloses that she resisted to the utmost of her ability until the third or fourth act of sexual intercourse when she became unconscious and so remained until they were taken to military police headquarters. She is corroborated in this position by bits of evidence here and there in the record, particularly the testimony of Dr. Bora whose examination the next morning disclosed that there was a redness and blood clots around the aperture of the vagina with soreness in the vaginal tract as well as other parts of her body including

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her thighs. Many of the circumstances disclosed by the record tend to support her in this respect.

Huggins and Wilson are not absolved from liability merely because they did not actually have forcible carnal knowledge of Mahar Mayn. Huggins was an active participant in the conspiracy. He backed the truck up so that Mahar Mayn might be loaded into it. He drove it on the road to the tea patch. Wilson partook of all other elements of guilt except the actual act of intercourse itself. He was attempting to have sexual intercourse with her when he was intercepted by the military police. The evidence is such as to prove them both to be equally guilty with their confederates.

"The general rule is well settled that, where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combined. In contemplation of law the act of one is the act of all. The law considers that, wherever they act, they renew, or, perhaps, to speak more properly, they continue their agreement, and that this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design."
(12 C.J. p. 577, par. 86)

"The least degree of concert or action or collusion makes the act of one conspirator the act of all". (Exp. Hayes, 6 Okl. Cr. 321, 188, p. 609; Hannon v. State, 5 Tex. A 549 (2))

"When by prearrangement or on the spur of the moment, two or more persons enter into a common enterprise or adventure, and a criminal offense is contemplated, then each is a conspirator, and if the purpose is carried out, each is guilty * * * whether he did any overt act or not. This rests on the principle that one who is present encouraging, aiding, or abetting or assisting * * * the active perpetrator in the commission of the offense is a guilty participant, and in the eyes of the law, is equally guilty with the one who does the act." (Jones v. State, 174 Al.53,56)

The conviction of three men of the crime of rape has been upheld recently by this Board of Review (CM CBI 159). The conviction of six men of the crime of rape has been sustained. CM 236801 (Bull. JAG, Aug. 1943, p. 310)

There is attached to the record a recommendation for clemency signed by five members of the court wherein they express a view that the court would have imposed lighter sentences upon the accused

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if such had been permissible under the law. This recommendation for clemency has been noted. The reviewing authority, upon consideration of it, reduced the period of confinement imposed upon each accused.

When the prosecution rested its case, the defense moved for a continuance so that it might obtain the presence of additional witnesses for the defense (R. 56). The law member asked if the defense would be able to go ahead with some other witnesses in order to get through with as many witnesses as possible and added, "If you still want a continuance at that time, we will give it to you". The defense then proceeded to offer evidence (R. 57) and never renewed the motion for continuance but stated at the conclusion of the evidence that the defense had nothing further to offer, MCM 1928, par. 52c reads:

"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 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 grounds 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".

While it appears that the court was of a disposition to grant the defense motion for a continuance upon a reasonable showing that it was necessary, the rule laid down in the Manual, as above quoted, was not entirely complied with. Neither did the defense ever indicate after it had started the introduction of testimony that such a continuance was desirable. It is proper to assume, therefore, that the application for continuance was abandoned. The whole matter rested in the sound discretion of the court and is harmless upon the facts here presented.

The written statements of accused (Pros. Exs. C, D, E, F, G, H, I) were, over objection by defense, received in evidence (R. 39, 41-42-43, 48).

"A confession is an acknowledgment of guilt." MCM 1928, par. 114a.

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Each of the accused who admitted having sexual intercourse with Mahar Mayn contend that she freely consented and even received compensation for such service. Hence, the statements were not confessions but admissions of certain facts which when considered with other testimony constituted proof of guilt.

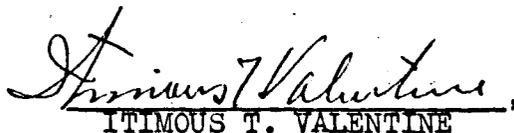
"In many instances an accused has made statements which fall short of being acknowledgments of guilt, but which, nevertheless, constitute important admissions as to his connection or possible connection with the offense charged. Such statements are called 'admissions against interest' and are admissible in evidence without any showing that they were voluntarily made". MCM 1928, par. 114b.

There is, however, in this record abundant evidence from which the court could have properly found that each of the accused before making a statement concerning the crimes with which they were charged was fully warned of his rights under the 24th AW and given full and complete notice that such statements as he might make could later be used as evidence against him (R. 39-40-41-42-43, 48, 51).

This Board cannot weigh evidence.

7. The court was legally constituted. It had jurisdiction of the persons of the accused and of the offenses charged. No errors which injuriously effected the substantial rights of the accused were committed upon the trial. The sentences are authorized for the offenses of which the accused have been properly found guilty. The Board of Review is of the opinion, and accordingly holds, that the record of trial is legally sufficient to support the findings, except the finding of guilty of Specification 1 of Charge II but is not legally sufficient to support the finding of guilty of Specification 1, Charge II, and is legally sufficient to support the sentence, as modified by the Reviewing Authority.


GRENVILLE BEARDSLEY, Judge Advocate


TITIMOUS 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,
2 October 1944.

Board of Review
CM CBI 246

U N I T E D S T A T E S)	S E R V I C E S O F S U P P L Y
v.)	
Private Ernest R. Forbes, Sr., 32486809, Company C, 858th Engineer Aviation Battalion.	)	Trial on 28 August 1944 by GCM at APO 689, % Postmaster, New York, N. Y. Dishonorable discharge, total forfeitures and confinement at hard labor for 5 years. U. S. Disciplinary Barracks nearest port of Debarcation 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 charges and specifications:

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

Specification: In that Private Ernest R. Forbes Sr., Company C, 858th Engineer Aviation Battalion, did without proper leave, absent himself from his Command near Namlip, Burma from about 0700 hrs May 28, 1944 to about 1100 hrs May 29, 1944.

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

Specification: In that Private Ernest R. Forbes, Sr., Company C, 858th Engineer Aviation Battalion, did, near Namlip, Burma on or about May 31, 1944 behave himself with disrespect toward 1st Lt. William K. Hancock, Company C, 858th Engineer Aviation Battalion, his superior Officer by saying to him, "why don't you cut this shit out", and contemptuously turning from him while he was talking to him the said Ernest R. Forbes Sr.

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

Specification: In that Private Ernest R. Forbes Sr., Company C, 858th Engineer Aviation Battalion, having received a lawful command from 1st Lt. William K. Hancock, Company C, 858th Engineer Aviation Battalion, his superior officer to "go to his tent" did, near Namlip, Burma on or about May 31, 1944 at app. 1900 hrs. willfully disobey the same.

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

Specification: In that Private Ernest R. Forbes Sr., Company C, 858th Engineer Aviation Battalion, having been duly placed in confinement in a tent at Company C, 858th Engineer Aviation Battalion Area, near Namlip, Burma on or about May 31, 1944 did at Namlip, Burma, 0100 hrs on or about June 2, 1944 escape from said confinement before he was set at liberty by proper authority.

3. Accused pleaded not guilty and was found guilty of all of the charges and specifications and was sentenced to be dishonorably discharged the service, to forfeit all pay or allowances due or to become due, and to be confined at hard labor for a period of 10 years. The sentence was approved by the reviewing authority but 5 years of the confinement at hard labor was remitted. The United States Disciplinary Barracks nearest the port of debarkation in the United States was designated 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. We are of the opinion that there is sufficient competent evidence to support the findings of guilty as to the Specification of Charge I and Charge I, the Specification of Charge II and Charge II, and the Specification of Charge IV and Charge IV, and therefore, do not deem it necessary to comment thereon. On the other hand we believe that the evidence in support of the finding of guilty as to the Specification of Charge III and Charge III is such that it is worthy of comment.

5. The evidence reveals that Captain Hancock had on May 31 called accused to the orderly room, informed him that charges were being preferred for being absent without leave and that he was to be restricted to the Company area pending trial (R.11). Later the Captain went to the theater and without intentionally doing so, sat in the row behind accused (R. 11, 13). Accused made some comment about having told Captain Hancock off, whereupon the officer ordered him to go to his tent (R. 11, 28). Accused made a disrespectful statement (R.11) and turned around

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(R. 13) ignoring Captain Hancock (R. 11). The order was repeated and accused did not obey at once. About four or five minutes after this (R. 14, 15) Captain Hancock proceeded to the orderly room and had accused brought to him by the charge of quarters. As the Captain left the show he did not turn around to see if accused was coming out (R. 14). As soon as Captain Hancock turned from accused to leave the theater, the latter walked out right behind (R. 21, 24, 28) and went to his tent where he was located by the charge of quarters (R. 21, 24).

6. The Judge Advocate General has held that, under some circumstances, alacrity is 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 willful disobedience as is contemplated by AW 64. (CM 236888, Bull, J.A.G., Aug. 1943, p. 308) In that case accused was found guilty of willful disobedience of his superior officer by the court martial. Accused was standing in the post exchange having a soft drink, when his battery commander, who had been searching for him since he had broken confinement earlier in the day, ordered him to put down the bottle and leave the place. Accused took another drink from the bottle and was slow about complying with a second command to go outside. He then walked slowly from the place. Under those facts it was held that there was not a willful disobedience of the superior officer.

Although it may seem that the case before us for consideration is somewhat analogous to the foregoing case, and that such decision might be controlling here, nevertheless distinguishing facts seem to us to be readily discernible here. In the case above summarized, the accused did belatedly comply with the order, and proceeded from the post exchange with the officer. In the instant case, the accused upon being ordered to go to his tent, remained where he was. When the order was repeated, accused paid no attention and continued to take no notice. Captain Hancock waited for four or five minutes for accused to obey and when it clearly appeared that accused was willfully disregarding it and intended to remain at the show, the Captain left. It is true that it appears from the testimony that accused left immediately thereafter. This appears to us, however, to indicate a change of heart on the part of the accused upon realization of the seriousness of his conduct rather than evidence of mere tardiness in rendering compliance with the order. As a general rule, when a direct order is given by a superior officer it is the obligation of the inferior to obey without hesitation, with alacrity, promptly and to the full (CM CBI No. 196). In those instances where

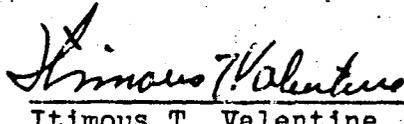
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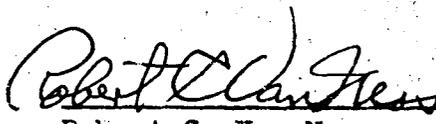
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alacrity and promptness are not the essence of a lawful command, it is difficult if not impossible to lay down any hard and fast rules as to what period of delay and how great the reluctance in compliance may be and still constitute obedience and not amount to such willful disobedience as is contemplated by AW 64. Each case must turn upon its own facts and circumstances. We are of the opinion that the actions and conduct of accused established by the evidence in this record are such as to amount to willful disobedience of the order, and that the findings of guilty by the court martial under Charge III and its specification is amply supported by substantial evidence.

7. The court was legally constituted and no errors injuriously effecting the substantial rights of the accused were committed upon the trial. The sentence is authorized. It is the opinion of the Board of Review and it accordingly holds 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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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

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New Delhi, India.
30 September, 1944.

Board of Review,
CM CBI 248.

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

v.

Pvt. Tyree J. Washington,
35120809, 540th Port Co.,
TC,

) SERVICES OF SUPPLY, USAF, CBI.

) Trial by GCM, convened at Calcutta,
) India, 31 August 1944. Dishonor-
) able discharge, total forfeitures
) and confinement at hard labor for
) 2 years. U. S. Disciplinary Bar-
) racks 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 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 upon the following charges and specifications:

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

Specification: In that, Private Tyree J. Washington, 540th Port Company, did at Calcutta, India, on or about 1 August 1944, with intent to do him bodily harm, commit an assault upon Private Davis Tolliver by cutting him on the face with a dangerous weapon, to wit: a razor.

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

Specification 1: In that Private Tyree J. Washington, 540th Port Company, was at Calcutta, India, on or about 1 August 1944, drunk and disorderly in uniform under such circumstances as to bring discredit upon the military service.

Specification 2: In that Private Tyree J. Washington, 540th Port Company, having received a lawful order

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from Corporal James D. Byrnes, Corps of Military Police, who was in the execution of his duty, to "Get into a jeep", did, at Calcutta, India, on or about 1 August 1944, wilfully disobey same.

3. Accused pleaded guilty to, and was found guilty of, all of 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 three years. The sentence was approved by the reviewing authority, but one year of the period of confinement adjudged was remitted. The order directing the execution of the sentence was withheld, and the record of trial was forwarded to this office pursuant to AW 50½. The United States Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement.

4. The 3d paragraph of AW 50½ directs that, "except as herein provided," no authority shall order the execution of any sentence of a general court martial not requiring confirmation by the President, which involves the penalty of death, dismissal not suspended, dishonorable discharge not suspended or confinement in a penitentiary, unless and until the Board of Review, with the approval of the Judge Advocate General, shall have held the record of trial upon which such sentence is based to be legally sufficient to support the sentence,

****except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty****."

It would seem that the language of the above quoted exception to the mandatory provision of AW 50½ is permissive only, and that such language is not intended to withdraw from the reviewing authority the privilege of obtaining the action of the Board of Review and the Assistant Judge Advocate General in charge of a branch office, in any case wherein the accused pleaded guilty, and although the sentence is based solely upon the pleas of guilty, in case the reviewing authority desires to have the record reviewed, before issuing his order directing execution. (CM 210-619, par. 408 (4), Dig. Ops. J.A.G., 1912-40, p. 260) It was proper therefore, for the reviewing authority, after approving and modifying the sentence adjudged in this case, to withhold his order of execution and to forward the record of trial for the

action of the Board of Review and the Acting Assistant Judge Advocate General. The Board of Review and the Acting Assistant Judge Advocate General may properly take jurisdiction of and act upon the record of trial in this case.

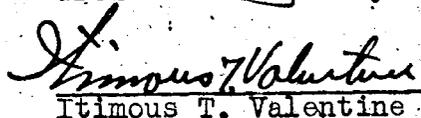
5. Accused went to Calcutta on pass on 1 August 1944. At the Broadway Hotel (R. 15) accused and Corporal Jack Wright drank two quarts of gin (R. 8) and then went to the Kidderpore area. There they went to the home of Mahina Baha Dasier, on Mritya Ghose Street. Privates Blackhawk and Davis Tolliver were already in her apartment. Drinking was indulged in by all. An hundred rupee note was observed in accused's shirt pocket. Wright abstracted it without accused's knowledge (R. 7). A few minutes later Blackhawk requested that accused lend him rupees 20. Thereupon he discovered that the 100 rupee note was missing. He questioned his companions in an effort to discover the identity of the thief. He whipped out a razor and cut Tolliver about the face (R. 7). Someone called the Military Police. Upon their arrival accused resisted arrest and refused to comply with the order of Corporal Byrnes, M. P. that he get into a jeep. It was necessary for Byrnes to menace accused with a pistol, before he would submit to being taken to the stockade (R. 11). Accused testified that he could remember nothing about what happened after he reached Kidderpore (R. 15).

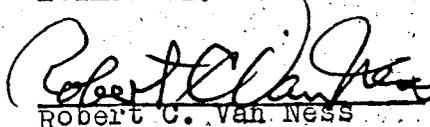
6. All of the testimony except that of accused is consistent with his pleas of guilty, and there is nothing to indicate that the pleas of guilty were inadvertently interposed. It may be presumed that defense counsel explained to accused the effect of his pleas of guilty, as required by MCM 1928, par. 456.

7. The Court was legally constituted. The trial was fair. No errors intervened which could have operated to the prejudice of any substantial right of the accused. The sentence, as modified by the reviewing authority, is authorized for the offenses of which accused has been found guilty.

8. 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

 Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

 Robert C. van Ness, Judge Advocate
Robert C. van Ness

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APO 885,
10 October 1944.

Board of Review
CM CBI 249

UNITED STATES

v.

Private Randolph W. Simon,
35046686, 541st Port Co.,
T.C.

) SERVICE OF SUPPLY, USAF CBI

) Trial by GCM 27 July 1944 at Cal-
) cutta, India. Dishonorable Dis-
) charge, total forfeitures, con-
) finement at hard labor for 5 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 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 93d Article of War.

Specification: In that Private Randolph W. Simon, 541st Port Company, Transportation Corps, did, at Calcutta, India, on or about 30 May 1944 wilfully, feloniously and unlawfully kill Private First Class Matthew Byrd by shooting him in the body with a rifle.

CHARGE II: Violation of the 86th Article of War.

Specification: In that Private Randolph W. Simon, 541st Port Company, Transportation Corps, being on guard and posted as a sentinel at Calcutta, India, on or about 30 May 1944, did leave his post before he was regularly relieved.

3. Accused pleaded not guilty to all charges and specifications and was found guilty of all of them. He was sentenced to be dis-

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missed the service, 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 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 U. S. Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement.

4. Corporal Russell and deceased had been in town drinking and on their return to camp at about 8:30 P.M., 30 May 1944, decided to go to the mess hall for some food (R. 8). Accused was posted at Post No. 2 at about 6:30 P.M., 30 May 1944, and Jordan, another sentry, was on Post No. 3: Post No. 3 being at the back of the mess hall (R. 15, 16) and Post No. 2, thirty feet away on the other side of the mess hall at the rear gate of the camp (R. 21). Accused left his post to go to the latrine at the other end of the camp (R. 17, 18) telling Jordan to watch his rifle (R. 19, 20). He left his post without being relieved (R.17). On his way, he met deceased and Russell who asked him if they could go in the mess hall to get something to eat, (R. 16) and accused answered they could not get anything. Russell and deceased then proceeded to the mess hall where they met Jordan who also told them they could not go into the mess hall but would have to see accused. Deceased and Russell went in anyway and in a few minutes accused returned and ordered them out (R. 9). Accused and deceased started to argue and curse each other and both appeared as though they wanted to fight. (R. 12) At this time Jordan came around the mess hall where the argument was taking place and accused stated that deceased had a rock. Russell grabbed the barrel of the rifle of accused and held accused while Jordan grabbed deceased (R. 19) and walked off with him for a distance of about 40 feet (R. 16). Accused struggled loose and put a bullet into the chamber of his rifle and cocked it (R. 9) but made no attempt to follow deceased (R. 13). At this time deceased asked Jordan to release him and when Jordan did so, deceased turned and walked back (R. 16) rapidly (R. 10) toward accused. Russell pulled accused back, and as he was doing so, accused was "breaking his rifle down" and hollered at deceased "You got a knife, ain't you?" (R. 9) "You, got something in your hand." (R. 10) When deceased was within about 8 feet of accused (R. 17) Russell moved away toward Jordan and accused fired (R. 9) at close range (R. 10). The shot hit deceased in the left side of the chest (R. 24). Russell saw something in the hand of the deceased but could not say whether

it was a knife (R. 10). Jordan did not see the knife but later found one on the ground with an open blade about five feet from where deceased fell (R. 17, 20). Deceased was not close enough at the time the shot was fired to hit accused (R. 14) but was walking rapidly toward him. During the argument in front of the mess hall prior to the time Jordan and Russell had separated accused and deceased, Russell tried unsuccessfully to persuade Byrd to go to the show in order to stop the argument (R. 12).

A corporal of the guard had told sentinels previously to keep their guns loaded (R. 17) but did not say whether to keep a shell in the magazine or in the chamber (R. 17). He had further instructed them not to allow anyone in the mess hall. If anyone tried to get in the mess hall the sentinels were to holler "Halt" and if they did not halt, to shoot (R. 19). The camp commander testified that guards on duty were authorized to carry five rounds of ammunition but were not directed to carry a shell in the chamber (R. 23) but there were no written orders that a shell could not be put in the chamber (R. 25). There were no written or verbal orders permitting a guard to relieve another at an adjacent post in order to go to the latrine (R. 24). To go, one would have to be properly relieved by the guard commander (R. 24). The commanding officer of the camp stated that he would expect a guard to look after a building forty or fifty feet away from his post (R. 24). The only person to relieve a sentry would be the corporal of the guard as there were no supernumerary guards. Guard duty is for a period of six hours and no instructions had been issued on procedure when it was necessary to go to the latrine. The commanding officer of the camp further testified that he was of the opinion that a sentry at Post No. 2, fifty feet from the mess hall, would be considered on his post on a duty status if he was at the mess hall at the scene of the shooting, but that he would not be on his post on a duty status if he left to go to the latrine (R. 26). Deceased was about five feet, eight inches tall and weighed approximately 150 pounds (R. 11). Deceased was taken to the hospital where he shortly died as a result of a hemorrhage secondary to the gunshot wound (R. 7).

EVIDENCE FOR THE ACCUSED

5. Accused went to the road and flashed his light several times in order to call the corporal of the guard and when the latter did not come in ten minutes, accused asked Jordan, the sentry on Post No. 3 to take over his post while he went to the latrine (R. 27). Accused had done this before while serving as a sentinel (R. 27). About a week before, the mess hall had been broken into and the next day the corporal of the guard stated that the OD said that they were not to allow anyone to enter the mess hall (R. 28). On the way to the latrine accused met deceased and Russell at a

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place where they had no right to be. Upon their inquiry about eating, he told them they could not have anything to eat as the cook had gone to the show. Deceased grabbed accused by the collar and pushed him down. Accused then proceeded to the latrine and when he came back he saw lights in the mess hall so he looked around inside but did not see anything. When he walked out he saw Jordan who asked who was in the mess hall. Accused did not know so when Jordan said "Go and see" he put his rifle on his shoulder and went back in. Deceased was in the kitchen and stated to accused that he came in through a broken window. Russell wanted to leave but deceased began to argue and at this time Russell grabbed the sling of the rifle and the three "got out of the door together". The flashlight of accused fell out of his hand and deceased grabbed it and came up with the light and a rock. Meanwhile, Russell had been telling deceased to go to his barracks. When accused saw the rock he was twelve feet away from deceased and moved over behind Russell so as not to be hurt. At this point, Jordan came up and Russell and deceased asked if they could get something to eat, to which Jordan replied, "No," and proceeded to take deceased by the arm leading him away. Accused, "Not thinking what I was doing", put a bullet in the chamber and stood on the board walk. Deceased broke away from Jordan and started back toward accused. When about twelve feet away, accused saw him pull his hand out of his pocket (R. 30) and saw something shining in the hand of deceased (R. 29, 30). Accused called out "You have a knife in your hand". Accused again said that deceased had a knife in his hand but deceased kept coming toward him and when four to six feet away, accused fired (R. 29). Accused stated, "I must have lost my head and fired the gun" (R. 29). Deceased weighed about ten to twenty pounds more than accused (R. 29) and the latter was afraid deceased was going to kill him (R. 30). Accused was about five feet, eight and a half inches tall and weighed 160 to 170 pounds (R. 29).

6. From the evidence it is clear and undisputed that accused without being regularly relieved did leave his post and it as such, supports the finding of guilty as to Specification of Charge II and Charge II.

7. Accused was charged with manslaughter. From the evidence adduced by prosecution and, as is apparent from the findings of the court, accused was convicted of killing Private Byrd in the heat of sudden passion caused by provocation, to wit: voluntary manslaughter. Accused may be relieved from responsibility of his act of homicide if it was not felonious but justifiable or excusable in law.

"Homicide is said to be 'justifiable' when committed by a public officer in the due execution of the laws or

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administration of public justice, or when committed by any person in the due prevention of a violent crime." (Winthrop p. 674)

Though accused was on guard as a sentry when the unfortunate incident occurred, the facts and circumstances of this case are such as to establish a quarrel between accused and deceased, a quarrel provoked and instigated by deceased but which accused entered into without proper action on his part in his capacity as a sentry.

8. However, homicide may also be excusable where it is committed in self-defense.

"The principle which controls in cases of provoking a difficulty largely controls the doctrine of mutual combat. Where a person voluntarily participates in a contest or mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense, regardless of what extremity or imminent peril he may be reduced to in the progress of the combat, unless before the homicide is committed he withdraws and endeavors in good faith to decline further conflict". (30 C.J. p. 54)

"It is essential to constitute mutual combat that there be a mutual intent to fight, but there need not be mutual blows". (30 C.J. p. 55)

The undisputed facts as revealed by the record seem to us clear that accused did not provoke the difficulty nor was there any agreement to fight. We therefore reject the principles governing a provoked conflict and mutual combat as inapplicable.

9. "A person does not under all circumstances forfeit his right of self-defense merely because he voluntarily and willingly engages in a fight or difficulty. While it is sometimes stated generally that to be entitled to set up self-defense as a justification or excuse, accused must not willingly enter into a fight, difficulty, or combat, with deadly weapons, by this is meant that he must not fight willingly to gratify his desire to fight or at all, unless there are present all the elements of self-defense, such as freedom from fault in bringing on the difficulty, performance of the duty of retreat, and an honest belief, based on the reasonable grounds, that the killing is necessary to save him from death or great bodily harm." (30 C.J. p. 55, 56)

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"As a general rule in order to justify or excuse a homicide as in self-defense defendant must have embraced all reasonable or probable means to escape or retreat within his power and consistent with his safety, so as to avoid the danger and avert the necessity of killing."
(30 C.J. p. 67)

Accused was on duty as a sentinel and as such was obligated to protect his post. Though ordinarily the doctrine of retreat would be applicable, we believe that under these circumstances, accused was under no obligation to retreat and could in law, without prejudice to his rights of self-defense, remain within the confines of his post.

10. "A person is not justified or excused in taking life in all cases where he fears or apprehends that he will be harmed or injured regardless of the extent of the harm or injury apprehended. The danger, real or apparent, which will *** excuse a person in killing another in self-defense must be danger, actual or apprehended, either of loss of life or of some great bodily harm. It is not required that the danger be of 'enormous' or 'the most serious' bodily harm. Also, the danger need not be that of loss of life: a person has as much right to protect himself against great bodily harm or serious bodily injury or a felony upon the person as he has against the taking of life." (30 C.J. p. 56)

"It is well settled as a general rule that a person under an honest and reasonable apprehension of death or great bodily harm may kill his adversary in self-defense. The slayer need not actually be in actual danger of death or great bodily harm; but he is entitled to act on appearances, and it is sufficient if he believes in good faith and on reasonable grounds that he is in such peril, although it afterwards appears that he is mistaken as to the existence or imminence of the danger, provided he is without fault or negligence in ascertaining the facts."
(30 C.J. p. 58) "In order to render a homicide justifiable or excusable on the ground that accused honestly fears or believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to kill to save himself therefrom, it is essential that he act solely under the influence of that fear, belief, or apprehension, and not in a spirit of anger, revenge, or malice, or through mere cowardice." (30 C.J. p. 61)

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"To justify or excuse a homicide on the ground of self-defense it is not enough that the slayer honestly believes himself to be in danger, or that he entertains a bare fear of the commission on his person of those felonies to prevent which homicide may be lawfully committed; there must be some grounds for the belief; the circumstances must be such as to make the belief or apprehension a reasonable one." (30 C.J. p. 61)

"In the majority of jurisdictions, the question is not determined from the standpoint of accused, or from the standpoint of a man of the class to which accused belongs, such as a person of accused's age, temperament, intelligence, experience, or physical condition; the test of reasonableness applied is that the circumstances surrounding accused at the time of the killing must be such as would induce a reasonable man, or a reasonably cautious man, or a reasonably prudent man, or a reasonably cautious and prudent man, or a reasonable and prudent man, or an ordinarily prudent man, or an ordinarily reasonable and prudent man, so situated honestly to believe that he is in imminent peril and that it is necessary for him to kill in order to save him from death or great bodily harm. (30 C.J. p. 62)

11. "What facts excuse or justify a killing is a question of law for the court, but whether such facts exist in the particular case is usually a question for the jury." (30 C.J. p. 328)

"Where, however, the evidence is conflicting or of such a character that different inferences might reasonably be drawn therefrom, it is a question of fact for the jury to determine, under proper instructions from the court, whether or not defendant acted in self-defense in a particular case, as whether or not, under all the circumstances, he acted under a reasonable belief that he was in imminent danger, either of losing his life or of suffering serious bodily harm, at the hands of deceased, and whether or not, in killing deceased, he used other means or more force than was necessary or than reasonably appeared to him to be necessary to repel the attack and defend himself". (30 C.J. 329-30)

12. In CM No. 235044 the Board of Review was of the opinion that accused was not absolved from killing under the doctrine of self-defense.

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"In the first place, it was not reasonable to believe that accused was in danger of being killed or suffering grievous bodily harm. The latter phrase refers to an injury so severe that it might maim accused, be permanent in its character, or produce death. (Acers v. U.S. 164 U.S. 388) In Napier's Case (Fost C.L. 278) deceased threw accused to the ground, beat him, and held him in such a manner that he could not escape the blows. Accused killed witness by cutting him with a penknife. The court held accused guilty of the homicide. In Blackburn v. State (36 Ala. 595, 6 So. 96) deceased, a vicious character who previously had threatened to kill accused, pursued him at a distance of five or six paces, with a stick in one hand and a pair of metal knuckles in the other. Deceased was a fine physical specimen. Accused jumped across the ditch, wheeled, and shot deceased. The conviction was affirmed. In State v. Thompson, (9 Iowa 188) deceased advanced upon accused with a heavy board. He dropped the board and continued after accused unarmed. Deceased was strong and in the prime of life, whereas accused had recently fallen off a horse and broken several ribs. He had been out of bed only a day or two. When deceased reached a point near accused the latter shot him. It was held that accused was not justified in killing his assailant to avoid a violent beating, he having no reason to fear death or great bodily harm. Similarly, in the present case, accused, armed with a rifle which he could have used as a club, had no reason to fear death or grievous bodily harm, and it was not reasonably necessary for him to shoot deceased to protect life or limb. Furthermore, accused could have avoided danger by retreating when deceased threatened to attack him from the steps. To have retreated would have lessened the danger materially, and his chances of suffering death or grievous bodily harm from a thrown bottle were infinitesimal. Instead, believing that deceased had been drinking, and knowing him to be in an ugly, threatening mood, accused elected to remain on the scene and invited the disaster. He failed to take the proper steps to avoid the catastrophe."

13. From the foregoing quoted excerpt from a Board of Review opinion, it is evident that their decision was based partly on the doctrine of retreat to avoid danger. We have stated previously in this opinion that it is our belief that accused was not required to leave his post and that the principle of retreat was not applicable in this instance. However, such opinion

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is pertinent on the question of reasonableness of apprehension or fear of death or serious bodily harm. In *Trice v. State* 89 Ga. 742; 15 SE 648, cited in 30 C.J. p. 58 note 66d, it was held that a killing was not necessary to save the life of a slayer where deceased, advancing with an open knife, had not approached near enough to put accused in immediate danger. Applying the foregoing principles to the facts at hand, the court as the triers of the facts could conclude from the evidence before them that accused under all the circumstances did not act on a reasonable belief of losing his life or of serious bodily harm at the hands of deceased, and that in killing him, he used other means of force than was necessary or then reasonably appeared to him to be necessary to repel the attack and defend himself. Although our conclusions based on the evidence in the record might have differed from the result reached by the court and the reviewing authority, yet we cannot say that there is no reasonable basis for the court's conclusion and that the facts here are such as to excuse the homicide as a matter of law. We are rather of the opinion that the evidence is of such a character that different inferences may be drawn therefrom.

There is no specific evidence in the record as to the size of the knife of deceased other than it was a pocket knife. Accused and deceased were of about the same height and weight. The evidence was not such as to make it unreasonable for the court to conclude that accused was not acting under a reasonable belief of imminence of danger to his life or of suffering serious bodily harm, and that he acted unreasonably under all the facts and circumstances by shooting deceased rashly and without reflection. The state of mind of accused may best be described by his statement: "I must have lost my head and fired the gun".

14. In CM CBI No. 110 (Smith) the Board of Review stated that the court, and not the Board of Review, are the weighmasters of the evidence. They then quoted from CM CBI 109 (Wright) as follows:

"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 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

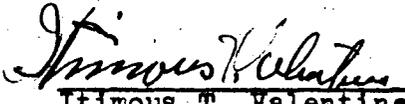
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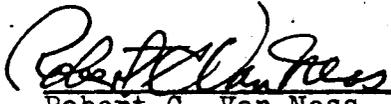
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province merely to determine whether or not there is in the record any substantial evidence which, if uncontradicted, would be sufficient to warrant the findings of guilty. It is exclusively the province of the court martial, including the reviewing, and if there be one, the confirming, authority to weigh evidence, judge of its credibility, and determine controverted questions of fact. CM 145791 (1921) par. 408 (2), Dig. Op. 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. CM 192609 (par. 408 (2), Dig. Op. 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'".

15. The Court was legally constituted and the sentence is within the authorized limits. The Court has jurisdiction of the subject matter of the offense and of the person of the accused. No errors injuriously effecting 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,
29 November 1944.

Board of Review
CM IBT No. 282

U N I T E D S T A T E S)	SERVICES OF SUPPLY, USAF CBI
)	
v.	)	Trial by GCM convened at APO
	)	629 7/8 Postmaster, New York,
First Lieutenant NICHOLAS	)	N. Y. on 5 October 1944.
DELANDY, 01000344, AGD,	)	Dismissal.
Headquarters, Intermediate)	
Section 2, SOS.)	

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office for India Burma Theater.

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

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

Specification 1: (Disapproved by the confirming authority)

Specification 2: In that First Lieutenant Nicholas Delandy, AGD,, Headquarters, Intermediate Section 2, did, at Hazelbank, Assam, India, on or about 12 August 1944, feloniously embezzle by fraudulently converting to his own use money, Rs. 1399/11, of the value of about \$423.58, in lawful money of the United States, the property of the Staging Area Post Exchange Fund entrusted to him by virtue of his office as Staging Area Post Exchange Officer.

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

Specification: (Disapproved by the confirming authority)

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3. Accused pleaded not guilty to all charges and specifications and was found guilty of all charges and specifications. He was sentenced to be dismissed 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 six months. The reviewing authority approved the sentence but remitted the portion thereof adjudging confinement at hard labor for a period of six months and forwarded the record to the Commanding General, USF, IBT for action pursuant to Article of War 48. The confirming authority disapproved the findings of guilty of Specification 1 of Charge I and of the Specification of Charge II and Charge II. He confirmed the sentence as modified by the reviewing authority but remitted the forfeiture. The order of execution was withheld and the record of trial was forwarded to this office pursuant to Article of War 50½.

4. During June, July and August, 1944 (R. 5) accused was Commanding Officer, Unit Section, American Staging Area, and acted as exchange officer there. As exchange officer he received merchandise from Post Exchange 886-10 and it was his duty to distribute it to personnel of the staging area, collect for the merchandise and turn the money in to Post Exchange 886-10 in payment for the merchandise. Accused was required to file a monthly report of inventory of merchandise and cash on hand. One such report was filed 25 June 1944 which indicated cash of Rs 2909/4 and total assets of Rs 8980/3. The report of 25 July 1944 revealed assets of Rs 7250/1 of which Rs 3209/14 was cash (R. 6). Shortly thereafter accused was relieved by Captain Sopka. Captain Harry S. Apter, Post Exchange Officer, Post Exchange 886-10 testified that a summary of the account at the time of the turnover disclosed a shortage of Rs 1399/11 as of 19 August 1944 (R. 7, 8, 9). A board of officers was appointed to investigate the shortage of funds. Before this board the accused testified that his report of 25 July 1944 was not correct. He said that a few days before the June 25th report he had about Rs 3400/ in the safe and that when he opened the safe to get the money to turn it in, it was gone (R. 15). Accused had both keys to the safe and the safe gave no indication of having been tampered with. Two predecessors had been in possession of keys before he took over (R. 16). Accused played cards but did not suffer any losses (R. 16) and stopped later in July (R. 18). He never used PX funds to gamble (R. 18). Accused decided to make up the loss instead of reporting it, so borrowed enough money to add to Rs 1100/ of his own to make the June balance correct (R. 15). He then took money out of the PX funds to pay back the loans (R. 17, 18) hoping to make it up later. Some of the loss had been made up on the July inventory (R. 17). At the time of the

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July inventory he was still Rs 2240/ short and certified he had money which was not actually there (R. 16). The inventory of July 25th was correct as to the merchandise on hand (R. 19).

5. The accused elected to remain silent.

6. If the accused's testimony before the Board of Officers is considered a confession rather than an admission against interest, there is great doubt as to its competency in evidence. It does not appear that in that proceeding accused was warned of his rights under AW 24. If such evidence is disregarded, the case as made out by the prosecution relies, for the most part, on the testimony of Captain Harry S. Apter, Post Exchange Officer, Post Exchange 886-10. He gave orally a summary of the account at the time the turnover was made (R. 7). It is provided in MCM 1928, par. 116a:

"A writing is the best evidence of its own contents, and must be introduced to prove its contents. Under this rule, if it is desired to prove the contents of a private letter or other unofficial paper, or of an official paper such as a pay voucher, a written claim against the Government, a pay roll or muster roll, a company morning report, an enlistment paper, etc., the strict and formal method of doing so is to call a witness who can authenticate it, and then to introduce in evidence the original."

As a general rule it is improper to use secondary evidence without having laid a proper foundation for its use. No foundation was laid in this instance for the oral summation of such accounts. MCM 1928, par. 116a, further provides:

"An objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived if not asserted when the proffer is made: It does not appear that the original has been lost, destroyed, or is otherwise unavailable; it does not appear that the preliminary matters described in the second subparagraph under this heading (Exceptions) have been shown to the court; it does not appear that a purported copy of a public record is duly authenticated."

No objection was here made to the manner of proof used by the prosecution. It is our opinion that, in the absence of any objection by the defense, the last quoted excerpt is controlling and that the evidence adduced by the trial judge advocate from Captain Apter is competent.

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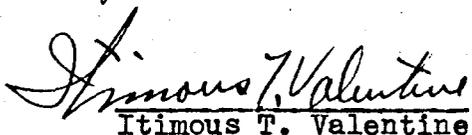
7. Disregarding the testimony concerning the proceedings before the Board of Officers, it is believed that it is established by uncontradicted, competent evidence that accused, as exchange officer, held a position of trust. He was entrusted with the funds and when called upon to do so failed to produce them or to properly account for them. We are of the opinion that a prima facie case has been made by the proof of facts which give rise to the presumption that accused embezzled such funds. Wharton's Criminal Law, 12th Ed. Vol. 2, page 1593, quotes from Digest of Criminal Law, Art. 312, the following language of Sir J. F. Stephen:

"The inference that a prisoner has embezzled property, by fraudulently converting it to his own use, may be drawn from the fact that he has not paid the money or delivered the property in due course to the owner; or from the fact that he has not accounted for the money or other property which he has received; * * *"

In our opinion, the foregoing principle is applicable and controlling in the case before us.

8. The court was legally constituted and there were no errors to the prejudice of any substantial right of the accused. The sentence imposed is authorized for the offense of which the accused has been found guilty. The Board of Review is therefore of the opinion and accordingly holds that the record of trial is legally sufficient to support the findings and the sentence.

 , Judge Advocate
John G. O'Brien

 , Judge Advocate
Itimous T. Valentine

 , Judge Advocate
Robert C. Van Ness

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CM IBT # 282 (Delandy, Nicholas) 1st Ind.

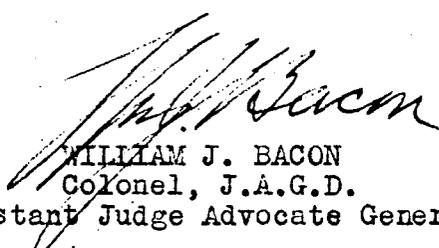
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, India Burma Theater, APO 885, New York, N. Y.

2 DEC 1944

TO: The Commanding General, USF, India Burma Theater, APO 885, U. S. Army.

1. In the case of First Lieutenant Nicholas Delandy, O-1000344, A.G.D., Headquarters, Intermediate Section #2, S.O.S., 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 IBT 282).


WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence as modified ordered executed. GCMO 4, IBT, 2 Dec 1944)

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Lieutenant Earnest J. Summers, saying, "I'll knock your God Damn block off".

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

Specification 1: In that First Lieutenant CARLOS H. THORNTON, 967th Engineer Maintenance Company, was, at Log-lai Burma, on or about 5 August 1944, in a public place, to wit, drunk and disorderly while in uniform.

Specification 2: In that First Lieutenant CARLOS H. THORNTON, 967th Engineer Maintenance Company, did, at Log-lai Burma, on or about 5 August 1944, behave in a manner unbecoming an officer and a gentleman toward Mrs. Susan B. Prescott, Miss Alberta M. Klein, and Miss Hope Fetterolf, by saying the following words in their presence: "Fuck the Red Cross", "God Damn, Son of a Bitch", and "Bastard".

3. Accused pleaded not guilty to the charges and specifications and was found guilty of the Specification of Charge I and Charge I and of Specifications 1 and 2 of Charge III and Charge III. By exceptions and substitutions accused was found guilty of the Specification of Charge II except the words "with intent to do him bodily harm, willfully", substituting therefor the word "wrongfully", of the excepted words, not guilty, and of the substituted word, guilty, and of Charge II, not guilty, but guilty of a violation of the 96th Article of War. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record to the Commanding General, USAF, IBT for action pursuant to Article of War 48. The confirming authority confirmed the sentence and remitted the forfeiture. The order of execution was withheld and the record of trial was forwarded to this office pursuant to Article of War 50½.

4. On 5 August 1944 at about 1600 hours two officers came to the Red Cross office at Loglai, Burma and invited the Red Cross personnel to an officer's party that night, but the personnel for various reasons could not attend (R. 13). Approximately at 2315 hours accused came to the Red Cross basha and again invited them, but as it was quite late, Mr. Clayton, Red Cross Director, explained that they could not come (R. 13). Accused insisted that he had been appointed to and that it was his "mission" to see that the Red Cross girls attended the party (R. 13, 22). He had been drinking and his speech was not clear (R. 13) so to appease him Mr. Clayton, Mrs. Prescott and Miss Klein consented to go (R. 14). On the way, while walking with Miss Klein, he fell down at least twice and had to be

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picked up (R.14, 17). Upon arrival at the officers' mess the party had broken up (R.14). Accused went in and sat down with his head on the table and the others returned to the basha. A few minutes later accused returned looking for Lt. Loy (R.14) and used quite a few swear words when he wanted to know where Lt. Loy was (R.19). He was told that Lt. Loy might be at the dispensary. Shortly thereafter accused, Lt. Loy, and two other officers returned to the basha (R.14). The other officers were assisting and helping the accused (R.14). He was staggering (R.23) and was drunk (R.24). He became pugnacious and used obscene language toward Lt. Summers who was there (R.14). Accused lunged forward (R.27) with his arm drawn back, swung and made a pass at Lt. Summers and said he would knock his goddamn block off (R. 14, 19, 20, 24, 28). Accused also could not understand why only certain lieutenants were invited to the "fucking Red Cross basha" (R.16). He also used the words "goddamn son-of-a-bitch". Three of the Red Cross female personnel were present at the time (R.16, 18). The other officers were asked to take accused away as he was causing trouble and "our walk was a private walk" (R.19). They did not do so.

The guard on whose post the basha is located heard some noise, came over to the basha and saw Lt. Loy holding accused who had a good sized stone in his hand (R.10). The guard asked accused to keep quiet so others could sleep. Accused replied that he "didn't give a God damn what I was" and that "if I had my rifle loaded I could shoot him". He also said that the guard could go to hell (R.10). The guard was trying to get accused to go away and accused threatened his life (R.20, 28). Mr. Clayton called the M.P.'s. and when told this Lt. Loy managed to shove accused up the pathway and away from the basha (R.15).

Captain (then Lieutenant) Andreas, Sub-Base Commander responsible for discipline in the camp, was awakened at about 2400 hours by some loud swearing and cursing at the Red Cross basha (R.6). The M.P.'s. were called and while waiting for them the guard reported to Capt. Andreas that two officers were drunk at the basha (R.6). Capt. Andreas went over to find out about it and on the way saw two officers sitting on the pathway about 30 yards from the basha (R.6a). From there the Captain returned (R.6a, 24) and ordered the two officers to their tent. Accused asked why, and was answered, "You are drunk and disorderly". They were again asked to go but refused. The Captain told accused who he was and that he was giving a direct order. Accused answered, "I don't give a God damn if you are Sub-Base Commander, I am not going to my tent" (R.6a, 11). After a few more words

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accused with the help of one M.P. went to his tent (R.7). The cursing of accused was loud, plain and could be heard for some distance, but was not directed at anyone in particular (R.25). Accused was drunk (R. 7, 11, 15, 20).

5. The accused elected to remain silent.

6. We are of the opinion that there is sufficient competent evidence to support the finding of the court as to the specification of Charge II and Charge III and therefore do not deem it necessary to comment thereon. Accused has been charged with and found guilty of a violation of Article of War 63. The disrespectful behavior contemplated is such as detracts from the respect due to the authority and person of a superior officer. The officer toward whom the disrespectful behavior was directed must have been the superior at the time of the acts charged; but by superior is not necessarily meant a superior in rank. (See par. 133, MCM 1928)

"Disrespect by words may be conveyed by opprobrious epithets or other contumelious or denunciatory language applied to, or in regard to, the commander; by an open declaration of an intention not to obey his orders". (See Winthrop's Military Law and Precedents, page 567)

Though there is no evidence as to the relative ranks of the accused and then Lt. Andreas, the record clearly reveals that the latter was Sub-Base Commander and responsible for discipline in the camp. As such, it is our opinion that he was the superior of the accused as contemplated by Article of War 63. We believe that there is no doubt that disrespect of accused has been established by the evidence. The animus of accused is clearly shown by the insubordinate and disrespectful language addressed to the Sub-Base Commander and warrants the conclusions and justifies the findings of the court in this respect.

"Where the accused did not know that the person against whom the acts, etc., were directed was a superior officer, such lack of knowledge is a defense". (Par. 133, MCM, 1928)

Though this was not raised as a defense, we may say in passing that the evidence was ample to prove that accused did know the capacity of the superior officer to whom he was disrespectful.

7. The evidence is undisputed that accused in the presence of three lady members of the Red Cross used the words "bastard", "God damn son-of-a-bitch" and "fucking Red Cross". Though the

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latter phrase varies slightly from the allegation of the specification, we are of the opinion that the variation is immaterial and of no consequence. Such behavior was most reprehensible and falls far short of the standard of conduct required of an officer of the Army of the United States.

8. Specification 1 of Charge II is as follows:

"In that First Lieutenant Carlos H. Thornton, 967th Engineer Maintenance Company, was, at Loglai Burma, on or about 5 August, 1944, in a public place, to wit, drunk and disorderly while in uniform".

The language used is irregular, inartificial and defective in that it fails to allege the particular public place at Loglai, Burma, in which accused was drunk and disorderly and the allegations might have been held insufficient on a motion to quash or to strike.

"The allegation should contain such a specification of acts and descriptive circumstances as will on its face fix and determine the identity of the offense with such particularity as to enable accused to know exactly what he has to meet, to give him a fair and reasonable opportunity to prepare his defense, and avail himself of a conviction or acquittal as a bar to further prosecution arising out of the same facts". (31 C.J. page 660)

We are of the opinion that the language used states the elements of the offense with sufficient particularity so as to fully advise the accused of the gist of that with which he was sought to be charged, that is, that at Loglai, Burma in a public place he was drunk and disorderly in uniform, and so as to permit the conviction or acquittal of the specification to be pleaded in bar of a subsequent prosecution for the same offense. It is clear that accused has in no manner been misled by the failure to name the public place where he was alleged to have been drunk and disorderly. He could have attacked the specification by the proper motion or plea, if he had believed it to be so vague and uncertain that he was unable to properly prepare his defense. It is obvious that matter intended to be pleaded under a videlicet was omitted, but for the reasons before stated, we are of the opinion that the failure so to particularize was not fatal.

9. A review of the evidence makes it clear that accused was grossly drunk and behaved in a disorderly and reprehensible

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manner in front of the porch of the Red Cross basha, on the foot path to such place, which one witness said was a "private walk", and on the pathway to his tent. A public place has been defined as "Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look" (Bouvier's Law Dictionary, Rawle's Third Revision, page 2765). It is also so defined in Black's Law Dictionary, Third Edition, page 1461. A public place is a place where the offense is likely to be seen by a number of casual observers (33 Am. Jur. p. 19). We believe we may properly assume that the incident took place within the limits of an Army establishment but are unable to say that for that reason the offense was not in a public place. There were not only military personnel present but also civilians. Though the general public was not permitted to go and come at will, the camp being only accessible to the military and other individuals with proper authorization, yet it was open for a certain class or group carved out of the general public and was not a private place. Indeed the camp may be likened unto a community itself rather than a private place. A board of review in CM 202846 has stated:

"The fact that only Army personnel and their wives were present is immaterial, since it is a mistaken notion that the Army can be disgraced or discredited by the misconduct of one of its members only if that misconduct is seen by outsiders".

In CM 196063 an accused was charged with being drunk on a public street, Langley Field, Virginia, and was found guilty of a violation of the 96th Article of War.

Under all the facts and circumstances in the case now before us, we conclude that the place was public where the offense was committed.

There was no direct proof that accused was in uniform but he was on duty with American troops in Burma, attended the officers' mess and was generally recognized as an officer of the Army. These facts are compelling and warranted the inference drawn by the court that he was in uniform. (Dig. Op. JAG, 1912-40, Sec. 453 (11))

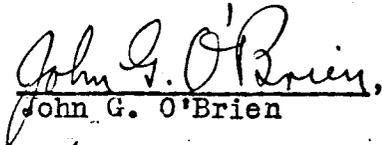
10. The court was legally constituted, no errors intervened to the prejudice of any substantial right of the accused, and

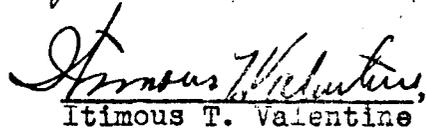
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the sentence imposed is authorized for the offenses of which the accused has been found guilty. The Board of Review is therefore of the opinion and accordingly holds that the record of trial is legally sufficient to support the findings and the sentence.

 Judge Advocate
John G. O'Brien

 Judge Advocate
Itimous T. Valentine

 Judge Advocate
Robert C. Van Ness

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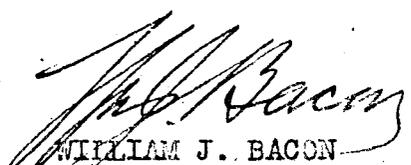
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, India Burma Theater, APO 885, New York, N. Y.

2 DEC 1944

TO: The Commanding General, USF, India Burma Theater, APO 885, U. S. Army.

1. In the case of First Lieutenant Carlos H. Thornton, O-1110292; C.E., 967th Engineer Maintenance Company, 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 IBT 283).


WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence as modified ordered executed. GCMO 5, IET, 2 Dec 1944)

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New Delhi, India
27 December 1944

Board of Review
CM IBT 284

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

v.

Pvt. Herman (NMI) Perry,
13074419, Company A, 849th
Engineer Aviation Battalion,
Advance Section #3.

SERVICES OF SUPPLY, USAF CBI

Trial by GCM, convened at APO 689,
4 September 1944. To be hanged
by the neck until dead.

HOLDING of the BOARD OF REVIEW
O'BRIEN, 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 Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

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

Specification 1: In that Private Herman (NMI) Perry, Company A, 849th Engineer Aviation Battalion, having received a lawful command from 1st Lt. Gene H. Carapico, his superior officer, to turn in his rifle and cartridge belt, did, near Tagap, Burma, on or about March 5, 1944, willfully disobey the same.

Specification 2: In that Private Herman (NMI) Perry, Company A, 849th Engineer Aviation Battalion, having received a lawful command from 1st Lt. Harold A. Cady, his superior officer, to get into a jeep, did, near Tagap, Burma, on or about March 5, 1944, willfully disobey the same.

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CHARGE II: Violation of the 65th Article of War. (Finding of not Guilty)

Specification 1: (Finding of Not Guilty)

Specification 2: (Finding of Not Guilty)

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

Specification: In that Private Herman (NMI) Perry, Company A, 849th Engineer Aviation Battalion, did, near Tagap, Burma, on or about March 5, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one 1st Lt. Harold A. Cady, a human being, by shooting him with a rifle.

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

Specification: In that Private Herman (NMI) Perry, Company A, 849th Engineer Aviation Battalion, did, near Tagap, Burma, on or about March 5, 1944, desert the service of the United States and remain absent in desertion until he was apprehended near Tagap, Burma, on or about 20 July 1944.

3. Accused pleaded not guilty to all of the charges and specifications and was found guilty of Charge I, Charge III and Charge IV, and of all of the Specifications thereunder, but was found not guilty of Charge II and of both Specifications thereunder. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. The sentence was approved by the reviewing authority and the record forwarded to the Commanding General, USF, IBT for action pursuant to AW 48. The confirming authority confirmed so much of the sentence as provides that accused by hanged by the neck until dead. The order of execution was withheld, and the record of trial was forwarded to this office pursuant to AW 50-1/2.

4. The evidence for the prosecution shows that both Lieutenant Cady and accused were assigned to Company A, 849th Engineer Aviation Bn. (R. 11), commanded by First Lieutenant Gene H. Carapico. On the evening of 4 March 1944, the company commander learned that accused had not reported for work that day and directed First Sergeant Stitt to have accused in the orderly room at reveille. The next morning, accused was in the orderly room and Lieutenant Carapico inquired whether Perry had reported

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for reveille. Accused answered, "Reveille, what's that?" (R. 12, 13). The company commander asked why accused had not reported for work promptly and accused answered, "Work, what's that?" (R. 18). Lieutenant Carapico, in the presence of Lieutenant Cady, then ordered Perry: "You turn in your rifle and cartridge belt, you are going to the guardhouse", and directed the First Sergeant: "Sergeant Stitt, see that he does it". Accused said, "You mean to say you are going to send me to the guardhouse?" The company commander answered, "That's right". A few minutes later, it was reported to Lieutenant Carapico that "Perry had got away". Lieutenant Cady was then with the company commander.

5. First Sergeant Stitt assigned Staff Sergeant Godbold to enforce compliance with the company commander's order (R. 18). As Godbold took accused out of the orderly room, he said to Lieutenant Carapico, "That's what you think, Lieutenant". (R. 20). Sergeant Stitt and Sergeant Godbold both accompanied accused to his tent. Accused picked up his rifle. Sergeant Stitt asked what he was going to do with it, and accused said, "I am taking it with me". Stitt instructed Godbold to take accused to the supply room and "let him turn it in" (R. 22). At the supply room, accused announced, "I am not going to turn my rifle in". Godbold said, "Perry, if I was you I wouldn't get into no more trouble. Go down and talk to the Colonel. You know he is a mighty good man and maybe he won't send you to the guardhouse". He told accused to turn the rifle in (R. 29). Accused said, "I don't want to turn my rifle in. Nobody is going to get my rifle. Even my mother wouldn't get this rifle (R. 31). I'll die and go to hell before I go to the guardhouse". Then he "pumped" his rifle, held it at port, told Godbold to go away, and added "you tell your commanding officer that I'm not going to the guardhouse (R. 22). Don't try to stop me. I mean business this morning" (R. 25, 29). Accused left. Godbold was afraid to follow him (R. 24), although he was armed with a pistol (R. 25). When accused held the rifle up, the bolt was back and "he showed brass" (R. 31).

6. As Private First Class James W. Walton drove his truck from the H. & S. Company area toward the gravel pit, he met Perry, who was trudging along the road. Accused was carrying his rifle. He signaled for the truck to stop (R. 33) and got in. About a quarter of a mile further along, near the Hkatang River, Lieutenant Cady drove a jeep past and toward the truck and told the driver to stop. This he did (R. 33). In the jeep were three (R. 35) soldiers whom the Lieutenant ordered to board the truck. He told accused to get out of the truck (R. 34, 47) and to get into the jeep. Perry got out of the truck, walked around the jeep and said, "I'm not going to get in the jeep. I'm going to report to Colonel Hiatt". The Lieutenant said, "You will either get in this

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God-damned jeep or I'll throw you in" (R. 34, 35, 42, 44).

7. Lieutenant Cady was unarmed (R. 34, 42, 45). He stepped around the jeep and accused said, "Lieutenant, don't come up on me" (R. 34), or "stay off me" (R. 42), or "to get back" (R. 47). The officer continued toward accused, who twice repeated his warning not to come up (R. 34), and then raised the rifle to his shoulder, clicked the safety (R. 42) and aimed at the Lieutenant (R. 34, 42). The slide was pulled back (R. 41). The Lieutenant crouched, to reach for the rifle (R. 36), and without flinching or hesitation walked toward accused. When he was about a foot (R. 45) or two (R. 42) or four (R. 34) feet away, accused fired twice (R. 34, 42, 44). The officer fell on his face (R. 34, 45). Accused ran down the road, then left it, climbed a bank and disappeared (R. 34) over a cliff (R. 42, 47) into the jungle. The Lieutenant asked the soldiers to take him to the hospital (R. 47). On the way, they met Lieutenant Carapico, who went with them. At the hospital Lieutenant Cady was found to be dead (R. 47). Both bullets went through the officer's body. One bullet pierced the spinal column and large blood vessels near the heart (R. 10). On 9 June 1944 accused's rifle (Pros. Ex. P-1) was found by a log in the jungle.

8. On 20 July 1944, after being told not to move (R. 58), accused was shot by a member of a party of five CID agents, while running away (R. 56) in an attempt to escape from a basha in the jungle about eight miles from Namyang (R. 51). An M-1 rifle (Pros. Ex. P-4) then was in his possession. One of the CID agents (Technical Sergeant Davis) testified that accused insisted "for approximately an hour's time" that his name was Johnny Talbot, but, "through continued questioning", he finally admitted he was Perry (R. 51). The witness further testified that "I questioned him as to the incident that took place on the 5th of March, 1944, and he readily admitted to me, in the presence of Lieutenant Strossberg and Corporal Wilson and Captain McMinn, all of the 502nd Military Police Battalion, that he did shoot Lieutenant Cady" (R. 51, 52). Accused was taken by stretcher to the Ledo Road (R. 53) and then by ambulance to the evacuation hospital at Shingbwiyang.

9. In the hospital on 23 July 1944, after being warned by Agents Davis and Nurthen (R. 54) of his rights under AW 24, accused made a statement in writing before Major Carl Goetz, adjutant and summary court officer, (R. 59) which he signed and swore to (R. 59). Neither any duress, nor compulsion, nor reward, nor hope of benefit was held out to the accused (R. 54). He signed it voluntarily and of his own free will (R. 55).

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Major Goetz asked Perry if he understood the statement. He acknowledged that he did before he signed and swore to it (R. 59). Such statement of accused was admitted in evidence as prosecution's exhibit P-5. Defense counsel specifically stated that there was no objection to the admission of the document (R. 60). On 28 July 1944, Major Goetz again saw accused in Ward B-3 of the hospital with Agents Davis and Nurthen, CID. The agents stated that Perry had an additional statement to make. Major Goetz administered the oath and accused affixed his signature to the statement in witnesses' presence. The additional statement was offered as prosecution's exhibit P-6. It was admitted in evidence when defense counsel stated that he had no objection (R. 66).

10. The original statement (Pros. Ex. P-5) (R. 60-64) recites in substance that accused had received an explanation of his rights under AW 24 from Agents Davis and Nurthen, CID, to the effect that he could remain silent without being prejudiced, that anything he said might be used against him, and that he was not required to give an answer to any question which might incriminate him. Accused acknowledged that he understood his rights and that the statement was made of his own free will and accord, under no threat or fear of punishment, and with no inducement or promise of immunity or reward (R. 60). He stated that on 5 March 1944, he missed reveille and that a little before breakfast on that day, the first sergeant told him to report to the company commander at the orderly room. There Lieutenant Carapico asked where he was at reveille. He told the Lieutenant that he did not know that the company held reveille. The company commander answered that he would have to put accused in the stockade and ordered him to pack his things and turn his rifle in to the supply room. With the first sergeant and another sergeant, he went to his tent. His bags were already packed. He picked up his rifle. They went to the supply room. At the supply room he "kicked" the safety off and pulled the bolt back so that he could see that the cartridge was in the chamber. Then he remembered that Colonel Hiatt had said that if he ever got in trouble, to come and see him. Accused told the sergeant, who was guarding him, that he was going to see Colonel Hiatt. The sergeant told him to hurry back. He left and walked down the Ledo Road where he was picked up by a soldier driving a truck. A jeep, carrying an officer and two soldiers, pulled up behind the truck and forced it to the side of the road. The officer ordered accused to get out of the truck into the jeep. Accused told him that he was going to Colonel Hiatt's office. The officer said that if accused did not get in the jeep, he would put him in with his fist. The officer drew his fist back. Affiant remembered his gun

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exploding, the smell of the powder, and the expression of the officer's face. He ran away. For three days his memory was lost. He heard a bugle and walked down the company street. A soldier grabbed him by the arm, asked what he was doing, shook him and threw water in his face and then said they were looking for accused for shooting the officer. From the time he shot the officer until water was thrown in his face, affiant knew something was wrong but could not remember what it was. He left the company area. In the jungle, he sat down on a log. An M. P. jeep came down the road. He ran away, leaving the rifle. That night he planned to give himself up but heard shooting and returned to the jungle. In the village where he was apprehended, he made friends and married a Naga girl about 14 years of age. He hired Nagas to work in the fields, where he planted rice, opium, marijuana and other seeds which he purchased (R. 62). Affiant further stated:

"I never intended to return to the Army, nor did I intend to return to the United States of America, I intended to pass the remaining years of natural life in the jungles where I was apprehended, and live with the Naga girl who I claim as my wife" (R. 63).

On the night he was apprehended, affiant became suspicious when he saw a flashlight in the fields and heard dogs bark. Intending to run, he walked out on the porch. A shot was fired. He started to run through the hut and out the back door. He saw a man with a rifle raised. He continued his flight. He heard shots, but kept on running. Then he fainted. When he came to, men were standing around. They put him on a stretcher and carried him away. When he shot Lieutenant Cady, accused held the rifle with his right hand around the trigger assembly, with the muzzle pointing forward. The small of the stock was at his right hip. When the Lieutenant started to walk toward him, accused said, "Stop, don't come up on me" (R. 64). When accused shot him, the muzzle was between the Lieutenant's hands which were in a position to grab accused. Affiant had had nothing to drink on the evening of 4 March or the morning of 5 March, but on 4 March had smoked both opium and marijuana (R. 64).

11. In the additional statement (Pros. Ex. P-6), accused stated that he did not know Lieutenant Cady personally or by sight, but knew his name and had heard "the boys" talk about him. On 4 March 1944, when he returned to the company from the 20th General Hospital, he did not think he had reported for work. On 5 March he did not turn in his rifle as he was ordered to. When

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Lieutenant Cady drove up in the jeep and stopped the truck, Sergeant Bethel and another soldier were in the jeep with him. Lieutenant Cady told affiant to dismount from the truck and to get into the jeep. Affiant got out of the truck carrying the rifle. He walked around the front of the jeep and about four or five steps backwards facing the jeep. Lieutenant Cady had gotten out and was standing by the left front fender of the jeep. At this time Lieutenant Cady was about five feet away and affiant was holding his rifle at port arms. Lieutenant Cady started to walk toward him and said, "Get in the jeep". Affiant said, "No, sir, Lieutenant, I am going to Colonel Hiatt". Affiant kept walking backward and Lieutenant Cady kept walking toward him. Then affiant stopped. Lieutenant Cady kept on walking toward him. Affiant said, "Lieutenant, don't walk up on me". Lieutenant Cady didn't smile. He looked at affiant, said, "Get into the jeep". Affiant repeated, "Don't walk up on me". When Lieutenant Cady was about one foot from the muzzle of affiant's rifle, he pulled the trigger and shot him. All he could remember was the one shot. When Lieutenant Cady started toward him he had both hands on his hips, then he dropped them to his sides. When about two or three feet away, Lieutenant Cady raised both arms as high as his chest with the palms facing affiant, his fingers stretched out, his fists not clenched. In this statement accused refused to answer question as to how he got rifle 420033 (Pros. Ex. P-4). He said he would rather not talk about it. "I know it is from Company A, but I don't know who it was issued to".

12. Prosecution's Exhibit P-1, extract copy of morning report of Company A, 849th Engineer Aviation Battalion, dated 6 March 1944, was received in evidence. Defense counsel expressly stated that there was no objection to its admission (R. 15). It contains the following entry: "Pvt Perry, H. fr arst in qrs to AWOL as of Mar 5/44." (R. 15).

13. To the admission in evidence of extract copy of morning report of Shingbwiya Sub Depot Stockade, 12 August 1944, objection was interposed on the ground that the officer authenticating the extract copy was not in court. The objection was overruled and the document received in evidence (R. 16). The entry which relates to accused is as follows: "7/22/44 AWOL to CONF in 73d Evac Hosp, Pvt. Perry, Herman 13074419, Co. "A" 849th Engineer Bn."

14. Following an explanation in detail of his rights, accused elected to be sworn (R. 74). He testified that Lieutenant Carapico on 5 March 1944 asked him why he missed reveille (R. 75) and he

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replied that he didn't know the company had reveille; that the Lieutenant inquired as to why he missed work call, and that he answered that he had not been advised as to the shift he would work. The Lieutenant told him to go to his tent and pack up. Accused asked if he were going to the guardhouse. The question was answered in the affirmative. He went to his tent. His bags were already packed, as he had just come back from the hospital. He took his rifle and started to the supply hut. When Sergeant Godbold said that he wanted to turn his rifle in, accused said, "No, I didn't want to turn my rifle in". He told Godbold he was going to see Colonel Hiatt and talk with him, because a couple of weeks before, the Colonel had said that, any time there was trouble, to report it to him and he would see that he was treated fairly. Godbold answered, "You are going to get yourself in a little trouble". Accused said, "I'll take the chance. You don't put a man in the guardhouse for missing reveille". Rawlins, the supply sergeant, said, "If he won't give me the rifle I won't take it". Godbold consented that accused go and see Colonel Hiatt, with the understanding that he would return. Accused went out on the road and got a ride on a truck. Soon a jeep pulled up beside the truck, and an officer said, "Get out". Accused did, and started toward the jeep. The other soldiers, who were going to work, left the jeep and got in the truck. Accused then knew he wasn't going to Colonel Hiatt's office. The Lieutenant came around the jeep and said, "Get in the jeep, soldier". Accused said, "I'm going down to see Colonel Hiatt" (R. 76). The Lieutenant said, "You get in the God damn jeep or I'll put you in there myself". Accused saw that the Lieutenant was going to catch him, and told him not to come up. The Lieutenant looked accused in the eye and kept on coming. Accused stepped back and twice asked him not to "come up". The Lieutenant "came right up", directly in front of accused's gun. Accused saw that he "would be caught". He brought the piece to port arms. As the Lieutenant "got up to me he jumped at me", and accused fired. He ran off the road into the jungle. He remembered nothing, until three days later, when he came back to the area and received information that "they were going to shoot" him. "They took me up to a tent and talked to me and gave me some letters". Accused returned to the jungle. The next morning, when he heard a bugle blow, he ran about five miles. At the Namyang river he placed his rifle and ammunition beside a log and went to the bridge. Hearing shooting he ran into the jungle. At a village, he got acquainted with people, and got married (R. 77). When he saw a flashlight at night, he walked out of his basha, as the Nagas don't own flashlights. He walked into the jungle opposite where there were five or six Americans. He went to the basha for his knife and decided to remain there, as he didn't have his rifle and it was a tiger section. A dog

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barked. Then a shot was fired. He ran through the basha and after he had taken two or three steps, someone started shooting at him with a carbine. He ran about 150 yards, stumbled, regained his feet, went to a little stream and as he bent over to drink, fell over and fainted. It was not his intention to remain away from the service. "I wanted to give myself up".(R. 77). He explained the recital in his statement (Pros. Ex. P-5) that he did not intend to return to the service, by saying that he told the man, who brought the statement to him that it was wrong. This man said, "That's all right, soldier, we just want the general idea of how it was". So accused signed it. When he shot Lieutenant Cady, accused was "pretty well angry, I was crying" (R. 78). On cross examination accused stated that he signed the two statements, but couldn't remember what he read because at that time he was kind of sleepy. No one forced him to sign the statements. He signed them because he was asked so to do. (R. 79). After March 5th he got a letter to the effect that as soon as he threw his gun down and said he was Perry, he would be shot. He took his rifle with him because he didn't think he was going to be put in the guardhouse. It was already loaded (R. 79). He did not remember saying that he would rather be dead than go to the guardhouse. He shot Lieutenant Cady because he didn't want him "to whale me" (R. 80). When Lieutenant Cady told him to get in the jeep, accused thought he was an officer but wasn't sure. He heard Lieutenant Carapico's order to turn in his rifle and cartridge belt. He did not turn them in. Lieutenant Cady attempted to strike accused, in that when he got to accused and accused backed up, the Lieutenant reached out for him. When accused shot him, Lieutenant Cady was one foot from the muzzle of the rifle. The Lieutenant didn't swing at accused (R. 82), but was reaching for him. Accused didn't know why the Lieutenant wanted him to get in the jeep.

15. Lieutenant Colonel Wright Hiatt, Commanding Officer of the 849th Engineer Aviation Battalion, testified (R. 6) that accused was in the military service. As a defense witness (R. 7) he further testified that some time previous to 5 March 1944 he was in the "A" Company orderly room and overheard the first sergeant and the company commander discussing trouble with accused, who then was brought into the orderly room. The company commander asked Colonel Hiatt to talk with him. He told accused to try to get along with the company commander and the non-commissioned officers for his own good (R. 8). He told accused that he was interested in every individual soldier in the battalion. If they were in trouble, they had a right and a privilege to talk to him about it. Six or eight months before this Lieutenant Cady had taken rather drastic action to enforce discipline when after a

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direct order to which a soldier was slow in reacting, he tried to shake him or slap him to get him to execute the order. At that time the Colonel admonished Lieutenant Cady that he should not touch any man or take any action such as striking a soldier (R.9). There was evidence to the fact that the soldier in question had been drinking.

16. It is believed that a serious irregularity appears with respect to the admission in evidence of accused's written confessions (Exs. P-5, P-6). The record discloses that on 20 July 1944, immediately after Perry had been wounded and apprehended, he was questioned at length by CID agents and, after first denying his identity, finally admitted in the presence of four military superiors that he shot Lieutenant Cady. Defense counsel's objection to the admission of testimony as to the statements then made by Perry was sustained by the law member. The trial judge advocate did not attempt to lay a foundation for the admission of such statements and the matter was not pursued by defense counsel on cross examination. Therefore, except as above indicated, the record is silent as to the nature of Perry's statements of 20 July and the circumstances under which they were made. In particular, there is no showing whether such statements constitute a confession or an admission and, if the former, whether it was voluntary. Manifestly, such circumstances as do appear of record militate against the voluntary nature of any confession then made. Under the reasoning applied in CM ETO 1486 (1944) 3 Bull. JAG 227, if Perry's statements of 20 July 1944 constitute a confession, and if such confession was improperly induced, it may be presumed, in the absence of clear and convincing evidence to the contrary, that the influence of such prior inducement continued with respect to his confessions of 23 and 27 July. Under the circumstances of this case, it is believed that the court should have fully elicited and carefully scrutinized the facts with respect to Perry's statements of 20 July in order to determine that no improper inducement was then used which might have continued with respect to the confessions of 23 and 27 July. It is considered that the court's failure to do so casts a serious cloud on the admissibility of the subsequent confessions which has not been dispelled by the testimony adduced. Accordingly, it is the view of the Board that Perry's written confessions (Exs. P-5, P-6) were inadmissible and their reception by the court was error.

17. Eliminating the illegal evidence as to accused's confessions, we shall consider the remaining evidence of guilt. As to Charge I and its Specifications, the evidence establishes that accused was ordered by his company commander to turn in his property at the supply room (R. 18). He refused to surrender his rifle and cartridge belt (R. 29, 31). A few minutes later, he was

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ordered by Lieutenant Cady to get into a jeep (R. 34, 35, 42, 44). He did not do so, under circumstances clearly manifesting his intent to disobey such order, even at the cost of taking human life. Guilt of Charge I and of the two specifications thereunder therefore is well established (CM CBI 196, Edwards; CM CBI 239, Bowles).

18. As to the charge of murder under Charge III and its Specification, accused testified in his own behalf that he shot Lieutenant Cady (R. 76, 81), because "he jumped at me" (R. 76) and because "I was under the impression that he was going to 'whale' me" (R. 80). He explained that he thought Lieutenant Cady attempted to strike him, because "when he got up to me he reached out for me" (R. 81). To support the defense contention (R. 83-84) that the homicide was in self defense and in any event amounted only to manslaughter and not murder, evidence was presented that six or eight months earlier the deceased had been admonished by Lieutenant and Colonel Hiatt for trying to shake or slap a soldier who had been drinking and was slow to obey an order (R. 9). It would appear, however, that accused had no knowledge of such prior conduct of Lieutenant Cady, since he stated that he did not know him (R. 82). Mere fear of being struck by an unarmed man is not in itself sufficient to reduce the killing, with a firearm, from murder to manslaughter (29 C.J. 1138). The evidence is heavily preponderant that decedent was merely reaching to grasp the rifle (R. 36, 42) which accused then possessed in violation of a competent order. While the accused had the right to act reasonably upon the circumstances as they appeared to him, it appears here that the situation which apparently confronted accused was not such as to cause him to believe reasonably that, if he did not shoot Lieutenant Cady, he was in danger either of indignity to his person or of bodily harm (CM CBI 172, Thompson). Force is warranted in self defense only against illegal violence, when actually or apparently necessary for self protection and in reasonable fear of imminent danger (CM CBI 122, Nappier).

19. It is clear that the homicide was the act of a man heedless of social duty, and fatally bent on mischief. Such a condition of the mind evidences malice, the characteristic which distinguishes murder from voluntary manslaughter. All the circumstances showed the slaying to be malicious. The record therefore furnishes abundant support for the findings of guilty of murder.

20. As to Charge IV and its Specification, accused admitted having been absent without leave. Such absence was also shown by the extract copies of the morning reports (Pros. Ex. 1; R. 15. Pros. Ex. 2; R. 16) from 5 March 1944 to 20 July 1944. It is undisputed that such absence of four months and fifteen days was terminated by apprehension, and then only by the shooting of

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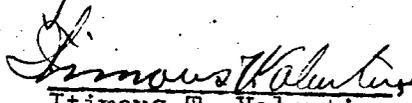
accused as he sought to flee into the jungle (R. 51, 77). When taken into custody, he gave a name other than his own (R. 51) and persisted for an hour in the assertion that his name was not Perry (R. 51). During the period of such absence, while living in the Naga village, accused married a Naga girl (R. 77). The manner of his departure, the length of the period of his absence and his flight at the time of apprehension indicate that he did not intend to return to the military service. Such intent coupled with unauthorized absence is sufficient to establish his guilt of desertion (CM CBI 14, Hess). The evidence fully supports the findings of guilty of desertion.

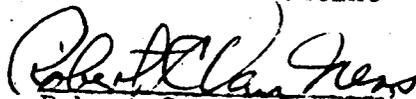
21. It is considered that the testimony of the prosecution's witnesses, other than that pertaining to accused's confession, is compelling as to each offense, and accused in his own testimony before the court substantially admitted the ultimate facts. It is our opinion, as to each charge and specification of which accused was found guilty, that the legal evidence standing alone is of "such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty" and that the admission of the mentioned confessions did not injuriously affect the substantial rights of the accused (CM 127490 (1919), CM 130415 (1919), Dig. Op. JAG 1912-30, sec. 1284, p. 634).

22. By letter dated 15 November 1944, Robert I. Miller, Esq., of Washington, D. C. transmitted to the Judge Advocate General for forwarding to the Commanding General, India Burma Theater, a written brief in behalf of accused. The mentioned brief has been submitted to the Board of Review and has been given careful consideration in connection with this case.

23. As the consequences of the sentence to accused are very grave, we have subjected the record to intense scrutiny. The court was legally constituted and had jurisdiction of the person of the accused and of the subject matter of the offenses charged. No errors injuriously affecting the substantial rights of the accused intervened upon the trial. His guilt of three capital offenses is established by abundant and compelling evidence. We therefore hold that the record of trial is legally sufficient to support the sentence.


John G. O'Brien, Judge Advocate


Itimous T. Valentine, Judge Advocate


Robert C. Van Ness, Judge Advocate

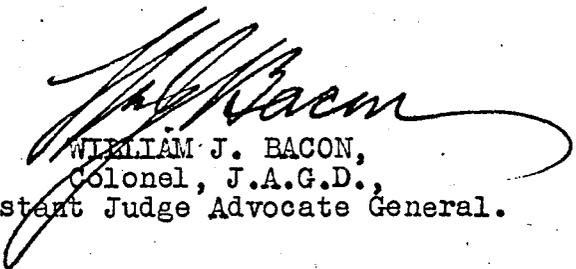
CM. IBT # 284 (PERRY, Herman (NMI)). 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 27 December 1944.

To: The Commanding General, USF, IBT, APO 885, U. S. Army.

1. In the case of Private Herman (NMI) Perry, 13074419, Company A, 849th Engineer Aviation Battalion, Advance Section #3, 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 IBT 284).


WILLIAM J. BACON,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 8, IBT, 10 Mar 1945)

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APO 885,
30 November 1944.

Board of Review
CM IBT No. 285

UNITED STATES)

XX BOMBER COMMAND

v.)

) Trial by GCM convened at APO 493,
) % Postmaster, New York, N.Y., 24
) August, 1944. Dismissed the ser-
) vice.

) Captain Dudley C. Murphy,
) 0-354383, 771st Bombardment
) Squadron, 462nd Bombardment
) Group, A.C.)

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 of Review submits this, its holding, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office with United States Forces India Burma Theater.

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

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: (Finding of not guilty)

Specification 4: (Finding of not guilty)

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

Specification: In that Captain Dudley C. Murphy, 771st Bombardment Squadron, 462nd Bombardment Group, was at Army Air Field, APO 220, c/o Postmaster, New York City, New York, on or about 1 July 1944, drunk and disorderly in a public place, to wit, the Officers' Club.

3. Accused pleaded not guilty to all charges and specifications but was found guilty of Charge II and its Specification and not guilty of the remaining Charge and Specifications. He

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was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General of USF, IBT, for action pursuant to Article of War 48. The confirming authority confirmed the sentence. The order of execution was withheld and the record of trial forwarded to this office for action under Article of War 50½.

EVIDENCE FOR PROSECUTION

4. Accused, who is in the military service of the United States (R. 6), on the night of 1 July 1944 was at the officers' club located at APO 220, in which there was a bar, a large room, a kitchen and a dining room. There were present in the club approximately one hundred officers (R. 7) about fifty of whom were around and in the bar. During the evening accused consumed a large quantity of liquor, estimated by one witness to be between fifteen and twenty drinks (R. 46). Among the drinks so consumed by accused was at least one double and one triple brandy (R. 46). Accused was intoxicated or drunk (R. 6, 10, 11, 46). Leaning on the bar, he stammered as he talked (R. 46). While so intoxicated in the bar, (Pros. Ex.1) accused became engaged in an altercation with a fellow officer, Lieutenant Hanson (R. 6, 23, 47). During such altercation some blows were struck (R. 6, 15, 19, 23, 47) and accused threw a chair at Lieutenant Hanson (R. 6, 15, 19, 23, 47). All this occurred between 10:00 and 11:40 o'clock P.M. (R. 23, 47). Later accused was in the passageway which leads from the bar to the kitchen of the club and one of the Chinese employees came out waving his arms and gesticulating wildly (R.26). Accused carried a loaded submachine gun (R. 27). The Chinese were standing around the wall of the kitchen (R. 27, 36), while accused pointed the weapon at them (R. 35). The submachine gun was taken away from accused (R. 27). He did not resist (R. 29). The bolt of the submachine gun was back and there was a cartridge lodged crosswise in the chamber (R. 27, 37) so that the gun could not be fired (R. 29). While accused was in Captain Hatch's office in the club, he became angry with Captain Terwilliger, angry words were exchanged between them and accused threw an ice tray or ash tray about ten inches long at Captain Terwilliger (R. 9, 20). During this incident, accused called a fellow officer a "big shit" and "ass kisser" (R. 9). Outside the club and around the officers' quarters at about 11:30 P.M. accused stopped Captain Terwilliger and Captain Simpson, told them he had a Thompson submachine gun in his hand and would spray the area from where they were to the barracks if they didn't get in their rooms and keep quiet. He told them he was waiting for Lieutenant Hanson (R. 8, 15, 17). Accused apparently grew tired

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of waiting for Lieutenant Hanson and said he was going over to get him (R. 8). A light was flashed on accused at that time, which revealed that he had a submachine gun. Accused pointed it at Captain Terwilliger and threatened to shoot the light out of Captain Terwilliger's hand. Lieutenant Clayton and Lieutenant Oleson heard and recognized the voice of accused when he said that the light was on his submachine gun (R. 20). Accused worked the bolt of the submachine gun (R. 20) and he said he was going to spray the area with lead where he saw them behind a tree. Whereupon Lieutenant Clayton and Lieutenant Oleson ran to their quarters. Commissioned officers of the armies of our allies were eligible for membership in the club, Defense Ex. "A", (R. 33) and all American officers on the base were admitted upon payment of an initiation fee (R. 33). There were present in the club at the time of the happening of the matters and things hereinbefore referred to at least one major of the British Army (R. 33, 36), two native bearers in the bar-room (R. 33) and some three or four enlisted men serving as bartenders (R. 35). There were also present in the kitchen, from fifteen to twenty Chinese employes (R. 36). There are usually a "flock" of British officers in the club every night (R. 36).

EVIDENCE FOR DEFENSE

5. Accused elected to testify as a witness after a full explanation of his rights by the law member. He admitted that on the evening of July 1, 1944 he had several drinks before going to the club and that when he joined a number of other officers in a promotion party at the club, he started drinking. He remembered having approximately four drinks and soon thereafter he reached a point where he could not remember except "just a hazy mess of two incidents", one of which was with Major Wagon who was mad at accused and pushed him (R. 41). The next thing accused remembered was when the M.P's. came in his quarters after him (R. 42). Corporal Edward R. Harris, Ninth Maintenance, 462nd Bomb Group, testified as a witness for accused. Corporal Harris was a steward at the officers' club and among other things was bartending, taking care of the kitchen and taking care of the officers who needed things. He recalled that between 7:30 and 8:00 o'clock accused came to the bar and asked for brandy and soda. Accused insisted that Corporal Harris take care of him. Accused appeared to Corporal Harris to have something on his mind and said he was disgusted with his job because, as he put it, "I am unloading freight cars and I have a corporal who could do the job". The accused leaned on the bar, he stammered and his words were not steady as the evening went

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on (R. 46). Accused and an officer named Hanson were talking and pushing each other around (R. 47). Prior to 1 July 1944 a couple of Anglo-Indian women had been in this officers' club (R. 48). Major John M. Green, Headquarters, 462nd Bombardment Group, became a witness for the defense (R. 50) and among other things said that accused performed his duty "in a very excellent manner" (R. 51). Summing up the character of accused, Major Green said, "I would say that Captain Murphy as an officer is outstanding" (R. 52).

6. From a careful examination of all the evidence, it is clear that accused was grossly drunk and disorderly and that his conduct was disgraceful and reprehensible at the officers' club at the time alleged. Such drunken conduct and reprehensible behavior compromised him as an officer and a gentleman. The clubhouse, where these incidents occurred, in our opinion, and within the meaning of military law, was a public place. "Public place" has been defined as:

"Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look". (Bouvier's Law Dictionary, Rawle's Third Revision, page 2765).

In CM IBT 283, Thornton, this Board of Review discussed a question identical with that here presented and then said:

"We believe we may properly assume that the incident took place within the limits of an army establishment, but are unable to say that for that reason the offense was not in a public place. There were not only military personnel present but also civilians. Though the general public was not permitted to go and come at will, the camp being only accessible to the military and other individuals with proper authorization, yet it was open for a certain class or group carved out of the general public and was not a private place".

In CM 202846, the principle was thus stated:

"The fact that only army personnel and their wives were present is immaterial, since it is a mistaken notion that the army can be disgraced or discredited by the misconduct of one of its members only if that misconduct is seen by outsiders".

In the case now under consideration the membership of the club was not limited to American Army officers. Commissioned officers of the armies of our allies also were eligible. There were

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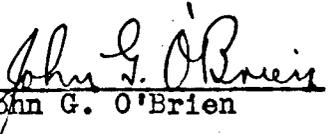
employed by the club some fifteen or twenty civilians, all of whom were present during the evening of July 1st in the club, as well as enlisted personnel and fifty to one hundred American officers. Accused was grossly drunk and engaged in unseemly behavior, violence and disorder. There is abundant evidence to sustain the findings of guilty by the court. In Winthrop's Military Law and Precedents, page 717, in speaking of what constitutes the crime here charged says:

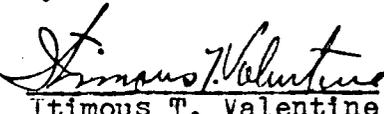
"Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused".

A footnote to this language reads:

"That a mere act of drunkenness, unaccompanied by any unseemly behavior, violence or disorder, would not, in general, properly be charged under this Article, is pointed out in G.O. 97 & 111, Army of the Potomac, 1862. Of the cases above cited nearly all were of a gross character; most of the offences being committed in places of public resort, as on the street, in hotels, 'saloons', theatres, &c., or in the presence of military persons at the officer's post or station, and under circumstances of aggravation."

7. The court was legally constituted and had jurisdiction of both the person of the accused and the subject matter of the offense. No errors injuriously affecting the substantial rights of the accused were committed at the trial. The punishment is authorized. The record of trial is legally sufficient to support the findings and the sentence.


John G. O'Brien, Judge Advocate


Titimus T. Valentine, Judge Advocate


Robert C. Van Ness, Judge Advocate

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CM IBT # 285 (Murphy, Dudley C.) 1st Ind.

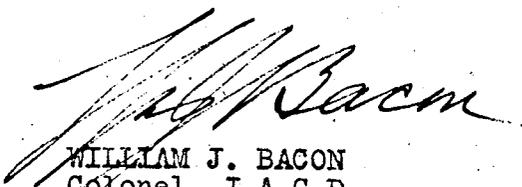
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, India Burma Theater, APO 885, New York, N. Y.

2 DEC 1944

TO: The Commanding General, USF, India Burma Theater, APO 885, U. S. Army.

1. In the case of Captain Dudley C. Murphy, O-354383, 771st Bombardment Squadron, 462nd Bombardment Group, A.C., 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 IBT 285).



WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 6, IBT, 2 Dec 1944)

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

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New Delhi, India
26 November 1944.

Board of Review
CM IBT 286

UNITED STATES)

SERVICES OF SUPPLY, USAF, CBI

v.)

Trial by GCM convened 11 August
1944 at APO 689 % Postmaster,
New York, N.Y. Dishonorable
Discharge, total forfeitures
and confinement at hard labor
for life.

Pvt. Willie (NMI) Delaney,
34472033, Company B, 1883rd
Engineer Aviation Battalion,
Base Section #3.)

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Willie (NMI) Delaney, Company B, 1883rd Engineer Aviation Battalion, did, at mile 162.77 mark, Tingkaw Sakan, Burma, on or about June 15, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Willie J. Thomas, a human being, by shooting him in the thigh with an M1 Rifle.

3. Accused pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, forfeiture of all pay and allowances due or to become due and to be hanged by the neck until dead. The

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reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The sentence was confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life. The order of execution was withheld and the record of trial forwarded to this office for action under Article of War 50½.

TESTIMONY FOR PROSECUTION

4. On 15 June 1944 at about 4:30 in the afternoon (R. 52) the accused and Willie J. Thomas, Howard Adams, Isaac Gibbs and William C. Vinson, all members of Company B, 1883rd Engineer Aviation Battalion were engaged in a game of "crap" in the tent of accused, where their organization (R. 25; Pros. Ex. P-2; R. 34, 44) was stationed near Tingkaw Sakan Airport in Burma (R. 5, 8, 44). On one bed in the tent the "crap game" was in progress, while on the other bed Emerson T. Clark and Harmon Spencer were engaged in a "cooncan" game. Eugene Hatcher looked on. Vinson loaned Thomas five rupees to make a bet against accused (R. 45). From this an argument and altercation resulted (R. 41, 48, 50), during the course of which accused referred to Vinson as "You rotten mother fucker, I don't want to have anything to do with you, loaning Thomas rupees to bet against me". To this Thomas answered, "Yes, Vinson loaned me rupees, but he isn't doing anything he isn't supposed to, he owes me rupees like you and others". Accused rejoined, "I don't owe you any rupees". As the temperature of the argument rose, accused got up and got a rifle which was by the side of the bed. He said to Thomas, "You bad mother fucker, you going to get it". Thomas replied, "You don't pay me I'm going to see how God damn bad you are". Accused said he "wasn't after nobody but Thomas". Accused was admonished not to shoot his rifle for to do so would only get him in trouble. To these admonitions accused answered, "Be quiet, I am not after anyone else, I'm after Thomas. The mother fucker said I owe him rupees. I'll kill him". As it became apparent that accused was about to execute his threat, Thomas gave in and said, "you don't owe me any rupees" (R. 45). Accused continued the argument by saying to Thomas, "Yes, I owe you rupees". Accused then fired three shots (R. 21, 32, 42, 45, 48; Pros. Ex. P-2). Thomas had no knife. At no time did he threaten accused (R. 13, 29, 30, 46, 57). When the shots were fired, Thomas ran. Blood was found just outside the tent, about five feet from the front (R. 33).

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Vinson was in the tent where the "squabble" and the "crap game" took place and saw accused get his rifle and attempt to kill Thomas. Accused pulled the trigger and Vinson ran out of the tent, but he heard two or more shots fired (R. 34). The first shots hit in the tent pole (R. 35). The shots were fired three or four seconds apart (R. 36). Thomas went some distance and fell. Pfc. Thomas A. Frazier of the Medical Detachment, 1883rd Engineer Aviation Battalion (R. 52) was on duty with his outfit, when he heard three shots and somebody hollering, "don't kill that man" (R. 52-53). Frazier and Cpl. Gallon, of the same outfit, grabbed a litter and started across the area to where the boys were coming out of the tent. When they arrived near where Thomas had fallen, accused came out of the tent, raised his rifle and said, "I don't owe him nothing; don't nobody go near that man or I'll kill him" (R. 53). Cpl. Gallon left. Frazier went back to get the wounded man, while Sgt. Ashby covered him with fire (R. 53, 54). Thomas never regained consciousness after the stretcher bearers reached him (R. 54). Accused was then taken to Cpl. Russell's tent. While accused waved the gun around, Frazier went back in the tent and laid down "probably 12 or 15 minutes", until Sgt. Ashby started shooting (R. 53). Thomas was still alive but was unconscious when Frazier took him away. As a part of his equipment, Frazier carried a tourniquet strapped to the litter handle (R. 55). He did not apply it immediately to Thomas, but waited until the shots were fired and a couple of the boys came over to help him (R. 55). Frazier and those aiding him applied a tourniquet to the wounded man (R. 55) and then rushed him to the doctor but he was dead before they got there (R. 55). Capt. Herman L. Aronoff, M.C., 1883rd Engineer Aviation Battalion, knew Willie J. Thomas and saw him on June 15, 1944 at about 4:50 when he was brought to the battalion dispensary. He found Thomas to be dead. His examination revealed a penetrating gunshot wound in the right lower thigh (R. 9) about one-sixteenth of an inch at the point of entry and smaller at the point of exit with slight evidence of powder blast (R. 8). The bullet severed a vein or artery (R. 8). If the shot had hit any part of Thomas' thigh except the artery or vein it is probable that he would not have died. (R. 8, 9). Death resulted from acute hemorrhage (R. 8). There was a possibility that Thomas could have been saved had first aid been administered immediately. Such medical first aid as clamping the wound and the little vessels, the giving of blood plasma immediately, involved transportation to the evacuation hospital where such aid could have been given. There was only a possibility even then that he might have lived.

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Administering blood plasma or even clamping the wound and blood vessels would have been impossible in the dispensary to which Thomas was taken (R. 9). The first aid man could have applied pressure immediately and have bandaged the wound and kept the bleeding and inflammation down in the area of the wound (R. 10). To have administered the first aid necessary to have saved Thomas, the first aid man would have had to have been on the spot at the time he was shot (R. 11). The wound was in the region of the femoral triangle (R. 11). The prosecution offered in evidence a voluntary statement of accused (R. 57; Pros. Ex. P-2). In this statement, accused admitted the shooting of Thomas, but contended that the shots were fired in self defense. Accused contended that on the way from the latrine Thomas called him into his tent and showed him pictures of his wife and mother and his home in Hollandale, Mississippi and discussed something about making liquor. Out of this conversation, according to accused, there arose an argument, and Thomas called him a liar and grabbed his rifle, whereupon accused ran out of the tent. Accused said that when he got to his own tent some men were playing poker on a bed and on another bed a crap game was in progress. Thomas was squatting down by the bed next to the tent wall. An argument arose over the crap game during which Thomas grabbed six rupees from the bed. Accused stated that Thomas pulled a knife out of his pocket and swung at accused across the bed. Accused backed away toward the post in the center of the tent while Thomas came around the bed with his right hand raised up. Accused then got his M1 rifle, which was hanging on the post, and leveled it at Thomas and said, "Don't you come another damn step". Thomas stopped but didn't say a word. Accused kept looking him in the eyes and backed up still more keeping his eyes on Thomas and with his rifle still pointed at him. Accused reached in his barracks bag with his right hand and got a clip of ammunition, put it in his rifle and closed the bolt. "Thomas was still standing there and didn't say a word". Accused knocked the safety off and fired two or three times.

5. Accused elected to remain silent (R. 68). Three witnesses were introduced by the defense, but none of them gave testimony of anything done or said before the shooting or anything else that affected the case or tended to support a plea of self defense (R. 62, 64, 65, 66). A defense witness, however, did testify that when the shot was fired somebody yelled, "Delaney shot Thomas" (R. 68).

6. Accused was tried and convicted of the murder of Thomas. At common law, murder consists in the unlawful killing of a human being with malice aforethought. (29 C.J. p. 1083, par.59).

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"In its popular sense, the term 'malice' conveys the meaning of hatred, ill-will, or hostility toward another. In its legal sense, however, as it is employed in the description of murder, it does not of necessity import ill-will toward the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief; in other words, a malicious killing is where the act is done without legal justification, excuse, or extenuation, and malice has been frequently substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse." (Ibid. page 1084, par. 61)

The proof sustains every necessary element of the crime of murder unless accused can excuse or justify his conduct on the grounds of self defense. Before such a course is available to him his evidence must meet certain specific legal tests, the rule of which is thus stated:

"To justify or excuse a homicide on the ground of apparent peril it is necessary that the slayer shall actually entertain an honest and bona fide belief that it is necessary for him to kill in order to save himself from death or great bodily harm or the commission of a felony upon his person. The rule is applicable, even though the circumstances and surroundings may be apparently dangerous or although there are reasonable grounds to apprehend death or great bodily harm. While accused may act on appearances, he must entertain a bona fide belief that he is in actual, and not apparent, peril or danger and that there is a real necessity to kill." (30 C. J. page 60, par. 230)

Again it is said:

"In order to render a homicide justifiable or excusable on the ground that accused honestly fears or believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to kill to save himself therefrom, it is essential that he act solely under the influence of that fear, belief, or apprehension, and not in a spirit of anger, revenge, or malice, or through mere cowardice." (Ibid. page 61, par. 231).

The evidence does not bring accused within the rule and his plea of self defense, therefore, must fail.

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The evidence offered for the defense is directed toward an explanation of his conduct after the fatal shooting and does not tend to show any element of self defense or excusable homicide. In fact the only evidence of self defense is in the statement of accused which was introduced by the prosecution and this falls far short of the requirements of the law. There is abundant evidence of strong and angry words used by accused immediately before the shooting to justify the court in concluding that his actions were the result of anger rather than a natural belief that he himself was in danger of suffering death or great bodily harm at the hands of Thomas.

While it may be true that the life of Thomas could have been saved if skilled and expert first aid men had been present at or immediately after the shooting took place, there is strong evidence in the record to support the conclusion that accused by a threat of further violence, prevented anyone from rendering aid to Thomas for a period of 12 to 15 minutes immediately after the shooting. It is apparent from all the evidence that the death of Thomas was produced by the gunshot wound inflicted by accused. He cannot escape responsibility for his conduct, merely because skilled aid possibly might have prevented the death of Thomas. The rule with respect to this situation is thus stated:

"It is generally held, however, that he who inflicts the injury is not relieved of responsibility if the wound inflicted is dangerous, that is, calculated to destroy or endanger life, even though the immediate cause of the death was erroneous or unskillful medical or surgical treatment, neglect of deceased to procure treatment or to take proper care of the injury, or negligence of nurses or other attendants." (29 C.J. page 1031, par. 56).

There is abundant competent evidence in the record, which sustains the findings of the court.

The court excused the assistant trial judge advocate, the first assistant defense counsel, and second assistant defense counsel. While the court had no right to excuse either the assistant trial judge advocate or the first assistant defense counsel and second assistant defense counsel (MCM 1928, par. 43a) (CM CBI 177), still accused's rights were not thereby affected. To reduce the number of counsel for the prosecution could not in any way militate against him. When asked whom he desired to introduce as counsel, he introduced as his individual

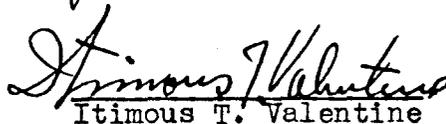
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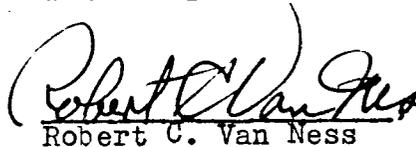
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and special counsel, Capt. George Schwartz (R. 2). This was, in effect, a declaration of his desire not to use the services of the regularly appointed defense counsel.

7. The court was legally constituted and had jurisdiction of the person of accused and of the subject matter of the offense charged. No errors injuriously affecting the substantial rights of 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.

John G. O'Brien, Judge Advocate
John G. O'Brien

Itimous T. Valentine Judge Advocate
Itimous T. Valentine

Robert C. Van Ness Judge Advocate
Robert C. Van Ness

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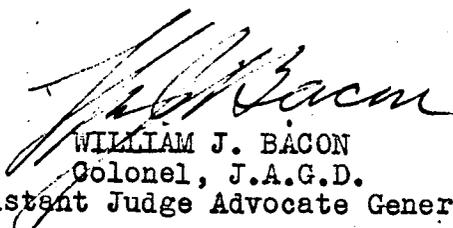
CM IBT # 286 (Delaney, Willie (NMI)) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, India Burma Theater, APO 885, New York, N. Y., 27 NOV 1944

TO: The Commanding General, USF, India Burma Theater, APO 885, U. S. Army.

1. In the case of Private Willie (NMI) Delaney, 34472033, Company B, 1883rd Engineer Aviation Battalion, Base Section #3, 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 IBT 286).


WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 1, IBT, 27 Nov 1944)

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New Delhi, India
2 December 1944

Board of Review
CM IBT No. 287

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

ATC, INDIA-CHINA DIVISION

v.)

) Trial by GCM convened at APO 885,
) 9 August 1944. Dismissal, total
) forfeitures, confinement at hard
) labor for seven years.

) First Lieutenant Clyde C.
) Sarver, 0793540, AC, 1307th
) AAF Base Unit, India-China
) Division, ATC.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office with United States Forces India Burma Theater.

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

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

Specification: In that 1st Lieutenant Clyde C. Sarver, AC, ICWATC, Station 8, did at a certain place about fifteen miles South of the Willingdon Airdrome New Delhi, India, also described as being at a place on a dirt road just off the Lodi Road, about eight miles from the intersection of the Muttra and Lodi Roads, near the village of Bradapur, India, at about 0230 hours, on or about 25 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Phyllis W. Jefferis, a sergeant in the Womens Auxiliary Service (Burma).

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

Specification: In that 1st Lieutenant Clyde C. Sarver A.C., ICWATC, Station 8, did, on or about 25 June 1944, at New Delhi, India, wrongfully use his official position as an officer in the U.S. Army, by attempting to persuade Phyllis W. Jefferis, a sergeant in the Women's Auxiliary Service (Burma), to have sexual intercourse with him by threatening to have her passage cancelled on a scheduled flight on a U.S. transport plane from New Delhi to Jorhat, and that the said Lieutenant Sarver did cause the name of said Phyllis W. Jefferis to be removed from the passenger manifest when she refused to submit to his desires.

3. Accused pleaded not guilty to all Charges and Specifications and was found guilty of all the Charges and Specifications. 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 the term of his natural life.

4. The reviewing authority approved the findings of guilty of Charge I and its Specification and of Charge II but only so much of the finding of guilty of Specification of Charge II as involves a finding that the accused did at the time and place alleged wrongfully use his official position as an officer of the Army by attempting to persuade Phyllis W. Jefferis to have sexual intercourse with him by threatening to have her airplane passage cancelled as alleged, and that the accused attempted to cause the removal of her name from the passenger manifest as alleged, and approved the sentence but reduced the period of confinement to ten years. The record of trial was forwarded to the Commanding General, United States Forces, India Burma Theater, for action under Article of War 48. The sentence as approved by the reviewing authority was confirmed, but the period of confinement was reduced to 7 years. No place of confinement has been designated. Pursuant to Article of War 50-1/2, the confirming authority withheld the order directing the execution of the sentence, and forwarded the record of trial to the Judge Advocate General's Branch Office.

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EVIDENCE FOR THE PROSECUTION

5. Sergeant Jefferis, although a member of the Burmese Army, is a British lady of the full blood. Her father is a colonel in the British Army and is stationed at Quetta, Baluchistan. She was and is stationed at Jorhat, Assam. She is 22 years old, five feet four inches in height and weighs 124 pounds. After an operation for varicose veins in the groin, she went on sick leave to visit her parents at Quetta, and travelled in an AAF airplane from Jorhat to Delhi on 18 May 1944. Then and on 25 June, accused was AAF operations officer at Willingdon Airdrome, New Delhi. On the way to New Delhi, Sergeant Jefferis expressed her desire to fly on an American plane from New Delhi to Jorhat on her return trip late in June. Captain Varga, a fellow passenger, introduced her to accused upon arrival in Delhi (R. 6). Accused volunteered to arrange such air transport for her.

6. Upon her return to Delhi on 21 June, she went to the home of her friend, Miss Anna Vanderhurst, in a hotel on Connaught Circus, about 7 miles from the airport. The next day she got in touch with accused. That evening she and Miss Vanderhurst dined with him and another American officer. Accused told her that the transportation had been arranged (R. 9), and that the plane would leave about midnight, 24-25 June 1944. Accused arranged to come to the hotel to take her to the airport.

7. The next evening, while they were on the way to the airport a rain and windstorm began. At the airport, accused told Sergeant Jefferis to wait in the car, while he inquired about her passage and the plane. Then he switched off the headlamps and tried to kiss her. She turned her face away and "not angrily" said, "No, you don't" (R. 13). He "rather slammed" the door, shouted, "That's how you feel", and went inside. He returned with coolies who removed the luggage. He said that he would take her to his room, as, owing to the storm, it might be two to five hours before the plane arrived. It was raining very hard (R. 14).

8. In accused's room, she drank a half glass of beer and he drank a coca cola. He went away for about ten minutes. When he came back, his clothes were very wet and muddy. He went into the bathroom and came out wearing different trousers and no shirt. At this time Miss Jefferis was seated in a chair. Accused sat in another chair and looked at a magazine. Remark- ing that she looked tired, and inquiring why she didn't use the bed, he took her arm and "simply propelled me towards the bed".

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She laid down. He inquired whether she would like pajamas. She replied in the negative. He suggested it would be more comfortable with her shoes off. She agreed, and he started to help remove them. He suggested that she would be much more comfortable without her belt. He unbuckled the belt and then left the room (R. 16). She became drowsy.

9. Accused left the room for about ten to fifteen minutes. Upon his return he switched off the light, saying, "Lights out". The next thing I knew he was on the bed and had put his arms around me and held me to him". (R. 17). She sat up and said, "No. What are you doing?" He said, "You don't mind if I play with you a little". She said that she did mind it very much indeed, and got up. Accused became very angry and said that he was "damned" if she would go on the plane, that she could collect her togs and go by train (R. 17). She put on her shoes and belt and he put on a bush shirt. They went to a weapons carrier, which he drove to the airfield. Lieutenant Bryan was in the office (R. 19). Accused had coolies take her luggage and carry it to the car. She told accused that she had asked Lieutenant Bryan if she might wait in the airport, and that he had said she could. Accused said, "So you still think you are going on the plane. Well, you are very much mistaken". He walked over to Lieutenant Bryan and told him to scratch her name off the manifest, that she had the wrong authority. She said the authority had been correct the previous evening. Accused said that was neither here nor there, that it was wrong for that night (R. 20).

10. Leaving the airport, accused drove at first along the road over which they had come from New Delhi, but in a little while Sergeant Jefferis noticed that they were on a deserted road. She had been in New Delhi only once before in 1940 for about a week. The road was strange. Soon, she noticed a white signboard, reading "To Muttra". She told accused that this was a very round about way to New Delhi. He replied that he was taking her for a joy ride. She asked him to turn around, and take her back to Central Court. He turned the car around and drove back about a mile and a half (R. 21), then reversed the car, turned off the road, went up a track a few hundred feet (R. 22), and swung the car around again.

11. Accused turned the lights out and said, "We are now forty-six miles from Delhi. Your luggage is in the back. You can get out and you can walk home or you can come back to my quarters and be a nice girl and I will see that you are put on the plane and you can go back to Jorhat". He said that she would find it rather difficult walking and probably would not

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arrive before morning. Although it was still raining, she said that she would walk (R. 23), but asked him to let her remain in the car until it quit raining. They sat there about 25 minutes, for the first fifteen minutes in silence. Accused smoked and said nothing. Then he got out of the truck, went to the back and threw out her luggage. Miss Jefferis tried to start the car but could not. She had previously driven trucks but not one like that. No cars, vehicles or people passed the place where the truck was parked although she saw a train go by on the track about three hundred feet away. She had no idea where they were (R. 24). He said, "You can get a taxi". She inquired where, and he answered, "Well, there is a telephone not far away". She asked, "How far away?" he said, "Oh, about twenty miles". She got out to walk (R. 24). It was still drizzling. The ground was soft and rather wet.

12. As Miss Jefferis was removing her flashlight from her haversack, accused came around behind her, took her by the shoulders and threw her to the ground (R. 25). She struggled. "I kicked him as hard as I could and he caught my hands and pinned them behind my head." He made no attempt to remove her clothing. His clothing was not removed. She was terrified (R. 27). She asked him to stop. Accused said it was a case of her going back with him to his quarters or remaining where they were. She made no response and continued to struggle. She tried to strangle him and slapped his face as hard as she could. Her undergarments were loose fitting cami-knickers. He got on top of her. She was still fighting with her legs in the air kicking him. He forced himself between her legs, pressed them wide apart and eventually managed to get himself into such a position that she was unable to move any further. Her legs were "way wide apart". The pain was excruciating, due to thrombo-phlebitis in her right leg, caused by the varicose vein in the groin. She told accused that this hurt her so terribly, that she was unable to do what he had "tried--forced me to do--". He said that her legs were "no matter at that time". He was trying to penetrate and kept saying, "Put your legs up higher". Finally he penetrated her and intercourse was accomplished (R. 28). After about fifteen minutes on the ground they went back to the truck (R. 29). She was bleeding. Her stomach and groin were very sore. She had to walk doubled up (R. 30).

13. Accused put the luggage back in the car. Then he said that he would still put her on the plane, if Miss Jefferis went back to his room first. She asked, "Just what does that mean?" He said; "You know very well what it means. If you are a nice-

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girl you will go on the plane." She said "no", she would not. He said that he would take her back to the flat if she wanted to go there. She answered affirmatively, and he drove straight there. Upon arrival, he called the servants who were sleeping on the pavement to remove the luggage. He left the luggage at the bottom of the stairs and she went up alone (R. 30). When she got upstairs, she missed her handbag.

14. Sergeant Jefferis told Miss Vanderhurst what had happened (R. 31). Miss Vanderhurst called Captain Rolfe, British APM, who came to the room. Miss Jefferis had undressed and was about to get in bed, when accused appeared about 40 minutes later. He came in, said that he was sorry, that the plane was leaving in 40 minutes, that he would put her on it and promised that "nothing would happen". She said she would not go. He said she could take Captain Rolfe and Miss Vanderhurst with him if she did not believe in him. When she persisted in her refusal, he said, "Well, to hell with the two of you", and left the room.

15. Captain Rolfe obtained two American enlisted military police, and in a little while Captain Sherman came (R. 34). She got in the car with them and after driving for about an hour and a half they found the place where she had been. Her handbag was still lying on the ground. It was then about daylight (R. 34).

16. Miss Jefferis' dress was muddy and stained with blood. Her collar ornament was missing. Her underwear (Pros. Ex. 8) were admitted in evidence (R. 160-161). A stain on the underwear had darkened from red since 25 June. The pin of the Burmese lion was still in the collar of the uniform although the badge had been broken away from the pin (R. 161). She pointed out mud on the shoulders and lower part of the dress (R. 162). She insisted that they did not sit or lie on a cloth at the time "the thing happened" (R. 163).

17. The prosecuting witness was subjected to a very searching and a very clever cross examination (R. 35-78) by the defense counsel, a distinguished lawyer of exceptional attainments and long practice in a large city. In the course of this examination, the attention of the prosecuting witness was called to portions of her testimony at the investigation made of the charges pursuant to AW 70. In no important particulars, do her answers on cross examination appear to be at variance with her testimony on direct

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or at the hearing before the investigating officer. In some respects her answers on cross examination were more damning to the theory of the defense counsel than her testimony upon examination by the Trial Judge Advocate. On cross examination, she stated that she felt that her life was threatened and regarded it as being in jeopardy although accused did not by words indicate any intent to kill her if she did not cease her resistance (R. 74-75). She insisted that she was badly frightened, but admitted that there came a time when she ceased to struggle. She testified:

- "Q. (By defense) It is a fact then, is it Miss Jefferis, that there came a time when your mind said "No" but your body said "Yes"?
- A. My body did not say "Yes" willingly. It was forced on me.
- Q. But there was a time when your body did say "Yes", was there not?
- A. I gave in, yes.
- Q. You gave in?
- A. Yes.
- Q. And ceased to struggle?
- A. Yes.
- Q. Now long after that did he have intercourse with you?
- A. Straight away."

She then testified that when accused began intercourse she was unable to wiggle or twist and that she never willingly gave in to him.

18. Although a defense objection was sustained to the question, "Miss Jefferis, had you ever had sexual intercourse prior to this occasion?" (R. 81), a physical examination of Miss Jefferis was made on the following day by Captain Christopher St. Johnston, R.A.M.C, Surgeon to His Excellency, the Commander in Chief, India. The examiner is a graduate of Birmingham Medical College with 9-1/2 years general medical practice in England (R.91). Such examination revealed fresh blood on the labia minora, and a freshly torn ruptured hymen, which was still bleeding. She was not menstruating. The blood was not menstrual blood (R.92). Dr. St. Johnston testified that as long as a woman remains a virgin, the hymen continues to be intact. The condition of the vagina was such as to indicate that penetration had been effected within a few hours preceding his examination. In his opinion, she was a virgin prior to the hymeneal rupture (R. 93).

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This physician again examined Miss Jefferis, at the request of her mother, on 29 June 1944. Then he found a bruise on the back of each shoulder and a bruise on the right buttock, each about an inch or an inch and a half in diameter (R. 94). He did not notice the bruises upon the examination of 25 June (R. 95).

19. Portions of the testimony of the accused before the officer designated to investigate the charges under AW 70 were offered in evidence (R. 104-113). At such investigation accused after being warned of his rights under AW 24 and after conferring with his counsel, Colonel Keating, and Captain Robinson (R. 105), testified that he told Miss Jefferis that either she would have intercourse with him or she would not ride the plane (R. 107), that he instructed Lieutenant Bryan to take her name off the manifest (R. 108). He stated that he stopped the car 150 yards off the road, put Miss Jefferis' luggage out of the car and told her that she could walk home. He admitted that his purpose in putting her luggage out and in telling her that she would have to walk home from a spot which accused described as rather lonely and deserted, was "psychological force" to compel her to change her mind (R. 110). He said he did not know whether he would have made her walk home, but that as far as she knew, he definitely intended to make her walk back if she didn't agree (R. 110). It was between five and twenty minutes thereafter that intercourse took place (R. 110). Accused further testified at such hearing that the girl got out of the car with the intention of walking, that she tried to find her flashlight in her haversack and that at that time he still maintained the position that she had to be a "nice girl" or walk (R. 111). Accused answered "yes" at the investigation to the question, "Didn't you feel that consent was compelled by the threat that you had made under force and the circumstances".

20. Captain Frank S. Sherman, C&P, Delhi Area Provost Marshal, met Sergeant Jefferis shortly after hours 0430, 25 June 1944 at Miss Vanderhurst's apartment. Captain Rolfe of the British Military Police was with the two ladies. With Captain Rolfe, Miss Jefferis and two enlisted men, he drove out the Delhi-Muttra Road seven or eight miles beyond its intersection with Lodi Road. About 0615 they located Sergeant Jefferis's handbag, which was lying on the ground. Later that morning he went out with Captain Lawler and found a bronze lion from which the pin on the back had been broken, similar to the insignia he later saw on Miss Jefferis' uniform.

21. Captain Geoffrey Rolfe found tire marks about 4 feet from the spot where the handbag lay (R. 122). The spot was a

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plain or maidan, with bushes in some places and stones and earth in others, about 13 miles from Connaught Circus, New Delhi. Lieutenant Bryan, Assistant P. and T. Officer at Willingdon Airport, testified that only about fifteen minutes intervened between the time when accused and Miss Jefferis checked in at the airport and their return, although when they first came in the plane was not expected until 3:30 (R. 131). When they came back, accused told Lieutenant Bryan to cancel the passage until, "He told me to put her on". Miss Jefferis said, "Well, it was o.k. last night", accused responded, "Just cancel it until I tell you to put her on". (R. 132)

22. Accused had no jurisdiction over Lieutenant Bryan and no authority to either direct him to put a name on or to take it off the manifest (R. 133). Lieutenant Bryan did not scratch her name off the manifest (R. 133).

23. On the morning of 25 June, hours 0930, Captain Edward J. Lawler, in charge of the regional CID office of the Theater Provost Marshal, talked with accused in the presence of Captain Rolfe, Captain Sherman, and accused's commanding officer, Major Coyne, and another officer. Accused was warned of his rights under the 24th AW and advised that the serious charge of rape was being urged against him and that he didn't have to answer questions or say anything. Accused stated that he was willing to tell his side (R. 137). He stated that he had not had sexual intercourse with Miss Jefferis or anyone else on the night before (R. 137). Accused handed over a pair of trousers (Pros. Ex. 2). There was a red stain inside the fly. One of the trouser legs was torn. There was a tear in the drawers of accused's underwear (R. 143). There was mud on the trousers (R. 144). Accused said that on leaving the airport he took Miss Jefferis directly by way of the King George Memorial and Curzon Road to Connaught Circus and at no time left the main highway. He stated that the mud stains on the knees of his slacks and the elbows of his bush shirt were acquired by falling in a ditch. The next afternoon Captain Lawler again talked with the accused who expressed his willingness to make a further statement. In the meantime, however, the investigation had been turned over to the Inspector General (R. 150). In the original interview accused stated that Miss Jefferis took her shoes off, loosened her belt and laid down on his bed, that he lay down beside her, but when he touched "it" she objected and became peeved; that she seemed willing up to the point when he put his finger in and then she was not willing (R. 154).

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EVIDENCE ON BEHALF OF ACCUSED

24. On 26 June 1944 accused was examined by Captain Sanford Press, MC, Captain Samuel E. Way, MC, and Captain Timothy A. Callahan, MC. No scratches, abrasions or marks of any nature indicating violence to his body or injury of any kind were discovered (R. 168, 173, 174).

25. After explicit warning as to his rights, accused was sworn and testified. He is 25 years old, and has a wife and one child. He has been stationed in India since 16 May 1943. He had been recommended for the air medal and for the DFC. In May 1944 he came to Delhi as Station Operations Officer. He was introduced to Miss Jefferis by Captain Varga. Either she or Captain Varga asked about a ride to Jorhat at the expiration of her leave six weeks later. Accused stated that it could possibly be arranged (R. 182). About the Wednesday or Thursday before 25 June, a British Captain came to the airport inquiring for "Lieutenant Sarver". He said, "I have got a note from one of your girl friends". Accused did not know about whom the officer was talking. The note was from Sergeant Jefferis, who gave her address in New Delhi and inquired about the plane ride. Accused told the British officer he would get in touch with her the next day.

26. About nine o'clock the next morning, Miss Jefferis called accused on the telephone (R. 182), and late that afternoon he went to see her. The door of the apartment was open, and after knocking, he stuck his head inside and saw Miss Jefferis lying on the bed. He went over and tapped her on the shoulder. She wore a green WAC dress, which was unbuttoned. She swung her legs over the bed, and walked around the end, buttoning her dress in his presence. Then she put on her shoes. She asked him to have a seat and inquired about a plane ride to Jorhat (R. 184). He asked her to come out to the airport that night to arrange the passage. She suggested that midnight was an odd hour. He told her it had to be done on the "QT". He invited her to dinner with him and to see the show. She asked if she could bring Miss Vanderhurst along.

27. The next evening at 8:15, with Lieutenant Braden accused called at the Central Court. Braden drove them to the airport. Miss Vanderhurst sat in front with him and Miss Jefferis in the back with accused. At the airport they met Captain Brewster who with accused and the girls went to his room. Miss Vanderhurst suggested that she liked the place and would like to

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come out and be accused's barmaid. They had dinner and saw the motion picture. During the movie he had his hand on Miss Jefferis' knee (R. 186). Then they went back to his room for more drinks. When accused got out a carton of Philip Morris Cigarettes, Miss Vanderhurst suggested that she liked that brand and would like to have a carton. Accused suggested that they were hard to get and that "it would cost her plenty". They talked with Lieutenant Bryan and arranged the passage (R. 188). The plane was to leave at 12:50 A. M. and they were told to be at the airport at 11:30 to weigh in Miss Jefferis and her bags.

28. On the way back to Connaught Circus Captain Press and two nurses got in the car. It was necessary for Miss Jefferis, accused, Miss Vanderhurst and Captain Brewster to crowd into the back seat. Accused had his arm draped over the back seat and his hand on Miss Jefferis' shoulder. He squeezed her. There was no indication of objection on her part. When they got out, Miss Jefferis said that she was very grateful. Accused remarked that he was tired of doing something for everyone and not get anything in return (R. 189). Either Miss Vanderhurst or Miss Jefferis said, "You will be repaid", or "Maybe you will get something". Accused couldn't recall the exact words.

29. Accused picked Miss Jefferis up about 11:30 the next night. On the way to the airport, he told her to sit close to him. He put his arm around her and drove with one arm. He played with her breast, then let his hand drop down to her thigh and stomach and "fiddled around a little bit". There was no indication of any resentment on her part. The plane was delayed by the storm and turned back to Agra when about ten minutes from the field (R. 192). Accused told Miss Jefferis that it would be three to seven hours before the plane came back (R. 193). They went to his room alone. She made no remonstrances. She accepted a can of beer. He went out and called operations. On the way back he slipped in a ditch (R. 194). In the bathroom, he put on a clean pair of pants. He wore no shirt and was naked from the waist up (R. 195).

30. The accused asked Miss Jefferis if she wanted to lie down. She asked "What are you going to do?" Accused said, "Don't worry about me". He helped her out of the chair and to the bed. He fumbled with her shoes. She undid one and he undid the other. He asked if she wanted to take her belt off and reached down to unfasten it. She said there was a safety pin in it, reached over, took the pin out and handed it to him. He laid down on the bed beside her and began "playing around, playing with her breasts, playing with her legs * * * underneath her dress, and that went on for a little while" (R. 195). She made no protest.

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He was not sure whether or not he kissed her once (R. 196). He had his hand on her private parts. They were there five to fifteen minutes. "After piddling around a while, I became passionate, of course, and I tried to roll over on top of her or made the motion to, and she said, 'No, you don't', or something like that. I said, 'O.K.; if that's the way you want it', and I sat up on the bed" (R. 196). She didn't state any reason. Accused concluded that she "wanted to let a guy play around a bit and that was all". There had been no resistance until he had rolled over on top of her. He told her, "If that's the way you want to play", or "O.K., I can play that way myself. Get your shoes on and put your belt on and go down and get your bags and I will take you back to the airport". "I asked her two or three times if she had changed her mind" (R. 197).

31. Accused got help to load Miss Jefferis' baggage back in the car and then went into the P & T Office where she was talking to Lieutenant Bryan. He went over and said to her, "Are you ready to go?" and she said, "No, I am going to stay here and ride the plane". Accused said, "I don't think you are" or "No, you are not". Then he said, "Lieutenant Bryan, take her name off the manifest until I tell you different". He walked out, followed by Miss Jefferis and got into the driver's seat (R. 197). She asked if all her baggage was in the car and, upon receiving the answer "Yes", got in. He drove off, and turned down Lodi Road (R. 198). It was sprinkling.

32. As they rode along, the girl inquired if accused was going to make her ride the train, and said that it would take her almost a week to get to Jorhat and that she would get into trouble. He didn't answer and drove on down Lodi Road and turned on to the Muttra Road toward Agra (R. 199). He drove, as he thought, between fifteen and twenty miles. Then Miss Jefferis asked, "Is this necessary?" Accused answered, "Yes, if you want to go back by plane". He drove on. After passing the Bradapur Rest House he turned around and then turned into a side road "a piece" and parked the car.

33. Miss Jefferis asked accused why he stopped. He said, "Don't you know? You have changed your mind, haven't you?" She answered, "No". He said, "You haven't?" She said "No". Accused said, "Well, honey, you can get out of here and start walking; you are only forty-two miles from Delhi and it won't take you long". Accused got out of the car, lit a cigarette, took her baggage out, came back to the front of the car and asked her if she was ready to start walking. She said, "You aren't going to make me walk in this

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rain, are you? I will catch pneumonia". He said, "It isn't raining hard and you won't catch pneumonia, but, if you want to, you can sit here until the rain stops". He asked why she wouldn't submit to his affections. She said that she didn't know him well enough, didn't even know his first name (R. 200). He smoked another cigarette. When he put her baggage out, he slipped on a condom (R. 199). It stopped sprinkling. They got out of the car. She said that one piece of her baggage was still in the car. Then she got a flashlight out of the haversack and handed it to him. He flashed it in the car and saw a steel box, which he removed.

34. Then accused turned, as if to walk back to the car. Miss Jefferis said, "Wait a minute". He said, "What's the matter, have you changed your mind?" She said, "What else can I do?" he said, "Well, you can walk". Then he took a long piece of cloth and handed it to her. She spread it on the ground. He sat on the cloth and she sat down beside him. He fondled her legs for two or three minutes and then got in between the legs and on top of her. He kissed her and played around with his hand under her dress. These preliminaries lasted two to five minutes. Then she asked, "How about the back of the truck?" Accused said that it was wetter in there than it was on the ground. She said, "Let's move", and they moved around lengthwise. He tried to have intercourse with her. "It wasn't the most comfortable place in the world." At first he couldn't accomplish anything. Then with her right hand, she helped to insert his penis. At first her legs were across the calves of his legs. He asked her to move them higher up and she placed them up around the small of his back. He didn't force her legs up.

35. According to accused, Miss Jefferis did not scream, shout, call out, strangle him, slap his face, push his shoulders, and did not wiggle or twist in an effort to get away, but only in the act" (R. 202). On the ground, she put up no resistance of any kind. He did not grab her by the shoulders and push or pull her down to the ground and pin or hold her hands down over her head either during or prior to intercourse (R. 202). During the act of coition, her left hand was around his back. He did not remember where she placed her right hand after aiding in the insertion. She did say that he was hurting her (R. 203). After this, he put her baggage back in the car, helped her in and drove toward the airport.

36. As they neared Lodi Road, accused asked, "You still

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want to ride the plane, don't you? Do you want to go the airport?" She said her hair was messed up, so maybe she had better go to her apartment. He suggested that she could fix it up at the barracks. She thought it would be best to go back to the apartment. Since the plane would not be there until early morning and he could come back and get her, he took her to the apartment. There were several natives there. He awakened one to take her luggage up to her room and carried some of it up to the steps. After some talk, he went back to the airport.

37. A little while later, accused went back to the apartment. When he got there, the lights were on, and Miss Jefferis was combing her hair. Miss Vanderhurst was dressed. Accused stood in the doorway and said, "Phyllis, the plane will be in at 3:30 if you want to come and go on the plane, get your bags and we will go out". Miss Vanderhurst said, "Don't you think you have done enough?" He answered, "No, I haven't done anything". She said, "Well, get out". He said, "I am not talking to you. I am talking to Phyllis." Miss Vanderhurst said, "Get out." Accused said, "Phyllis, do you want to ride the plane? You can bring Miss Vanderhurst and Captain Rolfe with you if you want to". She made no answer. Miss Vanderhurst said, "Get out" again and that she was going to call or had called the M. P's. Accused said, "Well you can call the M.P's; I haven't done anything out of the ordinary." Then she repeated again, "Get out". Accused said, "Go to hell" or words to that effect. He went back to the airport (R. 204).

38. On cross examination accused testified that so far as operations were concerned his only superior was his commanding officer (R. 207). He admitted that he had told Major Burton that he took Miss Jefferis' shoes and belt off and put the safety pin on the mantel and laid down beside her and started playing with her breasts and legs (R. 215). On cross examination, a day after direct, he stated that in his room, the lady did not refuse in words to have sexual intercourse. "She just seemed to me like she couldn't make up her mind". He did not recall that she said, "No, you don't" but admitted that he might have so testified on direct examination the day before (R. 217). He stated that he told her it might be two hours or more before a plane came, but when reminded, recalled that on direct examination he had said that he told her that it might be five to seven hours (R. 218). He did not remember having told Major Burton, "We then sat down on the ground; I put a rubber on, pulled her dress up and began playing around." (R. 224). He admitted

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having said to the investigating officer that he got no satisfaction. He had had an emission, but it was not the best place in the world to have an intercourse (R. 226). When they got back to her apartment, she did not request that he take the luggage out. He just took it out. He did not then know, but thought that she would still go on the plane, as she had to be back on the 26th. Back at the airport, he laid down on the bed. He got to thinking about the plane and called Lieutenant Bryan who told him that it was at Agra. He put on a bush jacket and drove to Miss Vanderhurst's apartment.

REBUTTAL

39. In rebuttal Major J. B. Burton, IGD, testified that accused was warned of his rights and made a statement to him, in the course of which accused stated that all he could get in was the head of the penis, that he couldn't "do any good", and he got up and said, "What the hell, let's go back". Accused stated to Major Burton that when he told Miss Jefferis the plane might be in, she said that her hair was messed up and she would have to get dressed; that he told her that "she could come out to the barracks and get cleaned up" and she said, "Well, I don't know", and accused said, "Go to hell", and started to Central Court. He told Major Burton that at the Central Court he took her bags out, woke up a native to carry them and put her handbag at the door. She asked if he had seen it. He answered that it was on the steps, said good night, and drove away. Accused also said that Miss Jefferis took her shoes off and when he asked if she wanted to take off her belt, she removed the safety pin herself. Accused made the following answer to the following question by Major Burton:

"Q. At the time you stated you laid Miss Jefferis on the ground, did you have her consent?"

A. I don't know exactly what you mean by that question."

40. The testimony of the prosecuting witness and of the accused has been summarized in greater detail than is usual or perhaps necessary. If her testimony is true, there would seem to be no question concerning the guilt of the accused under both charges and specifications, while if accused told the truth he is guilty of Charge II and of so much only of the finding of guilty under the Specification thereof as was approved by the reviewing authority, but not guilty of Charge I and its specification. The court saw and heard both the accuser and the accused. It was in a position to observe and carefully study their manner and demeanor while testifying, their apparent candor or lack of candor, their apparent truthfulness or untruthfulness, as well as the substantial

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interest which both had in the determination of the cause. No cold typewritten record can reproduce these factors. For this reason the law has committed to the court and not to the board of review the responsibility of judging the credibility of witnesses and the determination of controverted questions of fact. Where there is sufficient evidence to make it improper for a court to grant a motion for a finding of not guilty at the close of the evidence on behalf of the prosecution, the weight of such evidence and the extent to which it is contradicted or explained by the testimony on behalf of the accused are questions exclusively for the general court martial and the reviewing authority as well as for the confirming authority in a case such as this. Findings of guilty in this respect are not reviewable by the board of review. All will agree that there is substantial evidence to support the findings of guilty. (CM CBI 10, Martin; CM CBI 109, Wright). The vital question in the determination of this cause is whether certain errors during the trial prejudiced the substantial rights of the accused.

41. Miss Anna Vanderhurst was a prosecution witness. Miss Jefferis was a guest in her apartment when in Delhi. She was the first person with whom the prosecuting witness talked after leaving accused following the affair on the Delhi-Muttra Road. After she had described the appearance at that time of Miss Jefferis, the trial judge advocate asked, "What did she tell you then?" Objection was sustained to this question on the ground that conversation outside the presence of the accused was hearsay and inadmissible. Miss Vanderhurst was then asked whether Miss Jefferis made any complaint at that time. The answer was "Yes". (R. 86) She was then asked what kind of a complaint it was and answered that the complaint was that Lieutenant Sarver had forced himself upon her. She was asked whether Miss Jefferis told her other details about it to which the witness answered, "She did." We do not believe that the scope of the examination in relation to the complaint or the answer of the witness exceeded the bounds set by the rules of evidence. Underhill's Criminal Evidence, 4th Ed., p. 1255 lays down the applicable rule as follows:

"The fact that the victim of a rape was weeping, or that she was excited and unnerved, or that she made immediate complaint, as well as when she made it and to whom, being material and relevant to show the commission of the crime, may be proved as original evidence on the direct examination of the prosecutrix as not violating the rule excluding hearsay evidence, or of any other witness. It may be shown that the complaint was made, where and to whom it was

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made, and that some person was accused who must not be named. But, in order for the complaint to others by the victim of rape to be admissible, it must concur with the indictment in unities of time, place, act and actor. The details of what the prosecutrix said, and particularly the name of the person she accuses of the crime can not be proved on the direct examination, unless the complaint is so closely connected with the time or place of the crime as to form a part of the res gestae."

The foregoing rule seems to have been extended; although but slightly, so as to permit mention of the name of the party complained against (CM 228891, Robnett, XVI BR 359,364). The testimony concerning the fact of prompt complaint by Miss Jefferis was proper and did not prejudice any substantial right of the accused.

42. Colonel Mitchell Jenkins, MA, was ordered to investigate the charges prior to reference for trial, in accordance with the provisions of AW 70. He was a witness for the prosecution. Over repeated objection of counsel for defense, the prosecution was permitted by a series of highly leading questions (R. 106-112) to elicit his testimony concerning specific questions put by him and accused's answers thereto, in the course of the investigation. On cross examination the law member refused to permit defense counsel to proceed in the manner which he had ruled to be proper as to the trial judge advocate (R. 112-113). The defense was entitled to show any and every answer made by the accused during his interrogation by the investigating officer, which would tend to explain, qualify or modify the effect of the questions and answers brought out by the prosecution. In 20 Am. Jur. 464, the rule is stated:

"It is an elementary rule of law that when admissions of one on trial for the commission of a criminal offense are allowed in evidence against him, all that he said in that connection must also be permitted to go to the jury, either through cross-examination of the witness who testified to the admissions or through witnesses produced by the accused. Moreover, the fact that declarations made by the accused were self-serving does not preclude their introduction in evidence as a part of his whole statement, if they are relevant to statements introduced by the state and were made on the same occasion as the statements introduced by the state. There are decisions to the effect that error in refusing to permit a defendant in a criminal case to cross-examine a witness for the prosecution, who has testified on direct examination to an admission by the defendant, to bring out the entire conversation in which the admission

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was made, including parts favorable to the accused is cured by the testimony of the defendant in his own behalf in which the remainder of the conversation is given, but there is authority to the contrary. Moreover, the truth of exculpatory matter in an admission of one accused of crime, which is introduced in evidence by the state, must be presumed unless its falsity is shown."

Although the ruling of the law member was erroneous, it does not appear that it could have injured the accused. He testified fully, freely and in great detail. He was not denied the opportunity of presenting his version of the affair. In the course of his testimony, he explained and limited the admissions made in answer to the questions of the investigating officer. His testimony was just as effective, as his self-serving statements in the course of such investigation, some of which were actually testified to by Colonel Jenkins (R. 112). The trial judge advocate sought to offer in evidence the complete transcript of the questions put by Colonel Jenkins and the answers made thereto by the accused, but defense refused to accept his proposition to that effect (R.108). Such proposal was renewed, but it was not accepted (R. 113). There was nothing to prevent the defense from offering the complete transcript of such examination. No such offer was made. We do not see how the improper ruling in question could have affected the outcome of the case.

43. We are unable to understand upon what theory defense counsel vigorously asserted at the trial his supposed right to cross examine the prosecuting witness concerning her opinion prior to 24 June 1944 as to whether or not it was physically impossible for a man to have sexual intercourse with a woman against her will (R. 77-78). We have sought diligently and have been unable to find any precedents which would warrant cross examination concerning the former belief of the prosecutrix on this point. In our opinion the ruling of the law member was correct.

44. During the cross examination of accused, the trial judge advocate questioned him in an effort to show that on a previous occasion he had been punished by his commanding officer under Article of War 104. In answering one of these questions, to which there was no objection, the accused said:

"Under Article 104 I was supposed to be punished, but Colonel Renshaw withdrew all the charges of all the officers, the three of us, and we were not punished".

Accused was then asked if it was for making a false statement, but the question was not answered. When this subject was pursued further by the trial judge advocate in an effort to ascertain the nature of the charge, the defense

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objected (R. 233). An argument between the trial judge advocate and the defense counsel followed at the end of which colloquy the court was closed and when it re-opened the law member stated:

"The objection of counsel for the defense is sustained. The court is instructed to disregard all testimony and statements by the Trial Judge Advocate relating to any offense alleged to have been committed by the accused prior to the case on hearing, and the same will be stricken from the record. You may proceed" (R. 234).

Further argument ensued concerning the same subject and at the end of this argument the law member instructed the court as follows:

"The remarks will be stricken from the record and the court is instructed to disregard the remarks that were made. You may proceed" (R. 235).

A ruling should have been promptly made excluding the questions and answers relating to any punishment accused may have undergone under AW 104 but in our opinion no substantial right of accused was adversely affected by the argument in view of the instructions of the law member to the court. The law applicable to the question here presented is clearly stated in 24 C.J.S. page 938, par. 1914, where it is said:

"While error in asking or allowing the asking of questions which are improper on cross-examination is in many instances prejudicial and reversible error, particularly where the evidence is fairly evenly balanced, such error is not a ground for reversal where the rights of accused are not substantially prejudiced thereby.

Thus, such error, except where it is extremely prejudicial, is not a ground for reversal where it was corrected by prompt and adequate instructions to the jury, such as instructions to disregard the improper questions; nor, except where the question is extremely prejudicial, is such error harmful where the question was not answered, an objection thereto having been sustained, particularly where the court promptly instructed the jury to disregard the question or to draw any inference from it, or charged that the jury were to be governed solely by the evidence admitted; * * * "

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If instructions to disregard an improper question are sufficient to eliminate the effect on the minds of a jury, surely it could have no less effect on a court composed of men of such high character and intelligence as the members of this court. After a thorough examination of this record and careful consideration of all of its contents, we feel that the scales of justice could not here have been inclined against accused by the erroneous offer of proof. We therefore hold that the substantial rights of the accused were not substantially prejudiced.

45. It was strenuously urged by the defense counsel in support of his motion for findings of not guilty under Charge I and its Specification, and in his final argument, that Miss Jefferis voluntarily submitted to the advances of the accused, however rude and unseemly such advances were and however great the psychological pressure upon the prosecutrix. It was contended that she did not resist to the utmost, and that in the end she consented to the congress. This contention was based in part on the fact that no marks of a physical struggle were apparent upon the body of accused, when he was examined by the medical officers on 26 June (R. 168, 173, 174). While it may seem unusual that no scratches, abrasions or marks of any kind were found upon the body of the accused at the time of such examination, nevertheless such fact does not appear to us to be necessarily inconsistent with Miss Jefferis' version of what took place. She swore that she slapped him, that she attempted to put her hands around his neck to choke him, that she kicked and that she struggled. Much was made by counsel at the trial and subsequently by the judge advocate, Air Transport Command, India China Division (who disqualified himself as staff judge advocate in this case and submitted a memorandum opinion in support of a plea for clemency which is attached to the record) of the following cryptic answer of Miss Jefferis to a remarkable question by defense counsel during cross examination:

- "Q. It is a fact then, is it Miss Jefferis, that there came a time when your mind said 'No' but your body said 'Yes'?
- A. My body did not say 'Yes' willingly. It was forced on me."

We consider it strange that able defense counsel did not follow up these answers with more specific questions. It is even stranger that the trial judge advocate did not seek by appropriate questions to clear this feature up on redirect examination. It may be, however, that both the trial judge advocate and the defense counsel regarded as unnecessary a repetition of the evidence of the overpowering force employed and fear engendered by the brutal con-

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duct of accused from which her evidence shows she was powerless to extricate herself.

46. A frequent recurrence to fundamental principles is conducive to the proper administration of military justice. Rape was a felony at common law, and consisted in unlawful carnal knowledge of a woman by force and without her consent (CM CBI 245 Francis et al.). Naturally, the force and violence necessary in rape is relative. The age, size and strength of the parties are factors to be considered. Enough force to overcome a woman's resistance is indispensable to proof of this crime. Such force subjects the unwilling victim to the power of the assailant so that in spite of her objections, he has sexual intercourse with her. It is not necessary that the rapist beat her into insensibility or that the force be such as to create apprehension of death or great bodily harm. It is enough if the act be accomplished with sufficient force so as to be against the woman's consent. When a woman does not consent the law implies force, and it has been held that the mere force of penetration is sufficient, where there can be no effective resistance because of incapacity to make such resistance (52 C.J. 1018-1019). The prosecuting witness in this case was 5 feet, 4 inches in height. She weighed about 124 pounds. The height and weight of the accused are not stated in the record, but the court saw both him and her and was in a position to judge whether her relative size and strength was such as to have enabled her to have made more effective resistance at the lonely spot on a mere trail or track in the middle of a maidan or plain, to which she had been taken by accused over her protests. The evidence is such that the court reasonably could have inferred that the prosecutrix resisted until further resistance was useless, considering the place, the time and the other circumstances shown by her testimony. Yielding to overpowering force is not consent; it is submission (CM 236612, Tyree, XXIII BR 67, 71; CM 236801 Smith et al., XXIII BR 129, 132). One of the greatest of British Judges long ago wrote:

"It must be remembered, that it (rape) is an accusation easy to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent;"
(I Hale, PC 635)

Sir Matthew Hale further remarked in the light of his experience that a court should:

"be the most cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge

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and the jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and false witnesses." (1 Hale P.C. 636)

Testing the evidence in this record with conscientious regard for the above legal maxims, we are unable to escape the conclusion that the court was thoroughly justified in believing from the evidence that the accused committed the offense charged in the specification of Charge I, and that the court was thoroughly warranted in concluding that every element of the offense of rape was established.

47. Every member of the court concurred in the findings of guilty and in the sentence (R. 261). While under the established procedure it has been required merely that the record show the concurrence only of two-thirds of the members of the court in the findings of guilty, and of three-fourths of the members of the court in a sentence such as that here adjudged, the record in these respects properly conforms to recent War Department directives, published after the recent holding in a habeas corpus proceeding of a federal district court that the conviction of an offense for which the death penalty might be imposed must be by unanimous vote, regardless of the nature of the penalty actually imposed by the sentence of the court.

48. The court was legally constituted. The sentence which it adjudged was authorized by law. The court had jurisdiction of the subject matter of the offenses charged and of the person of the accused. No errors injuriously affecting the substantial rights of the accused intervened upon the trial. An appropriate place of confinement, however, should be designated by the confirming authority. 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 as modified and confirmed.

John G. O'Brien, Judge Advocate
John G. O'Brien

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

(dissenting)
Robert C. van Ness, Judge Advocate
Robert C. van Ness

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APO 885
5 December 1944

Subject: Board of Review holding in the case of First Lieutenant Clyde C. Sarver, O-793540, 1307th AAF Base Unit, India-China Division, ATC.

To : Assistant Judge Advocate General, USF, IBT, APO 885, U. S. Army.

1. As to the Specification of Charge II and Charge II, I concur with the result reached by the senior members of the Board of Review but I cannot agree with them on their conclusions as to the Specification of Charge I and Charge I and therefore file this dissenting opinion. The purpose of this opinion is not to again summarize the facts. This has been ably done in the opinion of the majority of the Board of Review. Rape is most reprehensible and as stated in the majority opinion is an accusation easy to be made and hard to be proved and harder to be defended by the party accused, however so innocent. It must not be forgotten that no matter how censorable, reprehensible or outrageous the conduct of accused may be to the sensible and ordinary mind, yet if the intercourse in fact is with consent, it matters not if the woman sought with might and main to protect her virtue, if at the last she finally consented, as distinguished from submitting because of the uselessness of continuing the struggle, then the offense has not been made out. As stated by the Supreme Court of the United States in Mills v. United States, 41 Law. Ed. 584:

"The crime itself is one of the most detestible and abominable that can be committed, yet a charge of that nature is also one which all judges have recognized as easy to be made and hard to be defended against; and it has been said that very great caution is requisite upon all trials for this crime, in order that the natural indignation of men which is aroused against the perpetrator of such an outrage upon a defenseless woman may not be misdirected, and the mere charge taken for proper proof of the crime on the part of the person on trial".

2. The case as made out by the testimony of Miss Jefferis alone is such that it would warrant the conclusion of the court that she was the victim of rape. The Board of Review cannot, of course, weigh evidence. That is the function of the court-martial, the reviewing authority, and, as in this case, the confirming authority. We are limited to a determination of whether there is

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sufficient evidence to support the findings of the court and if so whether any errors exist that prejudice the substantial rights of accused.

3. Accused admits having intercourse with Miss Jefferis but contends that it was with her consent and aid. She, on the other hand, claims she was raped by force and violence and against her will. It is necessary to summarize briefly some vital important facts as disclosed by the testimony of Miss Jefferis. She was terrified (R. 27), very frightened (R. 73), asked him to stop (R. 27), screamed (R. 72), continued to struggle and got her hands around his neck (R. 27), she tried to strangle him (R. 27), but did not squeeze as hard as she could and she could have squeezed harder (R. 68). She kicked his shins as hard as she could (R. 69). He pinned her hands above her head (R. 27), released them and she pushed on his shoulders to push him away (R. 28). There had been no penetration yet (R. 75) and he did not hold her hands over her head all of the time of the congress (R. 72). The lower part of the back of accused was beneath her knees (R. 28). There then came a time when her body said "Yes" but her mind said "No". Her body did not say "Yes" willingly. It was forced on her and she gave in and ceased to struggle. She never willingly gave in and by that meant she never consented in her mind (R. 77). From the foregoing, there is evidence that she did struggle valiantly for a while to protect her virtue but it also appears perhaps she did not use all the force and means at her disposal and command. This especially gains credence from the lack of any marks upon accused when examined the next day. It is not exactly clear as to her meaning when she testified that her body said "Yes" but her mind said "No" nor is it clear as to her exact meaning when she stated that her body did not say "Yes" willingly, but that it was forced on her, and that when she gave in there was no consent in her mind. To me it is inconceivable that any person as terrified and in as great pain as Miss Jefferis testified she was, could come to a state where her body would say yes. With this in mind I am of the opinion that the foregoing language is certainly susceptible, and reasonably so, of the meaning that though she knew from her training and rearing that intercourse was wrong outside the marital state and that therefore her mind never actually consented, nevertheless, at the same time, her passion became aroused by the attentions of the accused forced upon her against her will and she came to such a state of sexual emotion and excitement that her body said yes, that is, consented, and that controlled by passion which overthrew her reason, it was then that she gave in, ceased to struggle and engaged in the act of coition.

4. In the last analysis the determination as to this was a matter for the court-martial and not for us. However, accused,

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in all fairness, was entitled to have the facts presented to the court-martial in such a manner that the court's deliberations would be uninfluenced and not beclouded by any other evidence that would increase the natural indignation created by the naked charge itself. He, too, should be permitted every opportunity within the law to complete his defense and cross examine in a proper manner, any witness that may appear against him. If as it is contended, Miss Jefferis was raped by force and violence, the evidence is sharply in conflict on this point, since the accused had testified that the intercourse was with her consent and assistance. Under such conditions, if there are any errors they must be closely scrutinized, and if it be found that they substantially prejudice the accused the record must be held legally insufficient.

5. Colonel Jenkins, investigating officer, was called and testified for the prosecution. Over objection of defense counsel he was permitted to testify as to particular parts of the testimony given by accused at the investigation had pursuant to AW 70. Upon cross examination, defense attempted to ask the witness concerning other portions of the same testimony. The trial judge advocate objected stating that the matter about which the defense was questioning consisted of self-serving declarations. The court sustained this objection. 16 C.J. page 571 states as follows:

"It is well settled that, where either the state or accused introduces part of a conversation, transaction, or writing, the opposing party is entitled to introduce other parts or the whole of the conversation, transaction, or writing; * * * Limitations to the rule are that the evidence offered must relate to the same subject matter, and must explain and be necessary to a full understanding of that already introduced".

At page 634 it is further stated:

"While evidence of an admission, if complete, is not to be excluded because the witness called to prove it did not hear or understand the whole conversation, and the state is not required to prove the entire conversation or writing in which the admission was made, yet where the writing or conversation is an entire and connected one relating to the same subject matter, the whole of it is admissible, and where the state has proved part, accused is entitled to prove the remainder, even though it is in his favor, as where it comprehends his explanatory, exculpatory, or self-serving declarations; * * *".

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At page 636;

"The self-serving acts and declarations of accused are not admissible in his behalf, unless they are part of the res gestae, or unless they were done or made in a transaction or conversation part of which already has been introduced in evidence by the state".

20 Am. Jur. page 464 states:

"It is an elementary rule of law that when admissions of one on trial for the commission of a criminal offense are allowed in evidence against him, all that he said in that connection must also be permitted to go to the jury, either through cross-examination of the witness who testified to the admissions or through witnesses produced by the accused. Moreover, the fact that declarations made by the accused were self-serving does not preclude their introduction in evidence as a part of his whole statement, if they are relevant to statements introduced by the state and were made on the same occasion as the statements introduced by the state. There are decisions to the effect that error in refusing to permit a defendant in a criminal case to cross-examine a witness for the prosecution, who has testified on direct examination to an admission by the defendant, to bring out the entire conversation in which the admission was made, including parts favorable to the accused, is cured by the testimony of the defendant in his own behalf in which the remainder of the conversation is given, but there is authority to the contrary."

6. I am of the opinion that the proper manner of proof would have been to introduce the whole statement, but the court in its discretion having permitted the prosecution to take parts of such statement should have granted the same privilege to the defense upon cross examination of the witness. Sustaining the prosecution's objection was error as it prevented the accused from presenting explanatory matter concerning things gone into by the trial judge advocate, nor was such error cured by the testimony of the accused as he did not testify as to the remainder of that statement.

7. Upon the objection of the defense when the prosecution queried in regard to part of the testimony, the trial judge advocate stated:

"If counsel has no objection, we are willing to put all of Lieutenant Sarver's testimony into the record, if

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that is what he wants. We are merely pointing out what we consider are admissions against interest, but if counsel would prefer that we put in all of Lieutenant Sarver's testimony as given before Colonel Jenkins, it is perfectly agreeable to the prosecution".

Defense counsel answered:

"* * * Of course, I cannot on Lieutenant Sarver's behalf, accept any such proposition as that. My point at this stage of the game is that counsel is asking him about a specific line of questioning, as to whether Lieutenant Sarver instructed Lieutenant Bryan to take her name off the manifest. He asked two questions about it and then he skipped two questions and went down to another one. My point is that if he is going to be permitted to ask these questions, to which I again object, I think that he should pursue it one question after another in the same manner it was pursued before the Investigating Officer".

When the defense attempted to ask Colonel Jenkins questions in the same manner as permitted by the prosecution, the prosecution objected stating:

"We object to these self serving declarations. Counsel has put in one prior to this. Apparently he is going into self serving declarations, and they are improper on the part of the defense. It is new matter and entirely self serving declarations of the accused".

Further argument ensued and prior to sustaining prosecution's objection, the prosecution further stated:

"I might say on the part of the prosecution, we have offered and are perfectly willing to put in all of the record of Lieutenant Sarver's testimony. We have no objection whatever to putting it all in, but we do not believe that particular self serving declarations of the accused may be put in to strengthen any case he may have. We think it is improper at this time. I am willing, however, to put all of the testimony in, if counsel has no objection".

This was not a formal offer of all of the testimony of Lieutenant Sarver before the investigating officer. A formal offer, if accepted by the court over any objection that might have been made may have cured the error, but in the absence of this the ruling of the court was clearly erroneous.

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There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that commission of such an error against a party seeking to review it is not cause for the reversal of the judgment. (Crawford v. U.S. 53 Law. Ed. 465)

8. Over the objection of the defense the court admitted in evidence a written report of Captain St. Johnston, a British medical officer, which was made to His Excellency the C in C. This was clearly incompetent as it was an attempt to bolster the direct testimony of the witness and also includes clearly hearsay testimony. This was error and perhaps not in itself substantially prejudicial but considered with other errors in the record it is a factor which when considering the record as a whole tends to prejudice his substantial rights.

9. The most serious error occurred when the trial judge advocate was questioning accused about prior punishment under AW 104, and in order that this error may clearly appear, it is deemed necessary to quote at length from the record in regard to this proceeding.

- "Q. Lieutenant, have you ever been punished for any violation, any military offense, before?
A. No, sir. I have never been punished.
Q. Have you ever received disciplinary action, a reprimand or fine?
A. Under Article 104 I was supposed to be punished, but Colonel Renshaw withdrew all the charges of all the officers, the three of us, and we were not punished.
Q. Do you recall what the charges were?
A. Yes, sir.
Q. Was it for making a false statement?

Defense: That is objected to as immaterial, irrelevant, improper in form and no proper foundation laid.

Prosecution: If the court please, we are certainly entitled to know, by way of cross-examination in the nature of testing the credibility of this witness, as to whether he is telling the truth now or not as to whether he has ever been punished.

Law Member: Objection overruled.

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Prosecution: Or received a reprimand or fine.

Law Member: Objection overruled.

Defense: I call the attention of the court to the point that that was not the question.

Prosecution: Read the question, please, Mr. Reporter.
(Question read)

Law Member: Objection sustained as to the form of the question. Will you rephrase your question.

Prosecution: Yes.

Q. (By prosecution) Do you recall receiving a letter from Colonel Renshaw setting out the nature of any offense by you?

Defense: That is objected to as immaterial, irrelevant, highly prejudicial and improper in every manner.

Prosecution: We still maintain, sir, that we are entitled to know. He says he was charged and they were withdrawn. We are entitled to know the circumstances in order to test his credibility as a witness here.

Law Member: Objection overruled. You may proceed.

Prosecution: Will you read the question, please.

Q. (Read by the reporter).

A. Yes, sir. I received a letter.

Defense: I move to strike out the answer as immaterial in this proceeding, not properly proved and no foundation laid.

Law Member: Objection sustained as to the form of the question, and the answer will be stricken. The question as propounded does not state that it was an alleged offense. In view of the statement of the witness that he was not punished, therefore the offense must be an alleged offense.

Defense: Now I ask that the court be instructed to disregard all this line of questioning on the ground that it is improper, immaterial, irrelevant and highly prejudicial.

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I feel, and I must state on the record, that the introduction of this line of questioning carrying the innuendos which it does, cannot very well be cured by such a direction, but I still ask that the court be directed to disregard all of the remarks of counsel and all of the questions and all of the answers on this line of questioning up to this point.

President: The court will be cleared and closed.

(The court was then closed, and upon reopening, the trial proceeded as follows:)

President: The court will come to order.

Prosecution: Let the record show, please, that all of the members of the court who were previously present are now present; that the accused is present together with his counsel; and that the members of the prosecution and the court reporter are also present.

Law Member: The objection of counsel for the defense is sustained. The court is instructed to disregard all testimony and statements by the Trial Judge Advocate relating to any offense alleged to have been committed by the accused prior to the case on hearing, and the same will be stricken from the record. You may proceed.

Prosecution: I do not want to misunderstand the ruling of the Law Member, but I would like to put this question to the witness:

Q. (By prosecution) Do you state now that you have never received a reprimand or that any disciplinary action has been taken against you under Article of War 104?

Defense: That question is objected to as improper in form, immaterial and irrelevant, and I press my objection to this line of questioning as being highly prejudicial and improper in this proceeding.

Prosecution: We submit, if the court please, that this is proper cross-examination to test the credibility of this witness.

Law Member: Will the reporter please read the last question. (Question read) Objection sustained.

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Prosecution: May I ask the Law Member a question off the record, or would you rather it be on the record?

Defense: Yes.

Prosecution: Let us keep it on the record, then. Do I understand the Law Member to be holding that we--

Defense: Just a minute. May it appear that this question is being asked in the presence of the full court.

Law Member: I think a question of that nature at this time is a little improper in view of the ruling of the Law Member.

Prosecution: Will the reporter please read the objection of the defense counsel and the ruling of the Law Member. (Record read) Now, if the court please, since there were a number of reasons for the objection of the defense counsel, may I ask the Law Member on what basis that question is excluded?

Law Member: First let me state, for the sake of the record, that if you care to dispute the reason of the Law Member, the court will entertain a motion for a different ruling by the court provided it is presented in proper form. The reason the Law Member rules that no previous evidence of convictions either by court-martial or any administrative or disciplinary action under Article of War 104 is proper at this time, is that it might or might not prejudice the court in their determination of whether the accused is guilty or innocent of the offense alleged upon which he is now being tried. There is a proper time in military court for the admission of any evidence of previous convictions. The Law Member sustains the objection for that reason. In lieu of any law which you might have to the contrary, the ruling of the Law Member stands.

Prosecution: I would like to make this statement to the court, that it is my understanding of the law that we cannot introduce, at the time we submit other evidence of previous convictions, any disciplinary action under Article of War 104. We cannot show the court any previous convictions that have taken place prior to one year before the present offense upon which an accused is being tried. But this is an entirely different situation. We submit that this is on cross-examination of an accused

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and that the Court-Martial Manual in substance states that very wide latitude will be given in cross-examination of any witness and particularly an accused. It is for the purpose of testing the credibility of this witness, not for the purpose of showing any previous convictions or administrative action or reprimand; it is simply for the purpose of testing the credibility of this witness that these questions are being put to him.

Defense: I object to the remarks of counsel and consider that they are only cumulative, only have a cumulative effect in endeavoring to impress upon this court that the accused stands on some record, somewhere, convicted of a violation of Article of War 104. I consider that the remarks are improper, and should not be permitted to stand in this record. I ask that they be stricken from the record and that the court be directed to disregard them.

Law Member: The objection of counsel for the defense is sustained. The remarks will be stricken from the record and the court is instructed to disregard the remarks that were made. You may proceed."

10. 17 C.J. page 304 states:

"So, where defendant is asked if he has not committed another offense against a person named and denies it, and this person is called and questioned as to the matter to impeach defendant, and the admissibility of his testimony is argued in the presence of the jury, defendant is prejudiced even though the testimony of such person is excluded. The improper impeachment of a material witness for defendant will in general be ground for reversal, especially where the evidence is conflicting on the matters testified to by the witness whom it is sought to impeach".

The argument had before the court martial on the admission of prior punishment under AW 104 had all of the effect obtainable from open contradiction and impeachment and it is certain in this case that the offer of proof was as prejudicial as the evidence would have been if the court had permitted the trial judge advocate to show such punishment. Even though in the final analysis the law member ruled correctly and instructed the court to disregard this matter, it has, in my opinion, created prejudice in the minds of the court and even though they were instructed to disregard it, such prejudice is not necessarily removed thereby.

11. 17 C.J. page 309 states:

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"When an incompetent question is asked and the court sustains an objection to it, and it is not answered, there is no cause for reversal except perhaps in cases where the question is of an extremely prejudicial character, or where the prosecuting officer persists in asking the question".

This is what occurred in this case.

12. On the question of whether error will be presumed prejudicial, the general rule seems to be that if the record shows error it will be presumed that prejudice resulted to defendant unless it affirmatively appears from the record that no prejudice could have resulted. Nevertheless the presumption of error may be rebutted by proof to the contrary appearing on the record, and that judgment will not be reversed if the record as a whole overcomes the presumption of prejudice established by the commission of error and shows affirmatively that no substantial rights of appellant have been injuriously affected. Erroneous admission of evidence if it may operate to the prejudice of defendant necessitates a reversal of the conviction. The fact that evidence other than that which was improperly admitted is sufficient to justify a conviction does not make the admission of the incompetent evidence harmless since it cannot be said what weight the court gave to the evidence in reaching its verdict. The reviewing court will reverse a conviction where it cannot be determined from the record that the evidence erroneously admitted was not prejudicial to defendant or that it did not affect the verdict rendered. (See 17 C.J. p. 319)

13. The improper attempt to show punishment under AW 104 could not have had other than the same effect as if such evidence had been admitted. As stated in 17 C.J. p. 326:

"Nevertheless, striking out or withdrawing evidence does not in all cases cure the error. It frequently occurs that evidence of an important character is so strongly calculated to impress itself on the minds of the jury to the prejudice of defendant that a subsequent withdrawal will not remove the impression caused by its admission, and in this event the conviction must be reversed".

And at page 327:

"However, instances may arise where evidence is so material and highly prejudicial that no instruction which the court may give will cure the error of its admission,

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and it has frequently been so held. And it has been held that the admission of illegal evidence, if objected to, although under an offer to connect it with other proof that would render it competent, and although charged out of the case by the court, is a cause for setting aside a verdict, unless the court is able to say affirmatively that it worked no injury to the adverse party".

At 329 it is further stated:

"It has been held that notwithstanding the incompetent evidence is withdrawn or stricken out and the jury instructed to disregard it, a conviction will be set aside where the court believes that the conviction may have been founded on the incompetent evidence, or is unable to say that the evidence might not have affected the result, or where incompetent evidence of great importance is introduced deliberately and not through any inadvertence on the part of the court or counsel".

14. It is said that the credibility of the testimony of accused has been severely shaken by the testimony of Captain Lawler in regard to statements made to him when Captain Lawler was investigating the next morning. This statement was not under oath and was taken under conditions where it is the natural tendency of human nature to attempt to exculpate themselves from any charge that has been made against them. Even though this statement was not under oath and he later admitted that he had falsified to Captain Lawler, such falsity is sufficient grounds to warrant the court in branding accused as one who would not hesitate to fabricate if he thought such lie would be to his benefit. On the other hand, they may not have given this too serious consideration and lent some credence to his testimony upon the stand, if their minds had not been clouded and prejudiced by the attempt to introduce evidence of prior punishment under AW 104 for falsifying an official statement. What the court may or may not have done is conjectural at this stage, but accused was certainly entitled to be protected from the possible effect of the illegal attempt at impeachment. Such evidence was of a most damning character and should not have been before the court. Especially is this true where there are inconsistencies and variances between the testimony of Miss Jefferis at the trial and before the investigating officer. Several of such statements contradict each other and would warrant the court in some manner to question her veracity.

15. To discredit the testimony of accused by improperly attempting to show punishment under AW 104 for having previously

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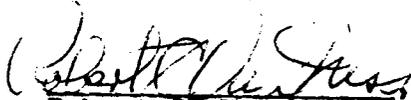
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made a false official statement it could only be natural for the court to believe that accused was falsely testifying when it had been impressed upon their minds that he had previously been punished under AW 104 for making a false statement. The charge is a serious one and the conduct of accused was of such a reprehensible nature as to naturally incense the mind of any ordinary reasonable person. Under such circumstances great care must be taken to protect the rights of accused and to prevent any matter from appearing such as may warp or misdirect the minds of the court in their deliberation. There is grave possibility that the minds of the court may have been misdirected. Was the illegal evidence which was offered by the prosecution of such a character as would ordinarily prejudice the minds of the court against accused? Would it reasonably make a fixed impression on the minds of the court and influence their findings? I am unable to say that it did not affect the findings or that the findings would not probably have been different in any event.

16. The rule, of course, is that in some instances there may be such a strong impression made by improper testimony that its subsequent withdrawal will not remove the effect, but such instances are exceptional and the case will not be suspended and retrial had when an error in the admission of testimony can be corrected by its withdrawal with proper instructions from the court to disregard it (CM 203718) Dig. Op. JAG 1912-40, Sec 395 (7). In a case such as this where the very nature of the offense is of such nature as in itself to arouse the minds of honorable men, it is especially important that the record of trial be free from error which could be reasonably said to have been such as to have even possibly prejudiced the accused in the eyes of the court. The trial must be untainted by irregularities of such a nature as could arouse the minds and consciences of the members of the court against the accused. Absolute absence of possibility of prejudice is essential to the fairness of a trial upon a charge such as this. In the last analysis, the great question for the court was whether the accused or the prosecutrix told the truth. This is a question which no human being except the two parties present at the scene of the affair can ever answer with absolute certainty. It was of the utmost importance that the scales of justice remained evenly balanced and not tilted against accused, however slightly, by any prejudicial error whatever. The majority of the Board concedes that this record is not free from error. They hold, however, that what they concede to be erroneous could not possibly have tipped the scales against the accused, and could not possibly have caused his testimony to be given less weight than would have been the case had the admitted errors not intervened. With all due deference to them and to the long and

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thorough study which they have made of this record, I am most reluctantly constrained to disagree. I cannot agree that this accused has had that fair and unimpeached trial implied within the definition of "due process", which the Articles of War provide as an absolute right and not as a mere privilege, for the most junior as well as the most senior member of the military service. My conception of military justice requires me most respectfully, although most unyieldingly, to assert that the palpable errors appearing upon the face of this record are such as to render the record legally insufficient to support the findings of guilty of Charge I and its Specification, and so much of the sentence imposed, as modified by the reviewing and confirming authorities, as involves total forfeitures and confinement at hard labor for seven years. In view of the testimony of the accused, which substantially amounted to a judicial confession of guilt of the vital elements alleged under Charge II and its Specification, it is equally clear that the errors did not prejudice him in respect to the issues presented by such charge and specification. I therefore hold the record to be legally sufficient only to support the findings of guilty under Charge II and its Specification and to support so much only of the sentence imposed as relates to dismissal from the service.


Judge Advocate
Robert C. Van Ness

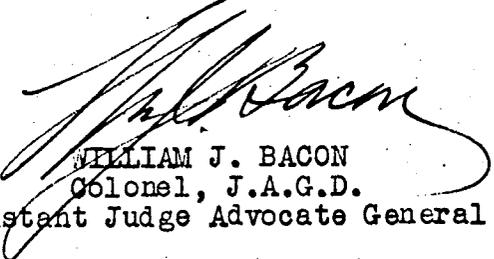
CM IBT # 287 (Sarver, Clyde C.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USF, IBT,
APO 885, New York, N. Y., 22 December 1944.

To: The Commanding General, USF, IBT, APO 885, U. S. Army.

1. In the case of First Lieutenant Clyde C. Sarver, 0793540, AC, 1307th AAF Base Unit, India-China Division, ATC, 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. There is also forwarded herewith the dissenting opinion by one member of the Board of Review. 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 IBT 287).


WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence as modified ordered executed. GCMO 8, IBT, 22 Dec 1944)

276446

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
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APO 885,
12 November 1944.

Board of Review,
CM CBI # 293

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

v.

Private Floyd W. Dixon,
37346926, Company C,
726th Railway Operating
Battalion.

) SERVICES OF SUPPLY, USAF, CBI.

) Trial on 9 August 1944 by GCM con-
) vened at APO 495 c/o Postmaster,
) New York, N.Y. Confinement at hard
) labor for 4 months and forfeiture
) of \$40.00 of his pay per month for
) 6 months. The stockade at Inter-
) mediate Section 2, SOS, USAF, in
) CBI, Hazelbank, Assam, India.

OPINION 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 reviewed by the Board of Review which submits this, its opinion, to the Acting Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office.

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private First Class Floyd W. Dixon, Company C, 726th Railway Operating Battalion, did, at Chaparmukh Junction, Assam, India, on or about 17 April 1944, feloniously take, steal, and carry away, one box containing 24 pair of U. S. Army Officer's dark green trousers of a value of \$288.00, property of, the United States intended for the Military Service thereof.

3. Accused pleaded not guilty to the charge and its specification. The court found him, as to the specification, "guilty, except the words, 24 pair and \$288.00, and substituting therefor, approximately 15 pair and approximately \$180.00; of the excepted words not guilty, of the substituted words guilty," and found him guilty of the Charge. Accused was sentenced to dishonorable discharge, total forfeitures, and to confinement at

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hard labor for 1-1/2 years. The reviewing authority approved the sentence but remitted that portion thereof which adjudged dishonorable discharge, confinement at hard labor in excess of 4 months and forfeiture of pay in excess of \$40.00 per month for a period of 6 months, and ordered the execution of the sentence as thus modified. The stockade at intermediate Section 2, SOS, USAF, in CBI, Hazelbank, Assam, India was designated as the place of confinement.

4. Pursuant to par. 5, AW 50-1/2, the record of trial was examined in the Military Justice Division of this Judge Advocate General's Branch Office, which division found it to be not legally sufficient to support the findings and sentence. The Acting Assistant Judge Advocate General in charge of this Branch Office has referred the record of trial to the Board of Review for its opinion in accordance with AW 50-1/2.

5. The evidence discloses that on 17 April 1944 at Chaparmukh Junction, Assam, India, the accused and several other soldiers entered a freight car. They were looking for typewriters (R. 5, 9). The car was in an up-goods train, which had been stopped on a siding in the yards before being operated to the next diversion point (R. 9, 13). While in the car, accused saw a box and a packing list which read, "Officer's Trousers" which was consigned to Ledo (Pros. Ex. A). Saying, "This is a good box", accused placed it on the shoulders of Pvt. Hollis (R. 10, Pros. Ex. A). Hollis and accused carried the box to the accused's basha (R. 8, 11). There accused opened the box. In it were approximately 15 pairs of green officers' trousers (Pros. Ex. A) which were worth about \$12.00 per pair (R. 16). The accused distributed the trousers among his fellow soldiers, and retained one pair for himself. When he heard that an investigation was under way, he gave the pair which he had retained to an Indian boy and his bearer threw the empty box into a nearby river (Pros. Ex. A). There is no evidence as to the name of the consignee of the box.

6. From the foregoing summation of the evidence, it must be apparent to all that the proof is fatally defective in an essential particular, since there is no evidence whatever that the box of trousers was "property of the United States, and intended for the military service thereof", as alleged in the specification of the charge. Ownership must be alleged in a specification charging larceny, and ownership must be proven in conformity with the allegation of the specification. (MCM 1923, pars. 149g, 149h, pp. 171-3). Where as here, the specification is laid under AW 94, it is essential both to charge and to prove

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that the property belonged to the United States and that it was furnished and intended for the military service thereof (MCM 1928, par. 150h, p. 185). It has been held on numerous occasions by the Judge Advocate General, and by the Boards of Review constituted in the Judge Advocate General's office, that ownership, or such right of possession or interest as amounts as against the thief to ownership, is an essential element, which must be charged and must be proved as charged, in larceny cases (CM 192-952, par. 452 (13), CM 133625, par. 452 (15) and CM 210763, par. 452 (22), Dig. Op. JAG 1912-40). It could not well be held otherwise, since the courts of last resort in all of the 48 states consistently hold that to sustain a conviction for larceny, it must be proven that the thing taken was the property of the person charged in the indictment to have been the owner (36 C.J. 859). The Federal Courts likewise are firmly committed to this well-established common law principle (Thompson v. United States, 256 Fed. 616). The trousers might have been the property of the United States or the property of the Army Exchange Service, an instrumentality of the United States. Had the goods been the property of the Army Exchange Service, they would not have been "furnished and intended for the military service". The box, for all that appears to the contrary, may have been consigned to a British firm in Ledo. In the absence of evidence, a conviction cannot be sustained by probabilities, conjecture, or speculation. Proof is necessary, and it is here wanting, as to ownership.

7. We have considered whether, since the Army has taken over the operation of a portion of the Bengal & Assam Railway, it could reasonably be inferred from the evidence that the taking was from a car on the section of the Bengal & Assam Railway which is operated by the United States, and hence constructively from the possession of the United States. No such inference seems possible here. The weakness in such syllogism is that there is no evidence in the record that the up-goods train was in fact operated by the United States or that the taking was on that comparatively small fragment of the Bengal & Assam Railway which is operated by the United States. We cannot indulge in speculation and assume that the taking was from a train operated by the Army, or even from a train operated by the Bengal & Assam Railway personnel on a part of the line now under the control of the Army. The accused was presumed to be innocent as to each element of the charge, until the contrary was proven.

8. This Board of Review may not weigh evidence, and it is limited to a determination whether there is any substantial evidence in the record to prove each material allegation of the

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specification. Since there is no evidence whatever, tending to prove the essential allegation of the specification that the goods taken were the property of the United States and intended for the military service thereof, the Board of Review is necessarily impelled to the opinion that the record of trial in this case is legally insufficient to support the findings and 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

CM IBT # 293 (Dixon, Floyd W.) 1st Ind.

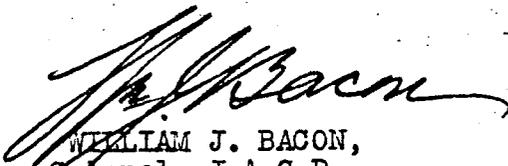
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, India Burma Theater, APO 885, New York, N.Y., 23 November 1944.

TO: The Commanding General, USF, India Burma Theater, APO 885, U. S. Army.

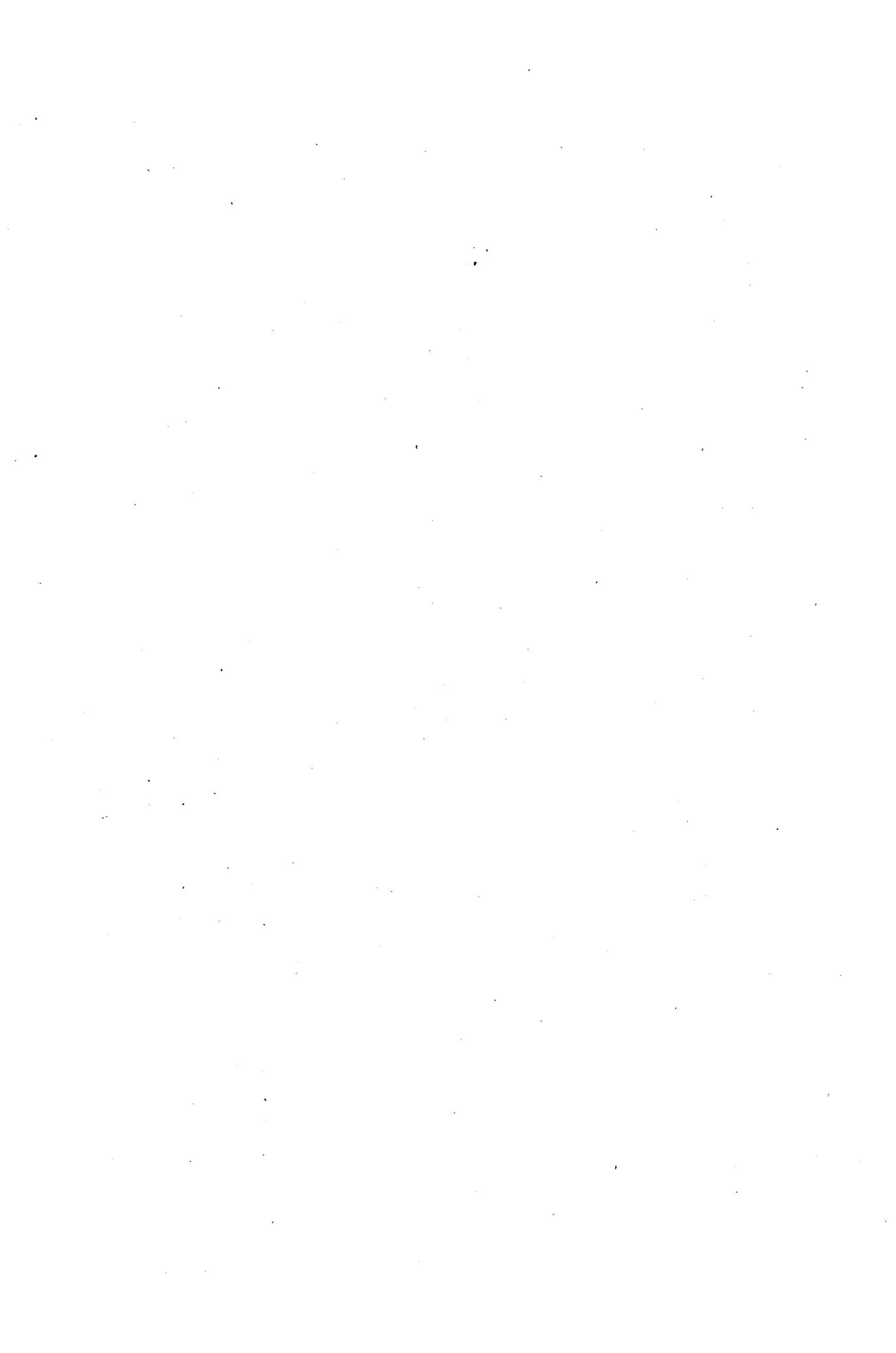
1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of August 20, 1937 (Pub. No. 325, 75th Cong.) and by the act of August 1, 1942 (Pub. No. 693, 77th Cong.) is the record of trial by general court-martial in the case of Private Floyd W. Dixon, 37346926, Company C, 726th Railway Operating Battalion, together with the foregoing opinion of the Board of Review constituted in the Branch Office of the Judge Advocate General with the United States Forces in India Burma.

2. I concur in the said opinion of the Board of Review that the record is legally insufficient to support the findings and sentence. It is my recommendation that, under the 5th paragraph of Article of War 50 $\frac{1}{2}$, the sentence be vacated for the reasons herein set forth, and that the accused be restored to all rights and privileges of which he was deprived by reason of the findings and sentence of the court.

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


WILLIAM J. BACON,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

(Sentence vacated. GCMO 3, IBT, 2 Dec 1944)



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APO 885,
14 November 1944.

Board of Review
Cm IBT 317

U N I T E D S T A T E S)	SERVICES OF SUPPLY, IBT.
)	
v.	)	Trial by GCM 16 October 1944 at
	)	Kanchrapara, India. Dishonorable
Private Deward (NMI) Price,	)	Discharge, Total forfeitures, con-
35523699, Attached Unassigned,	)	finement at hard labor for 10
34th Replacement Company.	)	years. United States 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 soldier above named has been examined by the Board of Review and the board submits this, its holding, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office.

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

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

Specification: In that Private Deward Price, 34th Replacement Company, did at Bombay, India, on or about 28 April 1944, desert the service of the United States Army and did remain absent in desertion until he was apprehended at Bombay, India, on or about 27 July 1944.

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

Specification: In that Private Deward (NMI) Price, 34th Replacement Company, did, at Bombay, India, on or about 27 July 1944 without authority, appear in civilian clothing.

3. Accused pleaded not guilty to all charges and specifications and was found guilty of all of them. He was sentenced

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to be dishonorably discharged from 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 10 years. The reviewing authority approved the sentence but withheld the order of execution pursuant to AW 50-1/2 and forwarded the record of trial to the Judge Advocate General's Branch Office. The United States Disciplinary Barracks nearest the port of Debarkation in the United States was designated as the place of confinement.

4. Accused who is in the military service of the United States (R. 6) was a member of casual shipment Code No. RT 250 AAA. The company of which he was a member had been in a casual camp site at Colaba. Notice was given to board a train which was to leave at 2300 hours from Bombay. Accused was there at 2230 hours and boarded the train but before it left he got off and left the area. He was apprehended, brought back, put on the train and placed under the watch of a corporal until the train moved out (R. 7), at which time the corporal left him (R. 10). The next day a check was made and accused was found absent (R.7). He did not arrive with his group at Camp Angus (R. 8, 34). A search was made at Camp Angus but accused was still absent (R.8). Accused acted as if he were discontented in the military service, and not satisfied in his company (R. 9). His company commander testified that the official morning report signed by him and of which he was official custodian, contained an entry as to accused, from duty to AWOL, dated 28 April 1944 (R. 9). On the night of 27 July 1944 accused was apprehended in a house at 3 Ripon Road, Bombay (R. 12, 13). At the time of apprehension, he was wearing a white jersey, sleeveless with round neck, and white trousers (R. 13, 20). The trousers were similar to sailor trousers (R. 16, 20). At the time he was also wearing brown bedroom shoes (R. 16). His dog tags and a G.I. shirt were found at the place in which he was apprehended (R. 17, 19, 20). The clothes he was wearing were not pajamas (R. 13). When apprehended accused asked, "Who turned me in?" (R. 16, 18). When he was being returned to military custody, he was given an American brand cigarette. He stated, "It sure tastes good; it is a long time since I had one" (R. 19). The clothes worn by accused at the time of his apprehension were put away for safe keeping, but were lost and could not be found at the time of the trial (R.22). New arrivals at Camp Angus are attached to receiving companies by replacement attachment orders. Captain Prince, officer in charge of the personnel section of Camp Angus, testified that the group of which accused had been a member, was attached to the

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34th Replacement Company on 3 May 1944, and that the name of accused was on this order. This group was sent to Kanchrapara to the Provisional Battalion. Accused had been placed on special orders on 3 June 1944. On 31 May 1944 the 34th Replacement Company transferred all their unassigned men to the 442nd Replacement Company and Captain Prince later learned that the latter company was not carrying accused. At the time the 34th Replacement Company transferred their men to the 442nd Replacement Company they had prepared a list for inclusion in their morning report for the month of May and this list did not have the name of accused on it. Captain Prince checked back through the morning reports of the 34th Replacement Company for the month of May 1944 and stated that he found accused "was on the books as being in the area about 4 May". In spite of that fact, when the transfer was made to the 442nd Replacement Company, accused was not transferred and he was not dropped between those dates. In the early part of June, Captain Prince was notified by the transportation section that accused, who was on special orders to be transferred, could not be located at Camp Kanchrapara. He notified the commanding officer of the battalion at Kanchrapara that his records showed accused had arrived. The Commanding Officer of the Provisional Battalion informed Captain Prince that as far as their records showed, accused was not at Kanchrapara and never had been there. The service record of accused showed that there had been a payment of \$10.00 on 29 May 1944 and a short time later a payroll was returned from the Provisional Battalion signed in the space where the name of the accused appeared. Captain Prince checked this signature against the signature on the classification card of accused and concluded that though the signatures were similar, they were not the same. On the classification card, the signature had an artistic "e" made similar to the capital "E". On the payroll, it had a loop "e". The capital "P" and the name "Price" was made differently than that on the classification card. On the classification card, the upward and downward strokes were on the same line. On the payroll, there was a decided loop on the "P". During the latter part of June, a check was made to see if anyone was drawing pay in the name of accused. No one obtained payment in his name at the time the regular payroll was paid (R. 25-28).

EVIDENCE FOR THE ACCUSED

5. An extract copy of the Consolidated Report of Change (with attached roster of 581 colored enlisted men of Code RT 250 AAA) dated 3 May 1944 (Def. Ex. A) and signed by the Personnel Officer of the 34th Replacement Company was intro-

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duced in evidence. The copy of the roster attached to the Exhibit contains Price's name. The original of this documentary Exhibit was prepared in Headquarters, Replacement Depot No. 2, SOS, USAF CBI, APO 496, by order of Lt. Colonel McCurdy. A copy of a partial payment payroll, Code RT 250 AAA, for the month of April 1944 dated 16 May 1944 was introduced. The Trial Judge Advocate stipulated to its introduction with the reservation that although the name of accused appeared on the original, he did not agree that it was the genuine signature of accused. The court permitted the original exhibits to be withdrawn and certified true copies were substituted.

6. The accused elected to remain silent.

REBUTTAL EVIDENCE

7. Sergeant Idar Lynner, who was assigned to troop movement section, Camp Angus, on temporary duty at Kanchrapara, testified that the group, in which accused should have been, was billeted in two areas, 5-A and 5-B, known as the Provisional Battalion. These men were sent out from this area at Kanchrapara on temporary duty to Ordnance and various other places about the camp. Early in June he received an order from Camp Angus upon which the name of accused appeared. He was unable to find accused and was told that accused was not in the area and had never been there. He called Camp Angus and was told that accused was not there. On cross examination he stated that he did not actually have a rollcall taken but that the Provisional Battalion did so (R. 31, 32). The original company commander who accompanied the group from Bombay was recalled and testified that upon their arrival at Angus the company was formed and accused was then absent. The battalion commander and the adjutant were notified at that time that accused was not present (R. 34).

8. The record is replete with errors. It contains a great deal of hearsay testimony and reveals several violations of the best evidence rule. A careful reading of the testimony of Captain Prince and Sergeant Lynner demonstrates that the greater portion of the evidence given by them is hearsay and is based upon conversations, notices, and orders, as to which obviously they had no first-hand knowledge, and from records compiled originally from casual shipment, Code No. RT 250 AAA. Any statement made to Captain Prince or Sergeant Lynner by persons at either Camp Angus or Camp Kanchrapara as to the absence of the

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accused, to which both testified, was obviously hearsay and incompetent. The list of personnel on the shipment code was not competent evidence to show either the presence or absence of the accused. Captain Prince's testimony to the effect that he had checked the morning reports of the 34th Replacement Company for May 1944 and found the name of accused on the books as being in the area about 4 May, is not the best evidence. The best evidence as to this matter would have been the original or correctly authenticated extract copy of such report. In the absence of the proper foundation, the failure to introduce it and the presentation of parole evidence as to its contents was improper. Even though such testimony tended to show accused was not AWOL on May 3, the court as the triers of facts and judges of the credibility and weight of the evidence, as is apparent from their finding, rejected this evidence. The court was warranted in concluding from all the evidence in the record that accused, in fact, had never been present for duty at either Camp Angus or Camp Kanchrapara. Captain Prince also testified that on two occasions payrolls had the name of the accused signed on them, but that comparison of such signatures with the signature of accused on his classification card revealed readily discernible differences between the former and the latter. We believe that the proper way to have proved this would have been to introduce both the payrolls and the classification card as exhibits to be considered by the court. In the absence of any objection, we do not believe that the accused has been prejudiced.

9. The testimony of Sergeant Lynner as to the absence of accused at Camp Angus and Camp Kanchrapara is clearly hearsay and incompetent.

10. Report of Changes is not a record of original entry but a mere compilation or summary of other official records made by the personnel adjutant who is not charged with the duty of having legal knowledge of the entries therein. (See Dig. Op. JAG, 1912-40, sec. 395 (19)). The court was warranted in rejecting this evidence of accused in arriving at its conclusion.

11. Desertion is absence without leave accompanied by intention not to return, and both elements are essential to the offense. It is uncontroverted that accused was AWOL on 28 April 1944. Such fact is amply proven by the testimony of his company commander. If absence without leave is much prolonged and there is no satisfactory explanation of it, the court will be justified in inferring from the length of such absence in itself the intent to remain permanently absent. The unauthorized absence of the accused from 28 April until he was apprehended constituted

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a sufficient evidential basis from which the court could properly conclude that accused intended not to return. Other facts further support the conclusion of the court. Accused was apprehended in other than military clothes, in a city wherein an Army installation is maintained. Although the opportunity existed, he had not surrendered to the military authorities. These facts, in conjunction with his long unexplained and unauthorized absence, clearly justify the inference of the court that the absence of the accused was accompanied by the intent not to return.

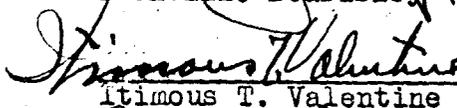
The evidence is also sufficient to support the finding of guilty of the Specification of Charge II and Charge II.

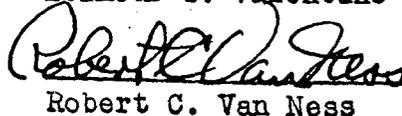
12. At page 9 of the record, testimony was admitted without objection that accused had to be forcibly ejected from several formations; that he had been upon occasions under the influence of liquor, and that he resented any orders given him by superior officers. This testimony was apparently admitted to show the discontent of the accused with the military service. Such evidence was of an inflammatory nature; its tendency to prove accused's motive so slight, that it should have been excluded.

13. In reporting members of the court present when the court convened, the record fails to state opposite the names of the following personnel the capacity in which they were to act: Law Member, Trial Judge Advocate, Assistant Trial Judge Advocate, Defense Counsel, and Assistant Defense Counsel. The method of reporting the concurrence of the court in the findings of guilty and the sentence are irregular.

14. The court was legally constituted and the sentence is within the authorized limits. The court has 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 on 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
Grenville Beardsley

 Titimus T. Valentine, Judge Advocate
Titimus T. Valentine

 Robert C. Van Ness, Judge Advocate
Robert C. Van Ness

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APO 885
15 December 1944

Board of Review
CM IBT 328

UNITED STATES

v.

Private Lucious P. Weaver,
36386717, Company C, 849th
Engineer Aviation Battalion

SERVICES OF SUPPLY, USAF CBI

) Trial by GCM convened on 23 October
) 1944 at APO 689, % Postmaster, New
) York, N.Y. Dishonorable discharge,
) forfeiture of all pay and allowances
) due or to become due, and confine-
) ment at hard labor for 10 years.
) United States Disciplinary Barracks
) nearest Port of Debarkation in the
) United States is place of confine-
) ment.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office with the United States Forces, India Burma Theater.

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

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

Specification: In that Private Lucious P. Weaver, "C" Company, 849th Engineer Aviation Battalion, did, at "C" Company Camp, Tagap, Burma (approximately mile 78, Ledo Road) on or about July 26, 1944, use the following insulting language toward Staff Sergeant Johnnie J. Leak, "C" Company, 849th Engineer Aviation Battalion, a non-commissioned officer who was then in the execution of his office: "Give me my mother-fucking canteen or give me my mother-fucking money", or words to that effect.

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

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Specification 1: In that Private Lucious P. Weaver, "C" Company, 849th Engineer Aviation Battalion, did, at "C" Company Camp, Tagap, Burma (approximately mile 78, Ledo Road), on or about July 26, 1944, with intent to commit a felony, viz, manslaughter, commit an assault upon Staff Sergeant Johnnie J. Leak, "C" Company, 849th Engineer Aviation Battalion, by willfully and feloniously shooting the said Staff Sergeant Leak in the hip with an M-1, calibre .30 rifle.

Specification 2: In that Private Lucious P. Weaver, "C" Company, 849th Engineer Aviation Battalion, did, at "C" Company Camp, Tagap, Burma (approximately mile 78, Ledo Road), on or about July 26, 1944, with intent to commit a felony, viz, manslaughter, commit an assault upon Technician Fifth Grade Lester P. Malava, "C" Company, 849th Engineer Aviation Battalion, by shooting the said Technician Fifth Grade Lester P. Malava in the arm and abdomen with an M-1, calibre .30 rifle.

3. Accused pleaded not guilty to and was found guilty of all charges and specifications. 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 the period of twenty years. The reviewing authority approved the findings of guilty of all charges and specifications, but reduced the period of confinement to ten years. The United States Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement. The reviewing authority withheld the order directing execution of the sentence and forwarded the record of trial to the Judge Advocate General's Branch Office, India Burma Theater for action under AW 50-1/2.

4. On 26 July 1944 at about 1415 hours, accused, First Sergeant William R. Rawls (R. 6), Corporal James Askew (R. 9), Staff Sergeant Johnnie J. Leak (R. 11), Technician Fifth Grade George E. Osborne (R. 14), Private First Class Jim B. Garrett (R. 19), Corporal Daniel E. Bethea (R. 21), Technician Fourth Grade Joseph R. Cowings (R. 25), and Private D. L. Robinson (R.28), all of whom were members of Company "C", 849th Engineer Aviation Battalion,

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were present in the company area at its station near what is known as the 78 mile station (R. 33), in the country of Burma (R. 6), as was also First Lieutenant John M. Hackett (R. 32), a platoon leader in the company. On the day above mentioned, during the lunch hour, Sergeant Leak was issuing accused and other members of the company supplies. While in the supply room accused claimed that he was entitled to draw a canteen cup (R. 11-12). Sergeant Leak told accused that he did not have such an article for him and pointed out that he had not signed for one. An argument followed during which Sergeant Leak told accused to get his supplies and get out of the tent. After accused left the tent Sergeant Leak went outside to call a soldier who had failed to get a cap for which he had signed. Leak testified that two shots were fired after he turned to go back into the tent (R. 12). Sergeant Leak and Corporal Malava, who was seated inside the supply tent, were wounded (R. 12). Both Sergeant Leak and Corporal Malava were taken to the 73rd Evacuation Hospital where they were examined by Captain Morris Cohen, Receiving and Evacuation Officer. They reached the 73rd Evacuation Hospital at approximately 1600 hours on 26 July 1944. The examination of Sergeant Leak disclosed a penetrating gunshot wound through the right and left buttocks. Corporal Malava was found to have a gunshot wound in his right upper abdomen and his left forearm which resulted in a compound fracture of his forearm (R. 5-6). Sergeant Leak remained as a patient in the hospital as a result of his injuries a little over two months (R. 12).

The distance between the supply tent and the tent occupied by accused was about one hundred yards, and the front door of the supply tent could be seen from the tent of accused (R. 14). The motor pool was only a short distance from the tent of accused (R. 13). The insulting language used by accused during the argument was directed at Sergeant Leak who was seated at his desk issuing the supplies (R. 14).

Sergeant Rawls, a part of whose duty with the company was "administration and disciplining of the men", was just outside the orderly room when the argument between accused and Sergeant Leak was in progress. He heard accused say to Sergeant Leak, "I want my canteen bottle or my mother-fucking money back" (R. 6, 7), or "I want my mother-fucking canteen bottle" (R. 10). This language was directed at Sergeant Leak while he was seated at his desk issuing equipment (R. 14). At this point, Sergeant Rawls went down to the supply tent to see what was happening. When he arrived he asked what the trouble was. He then directed Sergeant

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Leak to give accused whatever he was entitled to and order him out of the supply room and added that Sergeant Leak was in charge of the supply room and should not let men talk to him in such a manner (R. 7). Whereupon, Sergeant Leak advised accused again that he did not have a bottle, but he continued to argue with Sergeant Leak. Accused attempted to argue with Sergeant Rawls who told him that any money to which he was entitled because of the canteen cup would come back to him on his payroll (R. 7). In an effort to appease accused, Rawls stepped out of the supply tent on the way back to the orderly room and tried to give accused five rupees, which was twice the value of the canteen cup (R. 7). Accused declined this offer and went toward his tent while Sergeant Leak continued to issue supplies to the personnel. Sergeant Rawls had returned to the orderly room, where he was engaged in conversation with Lieutenant Hackett, when he heard three (R. 8) shots fired. These shots appeared to come from the supply room (R. 8).

Corporal Askew was present and heard the argument during which Sergeant Leak said to accused, "I haven't got a canteen bottle, you go out and let the other people come in" (R. 9). Accused said to Sergeant Leak, "I want my mother-fucking canteen bottle" (R. 10). Askew heard Sergeant Rawls offer accused five rupees in settlement of his canteen claim to which accused replied, "No, I want my mother-fucking canteen bottle". First Sergeant Rawls then directed Corporal Askew to have all the men turn in their guns and ammunition. At the time the shots were fired, Askew was in the motor pool not far from the tent of accused. He did not see accused fire the shots nor did he see anyone get wounded (R. 11).

Corporal Osborne was in the tent in which he and accused lived when accused asked him for a cleaning rod. Upon being told that there was no cleaning rod available, accused got up and went out the back of his tent with a rifle. A short time thereafter, Osborne heard three shots, jumped from his cot, and ran out of the tent to the hospital for a stretcher. After returning from the hospital he went back into the tent where accused was seated on the bed. Accused was holding his rifle and said, "I guess you come for me, tell them I am here" (R. 15, 17). He unloaded the rifle in Osborne's presence (R. 18). Accused was dressed in fatigues clothes, the legs of which had been cut off about three inches above the knees (R. 16). Accused did not mention to Osborne that he had been in an argument with Sergeant Leak (R. 16). From the time Weaver left his tent and the time Osborne heard the shots, accused did not have time to go out the back of the tent and up to the front of the supply room (R. 18). It was between one and five minutes between the time accused left the tent and the firing of the shots (R. 19). All the men of Company "C" had ammunition which had been issued to them.

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When Garrett walked into the tent in which he, Osborne and accused lived, accused was seated on the bed and requested that Osborne give him a cleaning rod (R. 20). This witness observed that accused was dressed in overalls, the legs of which had been cut off above the knee. Accused went out of his tent through a hole in the back with his rifle and ammunition belt and within four or five minutes the shooting took place. Accused said nothing of where he was going when he left the tent. The shots were too rapid for Garrett to count them (R. 20). In Garrett's opinion, it was about fifty yards from accused's tent to the supply tent (R. 20).

Corporal Bethea, who had been working nights, got out of bed about twelve o'clock, had lunch, and was chopping on an oil drum in front of Sergeant Blount's tent when he heard three shots fired (R. 21-22). At that moment he glanced in the direction from which the shots were heard and saw about four inches of a rifle barrel and the top of the knee of a man who was dressed in fatigues (R. 22). He went immediately to the supply tent to render aid to the wounded men. When he went back to the point from where the sound of shots came, which was about fifty yards almost directly in front of the supply tent, he saw three empty cartridges (R. 22-23). He could not tell whether the part of the man he saw when he glanced at the point where the shots were fired was the end of a knee or an elbow (R. 24). He merely took a glance at the man and ran down the steps. This witness was too excited when the shots were fired to take the time to find out who did the shooting. He just dropped everything and went down to the supply tent to help with Leak and Malava whom he had seen fall (R. 24). Bethea saw Clark and Blount pick up the empty cartridges (R. 24-25).

Corporal Cowings had just left the supply tent and was entering his tent when he heard three shots. When he looked, he saw accused, who was dressed in overalls from which the legs had been cut, going back to his tent (R. 25-26) and carrying his rifle (R. 27) and cartridge belt. Cowings saw accused turn and come from where "he made the shots" (R. 26, 28). When asked on cross examination how he knew it was accused who fired the shots, he answered, "He was the one that had the gun" (R. 28). At this time there was about fifty feet between accused and Cowings. Cowings observed that accused was walking "kind of fast" and bent over as he went back to his tent (R. 27). Then, "somebody hollered * * * to run and get the medics, Malava was shot". This witness was not close enough to accused to see the smoke come from his gun (R. 28).

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Robinson was in a friend's tent when he heard the shots. He immediately jumped up to go down the hill to the supply tent and met Weaver "coming back up the hill" (R. 29, 31). He asked accused what he had done and, "He didn't say anything, he shook his head, he just kept on walking". Accused had an M-1 rifle in his hand at the time (R. 29). Robinson went down the hill and saw that Malava had been shot. Shortly after this time when the company formed and had been called to attention by Lieutenant Hackett, accused, who was near Robinson, asked, "Is he dead?" to which Robinson answered, "You should be ashamed of yourself". Nothing further was said at that time by accused (R. 29).

Lieutenant Hackett was in the orderly room with Sergeant Rawls when he heard three shots which appeared to him to come from the supply room which was about thirty feet in back of the orderly room. He went down to the supply room and saw that Sergeant Leak and Corporal Malava were wounded. He arranged to get medical aid for the two wounded men (R. 33). When he came back from this errand someone had called the company together in the company street. The company commander was not present. Lieutenant Hackett asked the company who had done the shooting, "and Weaver spoke up * * *". Hackett told him to keep quiet and accused said, "You asked the question so I was going to answer it". Accused was then told to go ahead and he told Lieutenant Hackett that he was the one who had done the shooting. Accused added to his first remark in answer to Lieutenant Hackett's question something to the effect that the rest of the company might as well be sent to their quarters (R. 34).

Accused, after having been warned of his rights under AW 24, signed a sworn statement before Agent Robert W. Davis, Regional Office, Theater Provost Marshal, CID (R. 35). This statement was freely and voluntarily made (R. 36) and was received in evidence as Prosecution's Exhibit P-1. According to this statement, at the time in question, accused took an old pair of underpants and went outside his tent, dipped them in oil and went back inside to wipe his rifle off. He then went outside the tent but did not know how he was carrying his rifle. At the time, he was "feeling kind of high" from the use of gonja. He did, however, recall that someone whom he did not recognize was looking at him and said that someone had shot a rifle. Accused added, "I guess that I still had the rifle in my hands. I believe that I returned to my tent. I don't know what I had done or what had happened". Accused recalled that about this time the whistle blew for a company formation. He also recalled that the company in formation was asked who had shot a rifle and that at this time he

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stepped out and said, "I had shot a rifle". The officer in charge then said, "your the man I am looking for" (R. 36, Pros. Ex. 1). According to the statement of accused he remembered lining up at the supply tent with several other boys who were also there to draw their equipment and that he drew three pairs of shorts and two pairs of socks. It was then that he asked Sergeant Johnny Leak where the underwear tops were, to which Leak replied, "You don't get any". Accused then reminded Sergeant Leak that he had signed a statement of charges and wanted to know why he didn't get any. Accused then inquired of Sergeant Leak as to a canteen which he claimed he had signed for about three months previous to that time. Sergeant Leak answered that he didn't know anything about it. Accused wanted to know whether he would get a refund of his money and added, "won't you give me some kind of consideration; tell me what you are going to do or something". Sergeant Leak then raised up from his chair and shouted, "No, at me and told me to get out of the supply tent. He told me to get out several times so I obeyed his orders * * *". He also recalled that he met Sergeant Rawls who said to him, "all this is unnecessary the fellow done told you he isn't going to do anything about it, so why don't you get out of there". He recalled that the first sergeant, who was just outside the door of the supply tent as accused went out, had asked somebody the price of a canteen cup and had offered to pay accused five rupees. Accused then said it was all right and to forget it. He walked away to his own tent, a distance of about one hundred fifty yards, where he took a quart bottle of Bull Fight Brandy and drank about one-quarter of it and threw the bottle over the hill. He next rolled up a piece of Gonja and smoked it. This was about a half an hour after the altercation at the supply tent.

5. Accused elected to remain silent.

6. The first real question raised by this record is whether the language employed by accused to Sergeant Leak in the course of an argument with him in the supply tent over a canteen cup constitutes a violation of that portion of AW 65 directed against the use of insulting language toward a non-commissioned officer while in the execution of his office. Sergeant Leak was, under all the evidence, in the supply tent engaged in the duty of issuing supplies and equipment to the men of his company at the time of the incident, and there can therefore be no question but that he was in the execution of his office at the time. It may be argued that the expression quoted in the Specification of Charge I

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is not per se insulting and it is, therefore, necessary to look to the manner of its use. It appears that there was a disagreement between accused and Leak over the canteen cup. The argument became of such temperature as to attract the attention of the first sergeant, who from the orderly room some thirty feet away, went immediately to the supply tent in an effort to quiet accused and stop the argument. Parting with Sergeant Leak, accused in anger used the revolting language quoted, directly at the sergeant. The situation presented by the conduct of accused was such as to make it necessary that he be ordered out of the supply tent and this was done at the direction of the first sergeant. In the presence and hearing of accused, the first sergeant called to the attention of Sergeant Leak the fact that he should not permit men to talk to him in such a way.

"The essence of the offense of using insulting language towards a noncommissioned officer, under A.W. 65, is the insult to the office, not the affront to the person" (Dig. Op. JAG par. 423 (2)).

No matter how widespread the use of the language here referred to is or may become, it cannot be clothed with any degree of respectability. When used in anger and contumeliously, as the evidence here shows it was, it certainly constitutes an insult to the office of a staff sergeant engaged in the discharge of his duty and does violence to decency and decorum. The Board therefore holds that the language employed as here used constitutes a violation of AW 65, and sustains the Charge and its Specification.

The two specifications under Charge II present substantially the same factual and legal questions and may therefore be appropriately discussed together. The crimes charged in both specifications are identical except as to the person assaulted. The assaults here charged are described in the Manual as follows:

"Assault with intent to commit manslaughter.--This offense differs from assault with intent to murder in the lack of the element of malice necessary to constitute the latter crime. It is an assault in an attempt to take human life in a sudden heat of passion. The specific intent to kill is necessary, and the act must be done under such circumstances that, had death ensued, the offense would have been voluntary manslaughter. There can be no assault with intent to commit involuntary manslaughter."
(MCM 1928, par 149L)

Both Sergeant Leak and Corporal Malava were seriously wounded, the

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former receiving a penetrating gunshot wound through both the left and right buttocks while the latter sustained a gunshot wound in the left forearm of sufficient severity to produce a compound fracture, and a gunshot wound in the right upper abdomen, which strongly indicates that the injury inflicted was done with a purpose, an intent to produce death. If accused voluntarily fired the shots which wounded these men as above indicated, nothing else appearing, he is presumed to have intended the natural and probable consequences of his act. In 16 C.J. par. 1013, page 539, the following is to be found:

"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 intend the necessary or the natural and probable consequences of his voluntary acts".

The record does not disclose any evidence of ill feeling or bad blood between accused and Malava, nor does it show any intent on the part of accused to assault or injure this soldier. However, such an intent is unnecessary if accused intentionally fired shots at Sergeant Leak. This question is determined by the evidence as it relates to Specification 1 of Charge II. If sufficient to sustain this charge, it follows that accused was properly convicted under the specification charging the assault upon Malava. Support for this position is found in the Manual where it is said:

"But where the accused, intending to murder A, shoots at and wounds B, mistaking him for A, he is guilty of assaulting B with intent to murder him; so also where a man fires into a group with intent to murder some one, he is guilty of an assault with intent to murder each member of the group". (MCM 1928, par. 149L)

There is a further support for this position in 16 C.J. par. 50; page 83:

"Act directed against one affecting another. An act directed against the person of another, done with felonious intent, is equally criminal whether it affects the person intended or not. Thus it is a familiar rule that one who shoots, intending to hit one person, and unintentionally hits and injures another, is liable for an assault and battery on the latter. So, in cases of homicide, the rule is well established that one who attempts to kill one person and kills another, or who wantonly or in a reckless or grossly negligent manner does that which results in the death of a human being, is guilty of manslaughter, although he did not contemplate such particular result".

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A specific intent is a necessary element of the crimes charged in both of the specifications under consideration but intent may be inferred from the circumstances surrounding the event, the nature of the weapon used, and the character of the wounds inflicted (Dig.Op.JAG, par. 451 (10)).

The evidence in this case is largely circumstantial, but circumstantial evidence may be sufficient to support a conviction. In order to do so, it must be of such a quality as to exclude every reasonable hypothesis except that of accused's guilt (Dig. Op. JAG par. 395 (9)). There is, however, in this case direct evidence of the commission of the crimes by accused. The circumstantial evidence may be summarized as follows: Accused and Staff Sergeant Leak were in the supply room or tent where Leak was issuing supplies and equipment to the men of his company when an altercation arose over a canteen cup. Hot and angry words passed from accused to Leak of sufficient intensity to attract the attention of the first sergeant who attempted to intervene and did, to some extent, quell the disturbance. Accused started away from the supply tent in such an angry mood that the first sergeant sought to appease him by giving him five rupees which was twice the value of the canteen cup to which he claimed he was entitled. This offer was rejected by accused who went immediately to his tent, got his M-1 rifle with ammunition and went out the back of his tent. Very shortly thereafter three shots were fired which severely wounded both Sergeant Leak and Corporal Malava. Almost immediately after the shots were heard, accused was seen going rapidly and with his body bent over back to his tent. He still had his rifle with him. On the way back to his tent he was asked by a fellow soldier what he had done. To this he made no answer but shook his head and kept walking. Shortly thereafter, one of his tentmates came into the tent and accused remarked, "I guess you have come after me, tell them I am here". Three empty cartridges were found near where the accused was when the shots were heard. Accused was unloading his rifle in his tent immediately after the shooting. Within a few minutes after the shooting the company was formed for the purpose of ascertaining who had fired the shots. While the company was so formed and before the question was put, accused asked, "Is he dead?" A fellow soldier standing near told accused he should be ashamed of himself for what he had done. To this accused made no answer. The statement made to and shaming accused normally would have invited some reply. It was a strong suggestion to accused that he was the man who did the shooting and that he should be ashamed of himself, and the fact that he failed to make any reply is some evidence of guilt (23 C.J.S. 1234). About this time Lieutenant Hackett inquired of the company as to who had

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done the shooting. At this time accused admitted that he had fired the shots. The question of Lieutenant Hackett was not addressed directly to accused and his answer appears to have been not only voluntary but spontaneous. If this evidence is competent, it is strong and direct evidence of the guilt of accused. We are of the opinion that these statements were competent and, together with the circumstantial evidence, is abundantly sufficient to support the findings of the court under Specifications 1 and 2 of Charge II.

There is a suggestion in accused's statement, a part of which was read into the record by the prosecution and all of which was introduced as Prosecution's Exhibit P-1, that accused was intoxicated or under the influence of gonja when the shots were fired. This evidence was not supported by anything else in the record and, in view of accused's admitted ability to remember in detail the incidents that surrounded the shooting, is by no means convincing.

"Voluntary drunkenness is no defense, even when a specific intent or a guilty knowledge is an essential element of the crime charged, unless the accused was so drunk as to be mentally incapable of entertaining the requisite intent, or of possessing the requisite knowledge. It is only material when it negatives the existence of such intent or knowledge". (Clark and Marshall, Crimes, 4th Ed., par. 95, page 136).

Paragraph 126a, Manual for Courts-Martial, discussing the question of the effect of intoxication as a defense, says:

"It is a general rule of law that 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.

"Such evidence should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.

"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".

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The Board of Review is not authorized to weigh evidence in cases of this sort. The court has by its findings excluded the contention that accused was sufficiently intoxicated to make him incapable of entertaining the necessary intent to assault Sergeant Leak and Corporal Malava as alleged in the specifications.

7. The court was legally constituted. The sentence adjudged was authorized by law. The court had jurisdiction of the subject matter of the offenses charged and of the person of accused. No errors were committed upon the trial which injuriously affected the substantial rights 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 findings and the sentence.

John G. O'Brien, Judge Advocate
John G. O'Brien

Stimous T. Valentine, Judge Advocate
Stimous T. Valentine

Robert C. Van Ness, Judge Advocate
Robert C. Van Ness

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APO 885
18 December 1944

Board of Review
CM IBT 331

UNITED STATES

v.

Private John (NMI) Pulaski,
31315538, Hq. Co., 3rd Bn.,
5307th Composite Unit (Prov).

NORTHERN COMBAT AREA COMMAND

Trial by GCM convened at APO 689,
% Postmaster, New York, N.Y., on
1 October 1944. Dishonorable dis-
charge, total forfeitures, con-
finement at hard labor for fifteen
years. U.S. Disciplinary Barracks
nearest Port of Debarkation in U.S.
is place of confinement.

HOLDING of the BOARD OF REVIEW
O'ERIEEN, 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 Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

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

Specification: In that Private John Pulaski, Headquarters Company, 3rd Battalion, 5307 Composite Unit (Prov), did, at Mankrin, on or about 15 June 1944, misbehave himself before the enemy, by refusing to advance with his command, which had then been ordered forward by Lieutenant Colonel John F. Gestring, Commanding Officer of the 3rd Battalion, to engage with Japanese troops, which forces, the said command was then opposing.

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

Specification: In that Private John Pulaski, Headquarters Company, 3rd Battalion, 5307 Composite Unit (Prov), having received a lawful command from Lieutenant Colonel John F. Gestring, his superior officer, to transfer to a rifle company to carry ammunition in a mortar squad, did at Mankrin, on or about 15 June 1944, willfully disobey the same.

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3. Accused pleaded not guilty to all Charges and Specifications and was found guilty of all of them. He 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 twenty years. The reviewing authority approved the sentence but reduced the period of confinement to fifteen years and withheld the order of execution pursuant to AW 50-1/2. The record of trial was forwarded to the Judge Advocate General's Branch Office, USF, IBT. The United States Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement.

4. On 15 June 1944 the Third Battalion, 5307th Composite Unit (Provisional), was south of Mankrin, Burma, the Jap front lines being about 700 yards from the battalion command post and 150 yards from the battalion front lines. They were constantly in contact with the enemy and actually attacked that day. Accused refused to move forward. Accused was a member of a reconnaissance platoon and was noticed by Lieutenant Colonel Gestring hanging around the battalion command post. The accused was told by Lieutenant Colonel Gestring to rejoin his unit but refused, saying he could not see very well. He was then told that the reconnaissance platoon was a tough job for a man who couldn't see very well and he would be given an easy job (R. 6a). Lieutenant Colonel Gestring testified:

"I would send him to the Company "I" mortar platoon to carry ammunition. He said no, he wouldn't go up there. I told him he didn't need to see well to carry ammunition. He still refused. So, I explained to him the seriousness of the offense of refusing to face the enemy. I asked him if the Articles of War had been read to him and explained. He said that they had been. I again explained the seriousness in time of war. I asked him, in the face of that, do you still refuse to go. He did. I told him that such refusal might mean life, if it were approved and decided by a court. He said he'd rather die that way than face the enemy. I put him under arrest, and sent him to the rear".

At the time of the attack and the alleged refusal, the front was very active (R. 6b). Brigadier General Haydon L. Boatner talked to accused after warning him of his rights (R. 6d). Accused told him that it was right that he refused to fight and stay with his organization. General Boatner explained that the charge was a serious one, that there was no desire to bring him before a court-martial, but that there would be no other recourse (R. 6d). Appeal was made to the pride of accused for himself and family (R. 6e).

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At the conclusion of the talk, General Boatner asked him if he didn't want to change his mind and go back to fight, and if so, the whole thing would be dropped. He refused and the General told him:

"This is the last time I'm going to give you the chance to go back; the only alternative is for you to be put under arrest and court-martialed."

He refused to go to fight (R. 6e).

EVIDENCE FOR THE DEFENSE

5. The visual acuity of accused is 20/100 in each eye without glasses which means accused could read at 20 feet what the normal eye could read at 100 feet (R. 6f). Such visual defect is within the limits prescribed for those acceptable for infantry training in the army and to participate in battle (R. 6g). Accused would have difficulty in aiming beyond several feet without glasses (R. 6f), and any duty would give him difficulty although he could carry ammunition (R. 6g).

6. Accused elected to remain silent (R. 6c).

REBUTTAL EVIDENCE

7. While Major Harris, 42nd Portable Surgical Hospital, was examining accused, Lieutenant Colonel Wilbur W. Hiehle stretched a string across the doorway about three feet from the ground. At the conclusion of the test by Major Harris, accused started to leave and took definite pains to step over the string (R. 6h). Accused was not wearing glasses at that time (R. 6i).

8. The offense as here charged consists in such acts by any soldier as refusing or failing to advance with the command when ordered forward to meet the enemy. There can be no question that the command was before the enemy. The command post was approximately 700 yards from the Jap lines and the battalion front line only 150 yards from the Japanese. The battalion was in constant contact with the enemy and actually attacked that day. It is uncontroverted that accused refused to advance with the command but, instead, stayed around the command post refusing to go forward. The act or acts must be conscious and voluntary upon the part of the offender (See Winthrop's Military Law and Precedents, 2nd Ed., page 623). We believe that the evidence here abundantly shows that the acts of accused were voluntary. From the testimony of Lieutenant Colonel Gestring it is clearly evident that his refusal was of a considered nature. The voluntary nature of accused's refusal is apparent from his unwillingness and refusal of the offer to be transferred to an ammunition carrying job; one in which his

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visual deficiency would not be as great a handicap.

9. In defense, an accused may show that he was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior (See Winthrop's Military Law and Precedents, 2nd Ed., page 624). Accused had claimed that his eyesight was too poor, but this can avail him nothing as his visual acuity was such as to fall within limits prescribed for those acceptable to participate in battle.

10. In the Specification of Charge II and Charge II accused is charged with wilful disobedience of a lawful command to transfer to a rifle company to carry ammunition in a mortar squad. The board of review established in a branch office cannot weigh the evidence in a case. It is our function to determine whether or not the record contains any substantial evidence which, if uncontradicted, would be sufficient to warrant a finding of guilty (CM CBI 114). With this in view we shall proceed to a determination of whether there is evidence supporting the allegation. Winthrop's Military Law and Precedents, 2nd Ed. states:

"As to the form of the order,--this is immaterial provided that the substance amounts to a positive mandate".

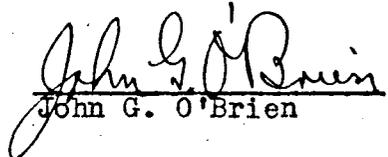
The only evidence that bears upon the foregoing Specification is from the testimony of Lieutenant Colonel Gestring. From this we fail to find any evidence of an order to transfer to carry ammunition. Lieutenant Colonel Gestring, after hearing the excuse of accused for not rejoining his platoon, told accused that he would give him an easy job, that is, send him to carry ammunition for Company "I" mortar platoon. Accused said he wouldn't go up there. We are of the opinion that the record reveals only an offer on the part of the accused's commanding officer to give accused a job where his deficient eyesight would not be as great a handicap. This offer accused refused. The evidence wholly fails to show anything amounting to a positive mandate, the essential element required.

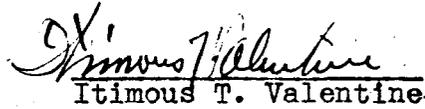
11. Therefore, the Board of Review accordingly holds that the record of trial is legally sufficient to support the findings of guilty of the Specification of Charge I and Charge I, legally insufficient to support the findings of guilty of the Specifi-

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cation of Charge II and Charge II and legally sufficient to support the sentence.

 Judge Advocate
John G. O'Brien

 Judge Advocate
Itimous T. Valentine

 Judge Advocate
Robert C. Van Ness

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New Delhi, India
30 January 1945

Board of Review
CM IBT 332

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

NORTHERN COMBAT AREA COMMAND

v.)

Private James D. Chaffman,
33559401, Casual Detachment,
5307th Composite Unit (Pro-
visional)

) Trial by GCM convened at APO 689
) % Postmaster, New York, N.Y. on
) 5 October 1944. Dishonorable dis-
) charge, total forfeitures, con-
) finement at hard labor for 15 years.
) United States Disciplinary Barracks
) nearest port of Debarkation desig-
) nated as place of confinement.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 which submits this, its holding, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private James D Chaffman, Casual Detachment, 5307th Composite Unit (Provisional), having received a lawful command from Captain LEMUEL S JOHNSON, 5307th Composite Unit (Provisional), his superior officer, to join his platoon and go forward in an advance, did at Myitkyina, Burma, on or about 2 August 1944, willfully disobey the same.

3. Accused pleaded not guilty to and was found guilty of the Specification and 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 thirty years. The reviewing authority approved the sentence but reduced the period of confinement to fifteen years. The United States Disciplinary Barracks nearest the port of debarkation in the United

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States was designated as the place of confinement. The order of execution was withheld pursuant to Article of War 50 $\frac{1}{2}$ and the record of trial was forwarded to the Branch Office of the Judge Advocate General, United States Forces, India Burma Theater.

4. The testimony for the prosecution shows that on 2 August 1944 accused's organization was in the front lines and attacking near Sitapur, Burma (R. 6a, 6f). It had been in combat about thirty-five days and had suffered casualties of about fifty per cent (R. 6a, 6e).

On the date mentioned, Captain Lemuel S. Johnson was up with the front line "looking over the ground" and talking with the platoon leaders. He went back to the rear to find his executive and radio man, and was told to report to the battalion. When he got there he found accused sitting beside the road. Captain Johnson ordered accused to return to his platoon. Accused said he would not go. Captain Johnson "gave him several chances, repeated the order", but accused continued in his refusal. Johnson then decided he would "give him a break" and ordered him to take a message to his platoon and remain with it. Accused said he would take the message but would not stay. Johnson repeated the order, accused again refused, and Johnson sent him back to the first sergeant under arrest. Accused gave no reason for his refusal (R. 6a). On cross examination, Johnson stated that he reported to his unit on 17 July 1944 and that accused was then with it. When asked if he knew "of any other insubordination of the accused", he replied in the affirmative (R. 6a).

First Lieutenant Clinton V. Chenault was present when a conversation took place between Captain Johnson and accused on 2 September 1944 at the company command post. Captain Johnson said "Private Chaffman, take this message to your platoon leader, and rejoin your platoon", and accused replied "I will take the message up, but I won't stay with my platoon" (R. 6e). On cross examination, Lieutenant Chenault testified that accused was a rifleman, that he had participated in previous attacks, and that on a previous occasion he had broken under fire and had been brought back to the company command post (R. 6f).

Private First Class Irving J. Herman was present at the company command post on the day in question and heard Captain Johnson tell accused to take a message to his platoon leader and stay with his platoon. Johnson told him this two or three times. Accused said he would take the message but he wouldn't stay and, "I might as well not take the message as I'm not going to stay" (R. 6g). Captain Johnson emphasized the serious-

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ness of the matter. Accused gave no reason for his refusal (R. 6h).

5. No witnesses appeared for the defense, and accused elected to remain silent (R. 6h).

6. It is noted that accused was designated in the charge sheet as a member of the 5307th Composite Unit (Provisional) but that the witnesses referred to him as a member of the 475th Infantry. Captain Johnson is identified in the record only as a member of the 5307th Composite Unit. In this connection, the court could properly take judicial notice of the fact that, subsequent to 2 August 1944, the 5307th Composite Unit (Provisional) was deactivated and the 475th Infantry activated (Par. 125, MCM, 1928). In the light of all the evidence, the inference is compelling that Johnson was accused's superior officer within the meaning of Article of War 64.

7. The Specification alleges that the offense in question occurred at Myitkyina, Burma, but the only evidence as to situs is that it occurred near Sitapur. The court could properly take judicial notice of the fact that Sitapur is in the immediate vicinity of Myitkyina (Par. 125, MCM, 1928). The apparent variance is, therefore, of no moment, nor is the failure to prove more specifically the place of commission (cf. CM NATO 2047; Sec. 422 (3), 3 Bull. JAG 233).

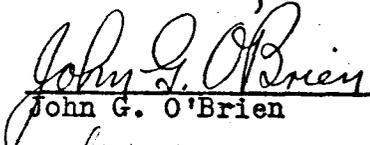
8. A seeming variance appears between the Specification and the proof, inasmuch as the Specification alleges willful disobedience by accused of a command "to join his platoon and go forward in an advance", whereas the evidence shows that the command was ordered to return to his platoon or, as later expressed, to take a message to his platoon leader and stay with the platoon. The commands given to accused were a part of the same transaction, and, in effect, constituted one command, the essence of which was that accused should return to his platoon, remain with it and, by necessary implication, join with it in the attack which was then in progress. Accused indubitably knew what was expected of him when the order was given. The fact that he was told to carry a message to his platoon leader and indicated his willingness to do so is of no consequence in view of his positive refusal to comply with the essence of the command, that is, to remain with the platoon during the attack. It is considered that the command given was substantially the same as that alleged, that there was no material variance, and that the accused was not misled or injured (cf. CM NATO; Sec. 422 (5), 3 Bull. JAG 233).

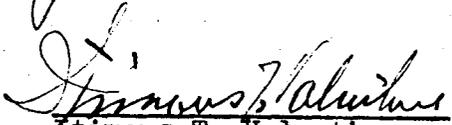
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9. There can be no doubt that the order in question was directed at accused personally and called for immediate compliance and that accused's refusal to obey was deliberate. There is, manifestly, ample evidence to support the conviction.

10. The court was legally constituted and had jurisdiction of the subject matter of the offense charged and the person of the accused. No errors injuriously affecting the substantial rights of accused were committed during the trial. The sentence was within the authorized limits. Therefore, 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.

John G. O'Brien, Judge Advocate
John G. O'Brien

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

Robert C. Van Ness, Judge Advocate
Robert C. Van Ness

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New Delhi, India
30 January 1945

Board of Review
CM IBT 334

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

v.

Raymond F. Page, 31315455,
Private, Casual Detachment,
5307th Composite Unit (Provi-
sional)

) NORTHERN COMBAT AREA COMMAND

) Trial by GCM convened at APO
) 689, % Postmaster, New York,
) N.Y. on 2 October 1944. Dis-
) honorable discharge, total for-
) feitures, confinement at hard
) labor for 15 years. United States
) Disciplinary Barracks nearest port
) of debarkation in United States is
) designated place of confinement.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

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

Specification: In that Private Raymond F Page, Casual Detachment, 5307th Composite Unit (Provisional), having received a lawful command from Captain Raymond A Leonard, 5307th Composite Unit (Provisional), his superior officer, to return to his unit which was then in contact with the enemy, did, at Myitkyina, Burma, on or about 1605 hours, 28 July 1944, willfully disobey the same.

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

Specification: In that Private Raymond F Page, Casual Detachment, 5307th Composite Unit (Provisional), being present with his unit, while it was engaged with the

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enemy, did at Myitkyina, Burma, on or about 1600 hours, 28 July 1944, shamefully abandon the said unit and seek safety in the rear.

3. Accused pleaded not guilty to all Charges and Specifications and the court found him guilty of all of them. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for twenty years. The reviewing authority approved the sentence but reduced the period of confinement to fifteen years. The order of execution was withheld pursuant to Article of War 50 $\frac{1}{2}$ and the record of trial was forwarded to the Judge Advocate General's Branch Office, United States Forces, India Burma Theater. The United States Disciplinary Barracks nearest the port of debarkation in the United States is designated as the place of confinement.

4. On or about 28 July 1944 Lieutenant Jones was in command of the second platoon, Company E, second battalion, 475th Infantry (R. 6a), then the 5307th Composite Unit (R. 6a, 6d). The platoon was in the presence of the enemy thirty-five to fifty yards away, and was moving in against them. On this date, accused, without proper leave, went to the rear (R. 6a) as soon as the first shot was fired. The platoon was later forced to retire and rejoined accused in a shell hole (R. 6b) about eighty to one hundred yards in the rear (R. 6d) where accused had taken refuge (R. 6d). Lieutenant Jones then sent accused back to the company commander (R. 6c). When accused was brought to Captain Leonard, his company commander, he was ordered to return to his post (R. 6e), to go back to the front line (R. 6i). Captain Leonard said, "I order you to take your rifle, to go back and fight. Will you do that?" Accused said no, he was afraid and that everything went black (R. 6e). He was crying and shaking. He was "pretty nervous" (R. 6e, 6j, 6o). Accused was asked by Captain Leonard if it was true that he had abandoned his post in the line and refused to fight. Accused said, yes. (R. 6e). Accused "had control of his senses and actions at all times, except mental actions" (R. 6g). On a previous occasion accused had been examined for neurosis. The doctors at the battalion command post kept him for two or three days and later told Captain Leonard there were no definite signs (R. 6e). Private Marbury testified on rebuttal that before giving the attack order Lieutenant Jones specifically told accused to attack with the rest of the men and to "stay up there with them". During the

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attack accused withdrew, asking the acting platoon sergeant for permission to go to the company command post. He was refused and told "to get back up there". Accused ran back toward the command post (R. 6n).

5. His rights having been explained to him, accused elected to take the stand and testify in his own behalf. He stated that he had never had any training in jungle warfare but had had basic training in the infantry. On the maneuvers in Louisiana he was on umpire detail and had no chance to go through any of the actual problems. Since his arrival in India he had about a week in general infantry tactics. The first time under fire one of the men he had been with all during his army life was killed. Always after that when he was under fire everything would go black. At a time previous to the offense in this case he had been sent back to the aid station for an examination for neurosis. He stayed there three days and was examined by Captain Snipes who was the doctor there. One day while out cleaning off the trail, everything suddenly went black and he fainted. He was sent back to the 42nd Portable Surgical Hospital for "fatigue state". On 28 July he was a rifleman and went forward with the platoon after being ordered to do so by Lieutenant Jones. He shot at the enemy and everything went black when they began firing. His platoon sergeant was about twenty-five yards to the rear and he ordered accused to go back to the shell hole and wait there. About five minutes later the rest of the platoon came back. Accused explained to Lieutenant Jones that he had tried, that he couldn't help it but everything went black. Accused was sent back to the company commander to be put under arrest. Captain Leonard did not give him an order to return to the line but sent him back under arrest with the battalion runner (R. 6j, 6k, 6l).

6. It is clear that accused was given a direct order by Captain Leonard. The Specification of Charge I alleges that accused was ordered to "return to his unit which was then in contact with the enemy". The unit was unquestionably in contact with the Japanese. The proof that Captain Leonard ordered accused to return to his post, to go back to the front line, "to go back and fight", amply supports the allegation "to return to his unit", and does not constitute a variance from the allegation. The order was a positive mandate and accused refused to obey and refused to comply with it. It is true that accused denied having received the order and stated that Captain Leonard sent him back to the battalion command post. It is the province of the court-martial to weigh the evidence and judge the credibility of

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witnesses. The testimony presents an issue of fact which the court decided against accused, and if there is substantial evidence supporting their findings, we cannot disturb them. The evidence is, in our opinion, sufficient to support the findings as to both Specifications and both Charges.

7. The Specification of Charge II alleges that accused shamefully abandoned his unit while it was engaged with the enemy and sought safety in the rear. A similar case was decided by the Board of Review in the European Theater of Operations. We believe it pertinent to quote extensively from that opinion (ETO 1249, Marchetti).

* * * Proof that accused abandoned his company while it was before the enemy will sustain a conviction under the 75th Article of War regardless of the length of time he was absent from his duty. Where the misbehavior is based upon proof that accused left his duty station and went to the rear, the offense is committed immediately upon and coincidentally with his departure from his station.

'This offense may consist in:-* * * Such acts by any officer or soldier, as - * * * going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire * * *. Nor will it constitute a defence, or scarcely an extenuation, that the accused did finally perform the service required of him or otherwise duly conduct himself before the enemy, if, after having originally misbehaved, he was compelled to such service or conduct by peremptory orders or by the use or display of force.

Running away. This is merely a form of misbehaviour before the enemy, and the words 'runs away' might well be omitted from the Article as surplusage'. (Winthrop's Military Law and Precedents - Reprint - pp. 622, 623, 624).

* * *

"The 75th Article of War provides in pertinent part:

'Misbehavior Before the Enemy. - Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct, disobedience, or neglect endangers

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the safety of any fort, post, camp, guard, or other command which it is his duty to defend, * * *.'

"The following interpretative comments of the foregoing article in addition to those hereinbefore quoted are pertinent:

'a. MISBEHAVIOR BEFORE THE ENEMY * * * Misbehavior is not confined to acts of cowardice. It is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article.* * *.'

Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy.' (Manual for Courts-Martial 1928, par. 141a, p. 156).

'An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offence as if he had deliberately proved recreant. * * *.'

The act or acts, in the doing, not doing, or allowing of which consists the offence, must be conscious and voluntary on the part of the offender.* * *.'

Defence. Beside negating the facts charged, the accused may show in defence that in what he did he was acting under the orders or authority of a competent superior, or was properly exercising the discretion which his rank, command, or duty, or the peculiar circumstances of the case, entitled him to use. He may also show that he was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehaviour" (Winthrop's Military Law & Precedents - Reprint - pp. 623, 624).

"The gravamen of the offense against accused is contained within the following allegations:

'Marchetti * * * being present with his company

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while it was engaged with the enemy * * * did * * * shamefully abandon the said company, and seek safety in the rear'.

"While this specification is modeled upon form 46 (Manual for Courts-Martial, 1928, p. 244) it is to be noted that it follows that part of the 75th Article of War which pertains to the abandonment of 'any fort, post, camp, guard or command'. There is therefore presented a situation which requires particularized consideration of the statute to determine its application in the instant case. * * *.

* * *

"The evidence in this case establishes the indisputable fact that accused, when his squad was advancing toward the enemy in the direction of * * * deliberately and without authority ran away from it. The evidence is therefore such as would consistently and appropriately support this averment:

'Marchetti * * * being present with his company while it was engaged with the enemy ran away from his company and did not return, etc.'

There was an apparent endeavor on the part of the draughtsman to lay his allegations in such form as to bring the same under the following denouncement of the statute:

'Any * * * soldier who, before the enemy * * * shamefully abandons * * * any * * * command which it is his duty to defend' (Underscoring supplied).

The pleading, however, fails to include the highly relevant allegation 'which it is his duty to defend'. It is therefore manifest that if the legal sufficiency of the record depends upon this provision of the Article only, a serious question would be presented as to whether the specification states facts constituting an offense under this particular clause of the Article. Fortunately, however, the allegations of the Specification are sufficiently broad to avoid this dilemma. It is alleged that Marchetti 'did shamefully abandon the said company, and seek safety in the rear'. Synonyms of 'abandon' are: leave, quit, renounce, resign, surrender, relinquish, vacate, remit, discard, forswear (Webster's New International Dictionary - 2nd Ed.). Judicially 'abandon' has been defined as totally withdrawing oneself from an object; laying aside all care for it; leaving it altogether to itself (Pidge v. Pidge, 44 Mass. (3 Metc.) 257, 265. Cf: 1 W. & P. Perm. 4).

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The Specification's allegations are beyond doubt equivalent to the allegation 'did run away from his company'. Interpreted in such manner the Specification clearly alleged facts constituting an offense under the clause of the Article which denounces as an offense the act of a soldier who 'before the enemy runs away'.

"In order to constitute an offense under the 75th Article of War the various acts of dereliction of duty by an accused must be committed 'before the enemy'. Winthrop comments as follows upon its meaning:

'Before the enemy.' This term is defined by Samuel as - 'in the face or presence of the enemy.' It is not necessary, however, that the enemy should be in sight. If he is confronting the army or in its neighborhood, though separated from it by a considerable distance, and the service upon which the party is engaged, or which he is especially ordered or properly required by his military obligation to perform, be one directed against the enemy, or resorted to in view of his movements, the misbehaviour committed will be 'before the enemy' in the sense of the Article.' (Winthrop's Military Law & Precedents - Reprint - pp. 623-624).

'Whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation'. (Manual for Courts-Martial 1928, par. 141a, p. 156).

"The Specification fails to allege in the words of the statute that accused was 'before the enemy' when he ran away from his company. However, it does allege that he was 'present with his company while it was engaged with the enemy'. The phrase 'engaged with the enemy' is properly construed as an allegation of place as well as time. It is identical in meaning with 'before the enemy' (CM, France, 24 May 1919, OAJAG 201-4170, Samuel Stone; CM France, 28 January 1919, OAJAG 201-1200, Francis Slagle). The Specification, therefore, alleges the crucial fact that accused was 'before the enemy' when he 'ran away'."

With the foregoing we agree.

8. When accused was brought to the company command post, Captain Leonard asked him if it was true that he had abandoned his post in the line and refused to fight. Accused replied in

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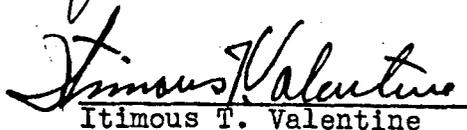
the affirmative. No warning was given and the facts were not developed fully to determine whether such statement was voluntary. This appears to be substantially tantamount to a confession to the allegation of misbehavior before the enemy. However, we deem it unnecessary to discuss whether this is a confession or merely an admission against interest because there is substantial competent other evidence that would compel in the minds of reasonable men a finding of guilty.

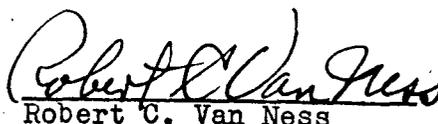
9. In defense accused may show that he was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior (See Winthrop's Military Law and Precedents, 2nd Ed. p. 624). The record as a whole suggests the possibility of battle neurosis. No medical testimony was produced as to this pertaining to the particular offense charged. However, the court having before it all the facts and the appearance and demeanor of accused has by its very finding rejected this defense and decided such question against accused.

10. The advisability of a medical examination for the possible existence of battle neurosis is a matter for consideration by the reviewing authority and not for the Board of Review.

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.


John G. O'Brien, 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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UNITED STATES ARMED FORCES CHINA BURMA INDIA

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APO 885
23 December 1944

Board of Review
CM IBT 338

UNITED STATES

NORTHERN COMBAT AREA COMMAND

v.

Private Lawrence Schryver,
32748839, Casual Detachment,
5307th Composite Unit (Pro-
visional).

) Trial by GCM convened at APO 689,
) % Postmaster New York, N. Y. on
) 8 October 1944. Dishonorable dis-
) charge, to forfeit all pay and
) allowances due or to become due, to
) be confined at hard labor for 25
) years. U.S. Disciplinary Barracks
) nearest Port of Debarkation in U.S.
) designated as place of confinement.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Lawrence Schryver, Casual Detachment, 5307th Composite Unit (Provisional), did, at Myitkyina, Burma, on or about 13 July 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: engaging the enemy, and did remain absent in desertion until he surrendered himself at Myitkyina, Burma, on or about 21 July 1944.

3. Accused pleaded not guilty and was found guilty by the court of the Specification of the Charge and the Charge. 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 at such place as the reviewing authority may direct for the term

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of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 25 years. The United States Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement. Pursuant to Article of War 50-1/2 the order directing the execution of the sentence was withheld and the record was forwarded to the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

4. Technical Sergeant Olin McGregor testified that on 13 July 1944 he was acting first sergeant of Company E, 475th Infantry, 5307th Composite Unit (Prov.). The company of which he, accused, and Private Edward A. Hahn were members was in the front perimeter in contact with the enemy about 75 yards from the enemy pillboxes. On this day accused and Private Hahn were reported absent by the platoon sergeant, and McGregor went around and checked the other platoons. Not finding them, he entered their absence on the morning report "From duty to AWOL". On this day the two men had not been detailed for any particular duty except to hold the front line. About 10 or 15 days later the sergeant major called and said they had been picked up at the air strip which is eight or ten miles away. At that time they were entered on the morning report as "from AWOL to desertion" (R. 6a). They were held at the air strip (R. 6b). On cross examination he testified that he had seen these men each day he went around the perimeter, but it was possible for accused to have been given a detail without him knowing about it until the next morning (R. 6b).

5. Private Alfredo F. Garcia testified that on 13 July 1944 he and Private First Class Douglas E. Reed (R. 6h) occupied the foxhole next to accused. The foxholes were about a foot and a half apart with an opening connecting them (R. 6d). In the afternoon (R. 6e) he heard accused or Private Hahn say, "We are going to the air strip" (R. 6g). That night they were gone, though he did not see them leave (R. 6d). One said he was going to leave (R. 6e). They left a Bren gun in the foxhole (R. 6e). Three or four days later the platoon withdrew to permit bombing operations (R. 6d, 6f).

6. Private First Class Douglas E. Reed, acting staff sergeant, squad leader of Company E, testified that accused and Private Hahn were in the foxhole next to the right to the one occupied by Garcia and himself. There was a small opening between the foxholes and it was only large enough to permit conversation and the passing of rations. About 1300 hours, 13 July 1944, he overheard a conversation between accused and Hahn. "They said that they were talking together about getting out. Leaving.", and he told them they had better think another time about it. He saw

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them leave about a half hour later, but thought they were going after water (R. 6j). The water was about 200 yards away, and such trips were permissible (R. 6k). That afternoon he checked their foxhole to see if they were there. He saw a Bren gun in the foxhole, but noticed no other weapons. That night when they didn't come back, Garcia told him that they had said something about going to the air strip. Two days later the B-25's came over and bombed (R. 6k). He had not given them permission to leave the foxhole (R. 6L). When he warned them, they did not reply but stopped talking about leaving (R. 6L). After he noticed the two men were missing, he never saw them again. They could not have returned to the foxhole without being noticed (R. 6p).

EVIDENCE FOR ACCUSED

7. Lieutenant Collingsworth, commanding officer of accused and Private Hahn, testified that a man whom he assumed to be accused, though he could not swear it was, brought the Bren gun when it was called for (R. 6m). Within two days after accused and Private Hahn left the foxhole, such fact was reported to Lieutenant Collingsworth (R. 6n, 6o). He did not report it to the company commander at the time the report was made but did so the day after the bombing (R. 6n).

8. The accused elected to remain silent (R. 6h).

9. This is a companion case to that of Private Edward A. Hahn (CM IBT #339). The appointing authority authorized a common trial of accused and Private Hahn subject to objection by any accused. The convening authority may direct a common trial where two or more accused are charged as separate offenders, having simultaneously and severally and at the same time and place committed offenses of the same character, provable by the same witnesses (Sec. 395 (33), Dig. Op. JAG 1912-40). Although in such case the offenders are tried together, in law actually not one trial but several trials occur simultaneously. Each of the accused at such common trial is entitled to exercise the right of peremptory challenge under Article of War 18. The findings and sentences are separately voted on as to each accused. There must be a separate review by the staff judge advocate and a separate action by the reviewing authority upon each record.

"In common trials, only one original record should be prepared with a copy thereof for each accused. The original record should show separate findings, sentence and action,

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and separate general court-martial orders should be published, as to each accused." (SPJGJ CM 256499, 256500, 256498; 27 May 1944)

10. There is no competent legal evidence of where or when the desertion was terminated. The testimony as to the sergeant major having picked up accused and Private Hahn at the air strip is clearly hearsay and incompetent. As the offense of desertion is complete when the person absents himself without authority from his place of service with the requisite intent, proof of the duration of absence is not essential to sustain a conviction of the offense. The element of proof "that his absence was of a duration and terminated as alleged" as set forth in MCM 1928 was formerly essential only when the legality of the sentence imposed was dependent upon such duration under the Table of Maximum Punishments. Since the suspension of limits upon punishments for wartime desertion, the maximum punishment for which in all cases is now death, the duration of the unauthorized absence is material only in extenuation or aggravation of the offense or to show the requisite intent. It is clearly not an essential element of the offense (See CM ETO 2473).

11. Nor does it appear whether accused and Private Hahn were apprehended or whether they surrendered themselves. The absence of proof as to the manner, time and place of the termination of the desertion is immaterial. The offense charged was committed at the moment accused absented himself without authority in order to avoid hazardous duty (Bull. JAG, June 1944, p.232). To prove the offense charged it is necessary to show (a) that the accused absented himself without leave as alleged; (b) that he intended, at the time of absenting himself, or at some time during his absence, to avoid hazardous duty. The intent of accused is a fact which must be proved as any other fact and for such purpose evidence of relevant and material circumstances is cogent and proper. From such circumstances and reasonable and legitimate inferences therefrom, the intent may be discovered. Under Article of War 28, any person subject to military law who "quits his organization or place of duty with the intent to avoid hazardous duty or shirk important service shall be deemed a deserter" (MCM 1928, p. 142). There can be no serious question concerning the hazardous nature of the duty of accused in view of the location of the front perimeter about 75 yards from enemy pillboxes. There is evidence revealing that accused, without authority, quit his place of duty and was gone for several days. We think that the fact of accused's unauthorized absence for the period shown under

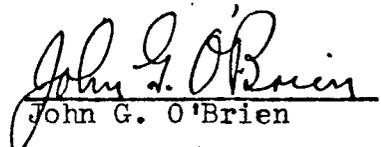
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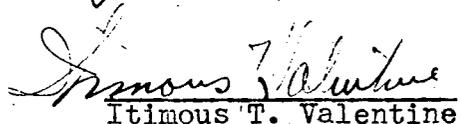
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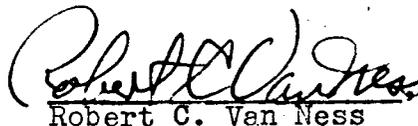
the prevailing conditions, without explanation, coupled with the conversation between him and Private Hahn concerning leaving and getting out of there are compelling facts which clearly justify the conclusion of the court that he intended to avoid hazardous duty as alleged.

There is no affirmative showing in the record that each accused was given the right to exercise a peremptory challenge. We are of the opinion that the presumption of regularity attaches. To reach a conclusion that the right of one peremptory challenge was not extended to each accused, it would be necessary to ignore the applicable presumption that the proceedings were regular unless the contrary clearly appears on the face of the record. (CM CBI 71) (Cf. CM 196619, Dig. Op. JAG 1912-40, Sec. 416 (17))

12. The court was legally constituted and had jurisdiction of the subject matter of the offense and the person of the accused. No errors injuriously affecting the substantial rights of accused were committed during the trial. The sentence was within the authorized limits. Therefore, 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
John G. O'Brien

 , Judge Advocate
Itimous T. Valentine

 , Judge Advocate
Robert C. Van Ness

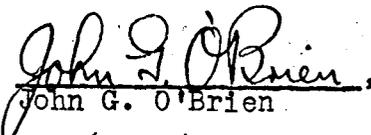
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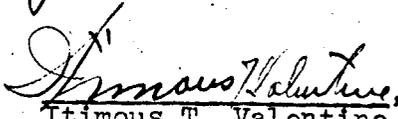
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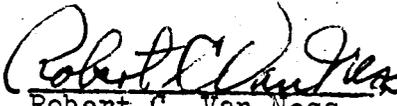
sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 25 years. The United States Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement. Pursuant to Article of War 50½ the order directing the execution of the sentence was withheld and the record was forwarded to the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

4. This soldier was tried at a common trial with Private Lawrence Schryver. Attention is invited to that case, CM IBT # 338, the holding in which is adopted as our holding in this case.

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


John G. O'Brien, Judge Advocate


Itimous T. Valentine, Judge Advocate


Robert C. Van Ness, Judge Advocate

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New Delhi, India
12 January 1945

Board of Review
CM IBT #344

UNITED STATES
v.
Captain Charles C. Walling,
0484093, 1305th Army Air
Force Base Unit, Air Transport
Command

INDIA CHINA DIVISION ATC

Trial by GCM convened at Calcutta, India on 14 and 15 September 1944. Sentenced to pay \$1200 fine, to be restricted to limits of post for three months.

OPINION OF THE BOARD OF REVIEW
O'BRIEN, VALENTINE and VAN NESS, Judge Advocate

1. The record of trial in the case of the above named officer having been examined in the Branch Office of the Judge Advocate General, India Burma Theatre, and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to the Judge Advocate General.

2. The accused was tried on 14 and 15 September 1944 by a court convened by Brigadier General Tunner, Commanding, India China Division, Air Transport Command, 1305th Army Air Forces Base Unit, APO #192, on charges and specifications referred for trial, on 7 September 1944, by that officer, as follows:

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

Specification: In that Captain Charles C. Walling, 1305th AAF Base Unit, Air Transport Command, did, at Misirari, India, on or about April 10, 1944, wrongfully use in the presence of a gathering of several commissioned officers of the United States Army, the following disrespectful, insulting, contemptuous and provoking words against Second Lieutenant Homer H. Wilson, United States Army, to wit: "Lieutenant Wilson pulled a chicken-shit trick by turning McNelley in" (or words to that effect); "Lieutenant Wilson deserves a good beating up and I am,

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going to give it to him" (or words to that effect); "There's Wilson back, the dirty low son-of-a-bitch. Somebody should knock his ears off. I think I will do it" (or words to that effect); "Somebody should pick a fight with Wilson and beat him up" (or words to that effect); "Broome, (meaning Second Lieutenant Robert K. Broome), I am a Captain and I can't go over there and pick a fight with him (meaning Lieutenant Wilson) due to our difference in rank. Why don't you go over and knock the shit out of him" (or words to that effect).

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

Specification 1: In that Captain Charles C. Walling, 1305th AAF Base Unit, Air Transport Command, did, in conjunction with Second Lieutenant Robert K. Broome, at Misimari, India, on or about April 10, 1944, commit an assault upon Second Lieutenant Homer H. Wilson, by wrongfully striking the said Lieutenant Homer H. Wilson on the face and head with his fists and foot.

Specification 2: In that Captain Charles C. Walling, 1305th AAF Base Unit, Air Transport Command, did, at Misimari, India, on or about April 10, 1944, wrongfully encourage, persuade, advise and knowingly assist Second Lieutenant Robert K. Broome to commit an unlawful assault upon Second Lieutenant Homer H. Wilson, in his presence, and the presence of several other commissioned officers, and that he was at the time of said assault the highest ranking commissioned officer present and he made no effort to prevent said assault or stop the progress of the assault but stood by and threatened Second Lieutenant Robert K. Broome in the following words, to wit: "I will beat you up if you let Wilson get the best of you" (or words to that effect).

Accused pleaded in bar of trial to all charges and specifications, basing his plea on a written reprimand and forfeiture previously administered under the 104th Article of War. This plea was overruled, and accused then pleaded not guilty to all charges and specifications. At the conclusion of the prosecution's case, accused renewed his plea in bar of trial, which was likewise overruled. He was found guilty of the Specification, Charge I, and

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not guilty of Charge I but guilty of a violation of the 96th Article of War, and guilty of Charge II and its specifications. He was sentenced to pay a fine of \$1200 and to be restricted to the limits of his post for three months. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2, Charge II, and Charge II, but approved the findings of guilty of the Specification, Charge I, and Charge I, and the sentence. The sentence was published in General Court-Martial Order No. 18, Headquarters India China Division, Air Transport Command, APO 192, Postmaster, New York, New York, 11 November 1944.

3. The only question requiring consideration by the Board of Review in this case is whether the court's action in overruling accused's plea in bar of trial to the charges and specifications was proper. In considering this question the Board will assume that the allegations set out in the specifications were proved by competent evidence and will recapitulate the testimony only to the extent that is necessary to lend continuity to what is alleged to have occurred.

4. It appears from the evidence that, on the evening of 9 April 1944, a promotion party was held in a basha occupied by several officers at Station No. 11, India China Wing, Misimari, India. In attendance were the accused, who was the senior officer present, Captain Andrews, Lieutenant Broome, and several other officers. The party engaged in drinking and general conversation. One of the subjects discussed was an alleged incident which occurred at Sookerating, India, when Lieutenant Wilson, who was co-pilot with Captain McNelly, refused to fly with McNelly because the latter had been drinking and which, it is indicated, resulted in disciplinary action against McNelly. It may be gathered that several members of the party joined in condemnation of Lieutenant Wilson for reporting Captain McNelly, and it is clear from the evidence that this was the occasion for the remarks alleged in the Specification, Charge I, to have been made by the accused and which, for the purposes of this opinion, are assumed to have been made. Lieutenant Wilson and several other officers, all junior to accused, had been at the Thakurbari Club at Ranjapara during the evening in question and returned to Lieutenant Wilson's basha, which was near the one where the promotion party was being held, at about midnight. Those still present at the party apparently heard Wilson and his group return, and accused and Broome thereupon entered into a discussion in which, it may be gathered, they agreed that someone should "kick the shit out of Wilson". Broome, Walling and Andrews then went to Wilson's basha and Broome entered into

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an altercation with him. Several other officers were present. It was at this time that the offenses set out in Specifications 1 and 2 of Charge II are alleged to have occurred. It is clear that accused struck no blows but there is evidence that he encouraged Broome in the commission of the assault. Wilson was severely beaten.

5. By letter dated 10 May 1944, subject "Disciplinary Action", signed by Brigadier General Thomas O. Hardin, Commanding, Headquarters India China Wing, Air Transport Command, Station No. 1, APO #192; Captain Walling was advised as follows:

"1. Investigation discloses that you have committed offenses against good order and military discipline as follows:

a. Permitting Lt. Broome to commit assault and battery upon Lt Wilson at Station #11 on or about 9 April, 1944. You made no effort to stop the fight which ensued, but on the contrary, by your words and actions, encouraged the continuance of it.

b. When your Commanding Officer, Major Collier, asked you if you were present when the fight and disorder took place, you untruthfully replied that you were not present and knew nothing about it.

2. It is my intention to impose punishment under Article of War 104. In accordance with Paragraph 107, MCM 1928, you are notified of this intended action. You will acknowledge receipt of this communication by indorsement which will include a statement as to whether you demand trial in lieu of action under Article of War 104".

By undated first indorsement, Captain Walling acknowledged receipt of the foregoing letter and elected to accept punishment under Article of War 104, and, by second indorsement dated 6 June 1944 and signed by Brigadier General Hardin, the following action was taken:

"1. You are hereby severely reprimanded for conduct to the prejudice of good order and military discipline.

2. Your action in encouraging a fight between two junior officers shows an utter disregard of your duties and responsibilities as an officer. Such altercations are detrimental to the efficiency and morale of our command.

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Furthermore, your statement to your Commanding Officer that you were not present at the affray and knew nothing about it is reprehensible and cannot be condoned. Our utmost effort in the prosecution of the war will not be attained until full confidence can be placed in the integrity of each officer.

3. You will forfeit the sum of one hundred dollars (\$100.00) from your June 1944 pay.

4. The action embraced in this communication will be recorded on your WD AGO 66-2 in accordance with AAF Memorandum 35-6A, 15 January 1944.

5. You are advised of your right to appeal in accordance with par. 108 MCM, 1928, and are directed to reply by indorsement herein which will include date of receipt of this indorsement and any appeal you may desire to make".

By fifth indorsement dated 16 June 1944, Captain Walling indicated his acceptance of the punishment imposed and waived his right to appeal.

There is no doubt under the record that Brigadier General Hardin was accused's commanding officer on 6 June 1944, and as such, was authorized to impose disciplinary punishment under Article of War 104.

6. The record of trial does not contain evidence as to any investigation made prior to the imposition of punishment under the 104th Article of War and the officer who imposed such punishment did not testify. For that reason, it is necessary for the Board of Review, in determining what offense or offenses were intended to be covered by the disciplinary action of 6 June 1944, to look primarily to the correspondence whereby the action was taken. The original letter of 10 May 1944 states, in pertinent substance, that disciplinary action was contemplated against Captain Walling for having committed an offense against good order and military discipline in having permitted Lieutenant Broome to commit an assault and battery upon Lieutenant Wilson and, by words and actions, having encouraged the continuance of it, and the second indorsement of 6 June 1944 broadly refers to Captain Walling's "action in encouraging a fight between two junior officers". It is considered that the mentioned letter and indorsement may be construed as pertaining

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not only to what occurred at Wilson's basha but also to what occurred on the same evening in the nearby basha where the promotion party was held. Manifestly, the nature of the offense for which punishment was imposed was not so "clearly and concisely" set forth; as required by section 107 of the Manual, as not to include Walling's alleged wrongful conduct at the promotion party in encouraging Broome to assault Wilson. It may be presumed that the commanding officer had investigated the matter pursuant to section 107 of the Manual and, therefore, that he was cognizant of all aspects of Walling's conduct in connection with the alleged assault and intended to punish Walling for all such aspects, including the use by Walling of the insulting and provoking words set out in the Specification of Charge I. There is nothing in the record to the contrary and, under the circumstances, it would be mere conjecture on the part of the Board to consider that such was not intended. Therefore, for the purposes of this discussion, it will be considered that Walling was punished under the 104th Article of War for all his acts of encouragement and participation in connection with the assault on Wilson, whether occurring at Wilson's basha or at the promotion party.

The provision of paragraph 69c of the Manual that punishment under the 104th Article of War "does not bar trial for another crime or offense growing out of the same act or omission" is not applicable in this case. The offense alleged in the Specification, Charge I, was essentially an act of solicitation and encouragement to Broome to assault Wilson and cannot be said to have grown out of what subsequently occurred. It is inextricably a part of accused's participation in the assault, albeit a different aspect thereof.

If the offense for which accused was punished under the 104th Article of War was not a minor offense, the punishment was void and would not constitute a bar to trial (CM 204275, Lichtenfel; Dig. Op. JAG, 1912-40, sec. 462(2)). In this connection, it is well established that when an officer administering punishment under the 104th Article of War determines that the offense is a minor one, his determination is, unless there is an abuse of discretion, final and conclusive (CM 204275, supra) (SPJGH CM 250912, Wells; 33 B.R. 91).

"Whether or not an offense may be considered as 'minor' depends upon its nature, the time and place of its commission, and the person committing it. Generally speaking, the term includes derelictions not involving

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moral turpitude or any greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial. An offense for which the Articles of War prescribe a mandatory punishment or authorize the death penalty or penitentiary confinement is not a minor offense". (Par. 105, MCM)

Although the offense alleged in the Specification, Charge I, is serious in its disciplinary aspects, it does not involve moral turpitude, nor is it one for which the death penalty or penitentiary confinement is authorized. The Specification does not set forth an offense inherently amounting to a violation of the 95th Article of War, and the court, in the exercise of its discretion, found the accused guilty only of a violation of the 96th Article of War, for which mandatory punishment is not prescribed. It follows that the offense is not a major offense within the meaning of the quoted excerpt of paragraph 105 of the Manual, supra. Its nature is such that a commanding officer might properly exercise the widest discretion in determining the degree of seriousness and whether action under the 104th Article of War would be appropriate. The fact that General Hardin, who imposed the punishment, did take action under the mentioned Article indicates that he determined it to be a minor offense, and there is no showing of record that subsequent events caused him to change his determination. Such determination must, therefore, be considered as final and conclusive (CM 204275, supra; SPJGH CM 250912, supra). So far as the record discloses, the accused had been punished for the offense or offenses involved and there was no abuse of discretion in the imposition of such punishment. It follows that the accused was not thereafter subject to punishment a second time and the plea in bar should have been sustained.

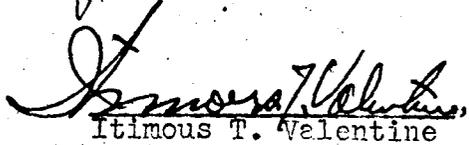
It is significant that the action under the 104th Article of War was taken by Brigadier General Hardin and that the case was referred to trial three months later by Brigadier General Tunner. There is no indication in the record of trial that General Hardin was not aware of all the facts involved and did not consider his action of 6 June 1944 final. Under these circumstances, and in the absence of a showing to the contrary, the action toward bringing the accused to trial appears to be violative of the spirit of Articles of War 40 and 104.

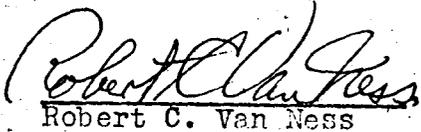
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7. The Board of Review is, therefore, of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.


John G. O'Brien, Judge Advocate


Itimous T. Valentine, Judge Advocate


Robert C. Van Ness, Judge Advocate

CM IBT # 344 (Walling, Charles C.) 1st Ind.

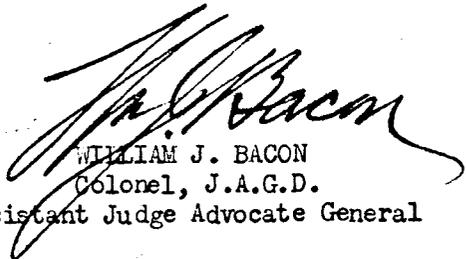
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, India Burma Theater,
APO 885, New York, N. Y., 15 January 1945.

To: The Commanding General, USF, India Burma Theater, APO 885, U. S. Army.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, 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 Captain Charles C. Walling, 0484093, 1305th Army Air Force Base Unit, Air Transport Command, together with the foregoing opinion of the Board of Review constituted in the Branch Office of The Judge Advocate General with the United States Forces in India Burma.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

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



WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

2 Incls.
Record of Trial
Action Sheet

(Findings and sentence vacated. GCMO 3, IBT, 27 Jan 1945)

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APO 885,
28 December 1944.

Board of Review,
CM IBT 349.

UNITED STATES

v.

Charles J. Stoddard, O-794176,
Second Lieutnant, AC, 1304th
Army Air Forces Base Unit, In-
dia China Division, ATC.

HQ. INDIA CHINA DIV., ATC.

Trial by GCM convened at APO 492
Postmaster, New York, N.Y., on
25 October 1944. Dismissal, total
forfeitures, confinement at hard
labor for one year.

HOLDING by the BOARD OF REVIEW
O'BRIEN, VALENTINE, and VAN NESS, Judge Advocates

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

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

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

Specification 1: In that Second Lieutenant Charles J. Stoddard, 1304th Army Air Forces Base Unit, Air Transport Command, did, at Barrackpore, India, on or about 1 August 1944, knowingly and willfully misappropriate two (2) Yale two (2) ton capacity chain hoists of the value of about \$200.00, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Second Lieutenant Charles J. Stoddard, 1304th Army Air Forces Base Unit, Air Transport Command, did, at 5317th Air Depot, Tit-taghur, India on or about 1 July 1944, knowingly and willfully misappropriate six hundred (600) pounds of lead ingots, and one hundred (100) feet of cold rolled steel of the value of about \$200.00, property of the United States furnished and intended for the military service thereof.

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

Specification: In that Second Lieutenant Charles J. Stoddard, 1304th Army Air Forces Base Unit, Air Transport Command, did, at Barrackpore, India, on or about 19 August 1944, willfully and wrongfully solicit Staff Sergeant Ward F. Monfort, 1304th Army Air Forces Base Unit, Air Transport Command, to assist him in the commission of an unlawful act, to wit: the felonious taking, stealing, and carrying away of twelve (12) electrical refrigerators, value about \$2400.00, property of the British Government, stored at Warehouse 4 Upper, Indian Jute Mill, Cossipore, India.

3. The accused pleaded not guilty to all Charges and Specifications and was found guilty of all of them. He was sentenced to dismissal, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, United States Forces, India Burma Theater for action under Article of War 48. The confirming authority confirmed the sentence. The order of execution was withheld and the record of trial forwarded to this office for action under Article of War 50-1/2.

4. Accused, who was Post Engineer and Utility Officer (R. 90), was, during July and August, messing with Alexander Grant and Reginald Pennington, civilians (R. 18, 19), who live outside the main gate of the area (R. 18) of the 1304th Army Air Forces Base Unit (R. 7). Both civilians are employes of the Tata Aircraft Corporation. Captain Vaughan Farrie, CMP, located two Yale two-ton hoists in the quarters of Grant and Pennington (R. 20) where he obtained possession of them with the permission of Grant. The hoists had been turned over to Grant by accused (R. 22) at the Tata Machine Shop (R. 58) and were subsequently taken to the quarters of Grant and Pennington by accused (R. 46, 59). During a conversation between accused, Grant and Pennington it was suggested that the hoists be sold (R. 47, 48, 50, 51, 60). While testifying, Pennington first denied that accused had said "these blocks were up for sale", but when presented with an earlier statement he had made, he admitted that such was true (R. 50, 51). Accused told Sergeant Monfort that if Monfort could sell them he would get a commission (R. 33).

5. Grant testified that he and accused picked up roughly five hundred pounds of lead (R. 61) and about ten to twelve lengths of steel varying from ten to twelve feet in length from

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the 28th American Depot during "I think it was some time in August" (R. 61). The steel was cold-rolled steel. The steel and lead were turned over to accused by a sergeant who was supervisor of Class 23 Warehouse (R. 69, 70, 73) and who had asked Grant if he could use some steel. Grant said "yes" (R. 63). The steel and lead were taken to the Tata Machine Shop and laid outside so it wouldn't be mixed with any coming in to Tata which company had a shortage of materials for their machine shop (R. 62). Captain Farrie found the lead and steel behind the machine shop (R. 10, 22).

6. At one time Grant, Pennington and accused had talked about refrigerators in a warehouse near Calcutta, and later accused was given the address. Grant and accused were to lock them over (R. 52). At the time accused asked for the address of the warehouse where the refrigerators were located, there was a driver with him (R. 54), and an enlisted man was present when the conversation took place about looking at the refrigerators (R. 64). Grant, the enlisted man and the accused went to Cosipore to the address given by Pennington (R. 65). On cross examination of Pennington and Grant it was shown that Tata had done various mechanical work for the United States Army through accused and had delivered a compressor, had made a spindle and bearings for their circular saw and delivered a motor to accused, all for army use (R. 56, 66, 68). Technical Sergeant Monfort testified that on or about 19 August 1944 accused had a conversation with him in the quarters of Grant and Pennington (R. 30) and accused mentioned refrigerators that could be had at the Indian Jute Mill (R. 31). They were to pick up refrigerators in a forty-foot trailer and if that was not available, there would be a six by six. Monfort was to get a jeep for a "get-away car" in case the military police stopped them (R. 32). Accused indicated he meant to steal them (R. 33) and Monfort was to "get \$1000.00 out of the refund that comes back in" (R. 32). Monfort was to be "strong-arm man", that is, to take care of the guards (R. 33). About fifteen minutes after this conversation Monfort reported it to Captain Cohen, his superior officer. Later, on the 26th of August, a Saturday, the witness made arrangements with accused to acquire a jeep on Sunday to go to the Indian Jute Mill in order to "case the job that was going to be pulled" (R. 36). The next day, 27 August 1944, they picked up Grant and went to Warehouse 4, upstairs in the Jute Mill (R. 37). There were two hundred refrigerators (R. 39) in "upper 4". These were Frigidaires and General Electric models (R. 38) and at that time Monfort noted all the sizes (R. 39). Before leaving, accused said that they would come back some night around 10:30 or 11:00 o'clock and case the place for guards (R. 39). Pennington

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had told Monfort he had charge of the Indian Jute Mill at one time and had the book of the stock there (R. 40). They looked around to find out how a truck could get in and out and it was concluded that a six by six would have to be used. Accused stated that possibly twelve refrigerators could be taken on a six by six (R. 39).

7. After having been duly warned, accused made a sworn statement to Captain Farrie. In this he said that on or about the first week of August two pulley blocks came with a shipment and no one knew where the shipment belonged. These he loaned to Tata Aircraft and delivered them to Grant. About two weeks later, accused moved them to Grant's quarters. The latter said he might be able to sell them in the black market and accused was to get something for it, a part of the profit. Accused and the two civilian employes of Tata Aircraft discussed selling some refrigerators from Warehouse 4, upper, at a Jute in Cosipore. They conspired to steal British property and were going to transport refrigerators in whatever vehicle they could get. Sergeant "Lefty", who works for Captain Cohen in SOS, was asked to help them. (Sergeant Monfort testified that his nickname was "Lefty" (R. 29)). Accused knew it was wrong to steal another's property (Ex. 1). Subsequently accused, after being warned, made another statement in which he said there were several tons of cold-rolled steel and about two tons of lead at Tata Aircraft which belonged to the United States Army. He said that he had gotten it from a sergeant in a warehouse across from the depot offices. This sergeant had wanted to get rid of it because it was in the way. Accused thought the lead and steel would be used for the allied cause and did not know the civilians were in the black market racket (Ex. 2).

8. Photographs of the hoists, lead and cold-rolled steel were introduced in evidence without objection and it was stipulated that "the pulleys marked Prosecution's Exhibit 3, and the steel marked Prosecution's Exhibit 4, and the lead ingots marked Prosecution's Exhibit 5, it is agreed between the trial judge advocate and the accused that that represents the items that are now in the provost marshal's office" (R. 79). It was stipulated that the value of the six hundred pounds of lead ingots and one hundred feet of cold-rolled steel as mentioned in Specification 2 was of the approximate value of \$200.00. It was stipulated that the value of twelve electrical refrigerators as mentioned in the Specification of Charge II is approximately \$2400.00. It was also stipulated "that the items of chain hoists mentioned in Specification 1 of Charge I and the lead and steel mentioned in Specification 2 of Charge I are the property, furnished and intended for the military service of the United States" (R. 27, 28).

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EVIDENCE FOR THE ACCUSED

9. Captain Cohen testified that accused performed his duties as expected to the best of his ability, seemed ambitious and aggressive and did a good job (R. 81). Sergeant Durden testified that the former commanding officer of the post called a mass meeting at which supplies were discussed. The commanding officer said, "get them anyway, if you can't get them on requisition, just get them", or something to that effect. He said "Don't get caught". The defense also attempted to show through this witness that the material was used to get other material which was just as valuable. The testimony of Sergeant Durden was stricken and the court was instructed to disregard "matters which developed subsequent to the original objection by the prosecution relating to bartering" (R. 86).

10. It was stipulated that Robert Bees, Superintendent, Machine Shop, Tata Aircraft, Ltd., would testify that the steel was offered to him in the early days when Tata was short of steel for manufacturing odd jobs for the American services and themselves. The steel was collected by Grant and accused by agreement with the storekeeper through accused. Some chainblock pulleys were borrowed from the American Engineering Section and brought to and taken away from Tata by accused (R. 87).

11. Accused, after having his rights explained, elected to testify in his own behalf. He stated that the hoists came to the field without requisition. He did not know who they were for so took them to Tata for them to use. He obtained the lead and steel and took it to Grant at Tata Aircraft. They used lead and steel for some work Tata was doing for the field and also used some for their own use (R. 91). Tata made a circular saw for use of accused at the field. This was worth about \$200.00 but the value of the job it did would be valued at thousands of dollars (R. 91). The prosecution at this point, objected to the latter line of questioning and was sustained by the law member (R. 92). Accused testified that he had been receiving treatment for syphilis which caused him great pain and anxiety (R. 93). He gave up the idea of taking and selling the refrigerators when he found he was cured of syphilis and at about the same time gave up his relationship with Grant and Pennington. He thought they were trying to use him while he was quite sick and when they realized he was under a nervous strain. They suggested it to him and the thrill of doing something like that, "like a commando act", kept his mind off of his illness (R. 94). He had been in a mental institution in Washington,

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D. C. for about two weeks in February or March 1942. He was examined three times by psychiatrists at the 263d General Hospital and was pronounced sane (R. 95, 100) and able to distinguish right from wrong (R. 95). When examined by a member of the court, accused stated that he had not paid for the loan of the hoist. He received a lot of valuable material and repairs from Tata, including a power saw which is used at the field. He never received anything for himself (R. 102, 103).

12. The evidence is clear and uncontradicted that accused took the chain hoists mentioned in Specification 1, Charge I, and loaned them to Tata Aircraft for a short period of time. Subsequently thereto he moved such equipment from Tata Aircraft to the quarters of Grant and Pennington. This equipment was stipulated to be of the value of \$200.00 and the property of the United States intended and furnished for the military service thereof. From the testimony of Grant and Pennington and by accused's own statement, it is uncontradicted that it was intended to sell the hoists and split the return therefrom. The record reveals facts from which accused could have been charged with and properly convicted of larceny. There is a divergency among the opinions of several boards of review as to whether misappropriation is a lesser included offense of larceny. We feel that it is unnecessary to discuss this question in the instant case because we are of the opinion that proof of the fact that accused turned over the hoists to Tata for their use in working on things for themselves and for the United States Army is sufficient to warrant the findings of the court. At that time the misappropriation was completed and we do not believe that any subsequent intention to steal affects the prior proof of the allegation. Misappropriation means devoting to an unauthorized purpose and need not be for the benefit of accused. Although the property alleged in Specification 1 and 2 of Charge I to have been misappropriated was apparently used in part for work done on behalf of the United States Army, it was in fact devoted to an unauthorized purpose, and under such circumstances the offense is established. That the military service received some benefit from such unauthorized use is, we believe, a matter to be considered in extenuation rather than in defense.

13. "Although it has been maintained that a mere solicitation to commit a crime is not indictable, except in a few cases, by the weight of authority it is an indictable offense at common law to solicit another to commit any crime amounting to a felony, although the solicitation is of no effect and the crime is not in fact committed" (22 CJS, p. 142).

And,

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"Thus it has been held a crime to solicit another to commit larceny * * *". (16 CJ, p. 117)

From the evidence in the record of trial there can be no question but that accused solicited an enlisted man to assist him to commit larceny. Under such circumstances, we believe the court wholly justified in its finding of guilty of the Specification of Charge II and Charge II.

14. There are several errors in the record and though we do not believe they prejudiced any substantial right of the accused, we shall discuss some of them. Captain Farrie testified without objection that Grant had told him that he got the hoists from accused and that Bees pointed out the lead as having been brought by accused to Tata Aircraft. This was an attempt to prove the corpus delicti through incompetent and hearsay evidence. Wharton, in his treatise on criminal evidence at page 680 states:

"What others told the witness is not admissible to prove the corpus delicti of a crime".

However, there is abundant competent evidence of the corpus delicti in the record upon which to predicate the admission of accused's confession, and in our opinion the accused has in no way been prejudiced.

15. The law member, upon objection by the trial judge advocate, refused certain testimony as to benefits received from Tata Aircraft in exchange for the use of the hoists and for the lead and the steel. Although this is not a defense, it is a matter that should have been admitted in extenuation or mitigation. However, some evidence of this was admitted without objection and the accused himself was permitted to testify as to such matters when interrogated by a member of the court. In view of the lightness of the sentence for the offense with which the accused has been charged and the fact that evidence in mitigation or extenuation was permitted in part when accused testified, we are unable to say that there was any substantial prejudice.

16. Upon cross examination of accused after defense counsel had brought out that accused had at one time been admitted to a mental institution, the trial judge advocate adduced testimony that accused had been in such mental institution because he had taken indecent liberties with a girl in a theater. We think that was clearly erroneous and should have been excluded, but viewing the record as a whole, we can not say such error was fatal.

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17. The question of sanity has entered into this record. According to the testimony of accused, he had been examined by Army medical authorities and found to be sane and able to distinguish right from wrong. It would have been more proper to introduce the findings of the medical board, if such there was, or by direct testimony of the medical officer who examined accused. It should appear not only that accused was able to distinguish right from wrong but also whether or not he could adhere to the right and whether his mental condition was such at the time of the examination so as to enable him to conduct his defense and co-operate with his counsel intelligently. The rules governing the determination of the mental responsibility for the acts of the 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".

"Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not 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".

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 a 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 the offenses charged 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. It is

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clear that the accused was not relying on insanity as a defense. The law presumes an accused to be sane and legally responsible for his acts. The court by its action as revealed by its finding must have discarded any question of accused's mental incapacity.

It has been noted that the investigating officer acted as assistant trial judge advocate. No objection was made by the accused. In this connection, the following excerpt from a recent opinion (SPJGQ CM 234622) is pertinent:

"It is the opinion of the Board of Review that the ruling of the law member was correct and proper. In the first place the trial judge advocate is not subject to challenge (sec. 375 (1) Dig. Ops. J.A.G., 1912-40). The mere fact that the assistant trial judge advocate served as the investigating officer cannot be considered ipso facto reversible error or as injuriously affecting any substantial right of the accused. There is no statutory or other legal inhibition against an investigating officer, serving as trial judge advocate or assistant trial judge advocate. The Board of Review has held repeatedly that the presence of the investigating officer on the court is not jurisdictional error invalidating the proceedings but procedural error only and hence curable under the provisions of the 37th Article of War, where after an examination of the entire proceedings, the reviewing or confirming authority is of the opinion that the substantial rights of the accused have not been adversely affected (CM 210612, Maddox; CM 203802 Braman). The record of trial in this case has been given the most careful consideration. The accused appears to have had an absolutely fair and impartial trial. There is nothing in the entire proceedings which in the slightest degree reflects any hostility, bias or prejudice against the accused on the part of the trial judge advocate or assistant trial judge advocate. If the presence of an investigating officer upon the court is procedural error only and curable under the provisions of the 37th Article of War, a fortiori the presence of the assistant trial judge advocate who has no voice in determining the guilt or innocence of an accused does not constitute reversible error.

We believe the foregoing to be a correct principle of law and applicable in this case.

18. The court was legally constituted and had jurisdiction of the person of accused and of the subject matter of the offenses

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charged. No errors injuriously affecting the substantial rights of 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.

John G. O'Brien, Judge Advocate
John G. O'Brien

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

Robert C. Van Ness Judge Advocate
Robert C. Van Ness

CM IBT # 349 (Stoddard, Charles J.) 1st Ind.

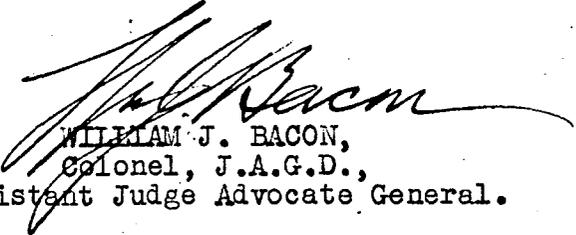
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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 30 December 1944.

TO: The Commanding General, USF, IBT, APO 885, U. S. Army.

1. In the case of Second Lieutenant Charles J. Stoddard, O-794176, 1304th Army Air Forces Base Unit, India China Division, ATC, 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 IBT 349).


WILLIAM J. BACON,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 12, IBT, 30 Dec 1944)

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APO 885
22 December 1944

Board of Review
CM IBT 350

UNITED STATES

SERVICES OF SUPPLY

v.

Second Lieutenant John C.
Reynolds, Jr., O-1115755,
CE, 779th Engineer Petroleum
Distribution Company.

Trial by GCM convened at APO 689
% Postmaster, New York, N.Y. on
25 October 1944. Dismissal,
total forfeitures.

HOLDING by the BOARD OF REVIEW
O'BRIEN, VALENTINE, and VAN NESS, Judge Advocates

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

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that Lt. John C. Reynolds, 779th Engineer Petroleum Distribution Company was, at the towns of Dum Duma, and Panetola, Assam, India, on or about 2 August 1944, found drunk while on duty as Officer in Command of his Company.

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

Specification: In that Lt. John C. Reynolds, 779th Engineer Petroleum Distribution Company, was, at Tinsukia, Assam, India, on or about 2 August 1944, in a Public Place, to wit, a Photographers stall, drunk and disorderly while in uniform.

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

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Specification: In that Lt. John C. Reynolds, 779th Engineer Petroleum Distribution Company was at his Company Area on or about 2 August 1944, drunk and disorderly while acting as Officer in Command of his organization.

3. Accused pleaded not guilty to and was found guilty of Charge I and its Specification. To the Specification, Charge II, he pleaded guilty except the words "and disorderly" and not guilty of Charge II, but guilty of a violation of the 96th Article of War, and was found guilty of the Specification, Charge II, except the words "and disorderly" and guilty of Charge II. To the Specification, Charge III, he pleaded guilty except the words "and disorderly while acting as Officer in Command of his organization," and guilty to the Charge. He was found guilty of Charge III and its Specification. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, United States Forces, India Burma Theater for action under Article of War 48. The sentence as approved by the reviewing authority was confirmed and, pursuant to Article of War 50-1/2, the order directing execution of the sentence was withheld and the record forwarded to the Judge Advocate General's Branch Office, India Burma Theater.

4. The evidence for the prosecution shows that the 779th Engineer Petroleum Distribution Company was in camp near Makum Junction, India, on the morning of 2 August 1944 (R. 7). First Lieutenant T. R. Van Kirk, who, as senior officer present, was in command of the company, had occasion to go to Ledo. On leaving camp at about 0900, he told accused, who was the next senior officer present, that he might not be able to return that day, to call him if anything happened, and that "you are in charge or you are in the saddle" (R. 7, 42). The only other company officer present in the area on 2 August was Second Lieutenant Melvin C. Robertson, who was junior to accused (R. 17, 42). Lieutenant Van Kirk did not return until late in the morning of the following day (R. 43).

At about 1330, 2 August 1944, the accused, Staff Sergeant Joseph J. Reynolds, Sergeant John Rich, Sergeant Alfred C. Hanna and Private William E. Bennett went to Dum Duma in a jeep (R. 32). They stopped at a liquor store there and purchased two cases of Lily Brand gin (R. 28). Accused had several drinks of straight gin (R. 23, 28) and, in the words of Sergeant Hanna, who was not drinking, "got pretty well intoxicated" (R. 28). They then went to Tinsukia and stopped at a photographer's stall in the bazaar center, where accused had his picture taken (R. 13, 30). Accused had acquired a monkey in the meantime (R. 29).

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Second Lieutenant Melvin C. Robertson saw accused at the stall at about 1500. Accused held the monkey in one hand and a beer bottle in the other while having his picture taken (R. 8). Thirty or forty soldiers were present (R. 13), accused was "creating an entertainment" (R. 18), was the center of attraction (R. 9), and the bystanders were amused (R. 18). Lieutenant Robertson stated that accused is ordinarily quiet (R. 9), but on this occasion, was in "rather high spirits" (R. 9) and in "a drunken condition" (R. 16), although not drunk according to the definition of drunkenness set out in paragraph 145 of the Manual (R. 15, 16).

The party in the jeep next proceeded to Panetola where they ate in a cafe. Accused gave the monkey a "pretty good whopping across the tables". Sergeant Hanna let the monkey escape on the way back to camp. When accused discovered this he threatened to give Hanna a "whopping", so Hanna gave accused ten rupees in payment for the monkey (R. 29). They arrived at the company area about 2030 (R. 33).

Private Bennett cut his thumb on a gin bottle soon after they arrived at camp, and accused volunteered to take him to the dispensary at Tinsukia (R. 23, 33). Sergeant Pace, a medical corpsman, accompanied them. Accused acted like he was drinking (R. 33), liquor could be smelled on his breath and he was "kind of weak legged" (R. 35). A guard stopped them near the motor pool and asked for accused's dispatch ticket (R. 33). Accused, who was driving, said he didn't need one "because he was in charge of the post at the time". When the guard said that he did need one, accused asked the guard if he had any ammunition in his rifle. The guard said "yes", whereupon accused said, "Well, draw a bead on me because I'm pulling off", and drove on. The jeep went from one side of the road to the other for about three-fourths of a mile, then went into a ditch and became mired (R. 34). The road was wet and in bad condition (R. 36). Military policemen came and pulled out the jeep, and one of them told Pace to drive. Accused asked the military policeman if that was an order, and the military policeman said, "If you put it that way, it is an order". Pace then drove (R. 23, 34). Accused laid over, went to sleep, and did not get out at the dispensary. When they returned to camp, the jeep became stuck in a mudhole. Pace switched off the motor and went to his tent (R. 34).

A guard awakened Lieutenant Robertson and First Sergeant Louis R. Nesbitt about midnight (R. 10, 21). They went to the jeep and found accused asleep in it. Private First Class Kane, who was also in the jeep, was drunk and refused to get out. Accused aroused when two men took Kane out of the jeep. Accused was unable to stand up, held on to the jeep for support, staggered and his breath smelled of liquor (R. 11, 21). Robertson held him

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up and helped him to his tent (R. 11, 21). Several empty gin bottles were found in the jeep (R. 14).

5. Staff Sergeant Reynolds, a witness for the defense, testified that he was with accused at Tinsukia on the afternoon of 2 August 1944, and that nothing out of the ordinary happened there or after their return to camp (R. 38). On cross examination he stated that accused took two or three drinks of gin on the way back to the company area; that he did not see accused take any drinks at Dum Duma but was not with him all the time; that he was with accused when he bought two cases of gin; that he did not see him at the photographer's stall and did not see him beat the monkey (R. 39-41).

6. The accused elected to remain silent (R. 41).

7. With respect to the Specification, Charge I and Charge I, to which accused pleaded not guilty, it is considered that there is substantial evidence to support the court's finding that accused was drunk at the towns of Dum Duma and Panetola on 2 August 1944 and that his drunkenness was sufficient sensibly to impair the rational and full exercise of his mental and physical faculties within the meaning of Article of War 85. It is not the function of the Board to weigh such evidence (CM CBI 109; Sec. 402, (2) Dig. Op. JAGBO, CBI) (CM CBI 224; Sec. 443 (1), Dig. Op. JAGBO, CBI, Supp. I). However, a question of law is presented whether, under the evidence, accused was, at the time and places in question, "on duty as Officer in Command of his Company", as alleged in the Specification. The defense counsel, in submitting a motion for a finding of not guilty, and again on final argument, invited the court's attention to the following excerpt from paragraph 145 of the Manual for Courts-Martial:

"The offense of a person who absents himself from his duty and is found drunk while so absent, or who is relieved from duty at a post and ordered to remain there to await orders, and is found drunk during such status, is not chargeable under this article".

The defense counsel also cited an opinion of the Judge Advocate General (CM 123594; Sec. 443 (1), Dig. Op. JAG, 1912-1940) which holds in substance that a company commander who was drunk at a general conference of officers not confined to company commanders cannot be said to have been on duty as commanding officer of his company within the meaning of Article of War 85. It was urged by the defense that the accused, while at Dum Duma and Panetola, was not on duty as commanding officer and, therefore, was not guilty under the mentioned Article.

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In connection with the foregoing arguments of the defense, the following quotations are deemed pertinent:

"The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty. In the case of other officers, or of enlisted men, the term "on duty" relates to duties of routine or detail, in garrison or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and men occupy the status of leisure known to the service as "off duty". (See Davis)

"In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article." (Par. 145, MCM, 1928)

"* * * it may be held to be the law that not only is drunkenness on guard, drill, police, parade, inspection, muster, court-martial, or any other duty or exercise of routine, fully within the contemplation of the Article, but also drunkenness upon any occasion of duty properly devolved upon an officer or soldier by reason of his office, command, rank, or general military obligation.* * *

"Continuous duty. While the term "on duty" can scarcely be regarded as so broad or comprehensive, in respect to the periods or occasions embraced, as the phrase "in the line of duty", employed in statutes relating to pensions, bounty and the like, there are yet some instances recognized by the authorities, where officers or soldiers, by reason of the peculiar nature of their office or duty, are considered to be continuously, or during business or working hours, on duty, and thus amenable to charges under this Article if becoming intoxicated during such period. Within this description have been classed post commanders and post surgeons, who are in general liable to be called upon for duty at any time during at least the business hours of the day. So a post or depot quartermaster would ordinarily be similarly amenable during any of the hours in which he may properly be called upon for the performance of duties pertaining to his office.* * *

"Again, in time of war, and especially in the field before the enemy, the status of being on duty, in the sense of this Article, may be uninterrupted for very considerable

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periods. As remarked by the reviewing authority, in approving a conviction of an officer under the Article early in the late war,--"an officer, when his regiment is in front of the enemy, is at all times on duty". In a more recent Order of the War Department, in the case of an officer found drunk while on duty in command of a company "on an expedition against hostile Indians," it was held by the Secretary of War that--"the nature of the service and the safety of the command certainly constitute this duty in the sense of the Article." (Winthrop's Mil. Law and Prec., Reprint 1920, pp.613, 614)

In a case considered by the Board of Review and concurred in by the Judge Advocate General (Fields, CM 241385, 20 Nov. 1943), an officer was charged under the 85th Article of War with being drunk, in the vicinity of Old Hickory, Tennessee, "while on duty as gas Supply Distributing Officer, Second Army Sub-Regulating Station, Donelson, Tennessee". The evidence showed that the accused in question was on twenty-four hour duty as gasoline officer, stationed at Donelson, Tennessee, and, while subject to call, was found drunk in a hotel at Old Hickory. He refused to go back to his unit when given the opportunity by the military police and was held until morning. It was held that the evidence supports the findings of guilty of being drunk on duty under Article of War 85.

In the case now under consideration, the uncontradicted evidence shows that accused had been expressly placed in charge of the 779th Engineer Petroleum Distribution Company when Lieutenant Van Kirk, the company commander, departed for Ledo at about 0900, 2 August 1944, and that he was the senior officer present with the company until Lieutenant Van Kirk returned on 3 August 1944. At about 1300 accused, together with several enlisted men, went to Dum Duma and Penatola, and became intoxicated. This occurred in time of war and while the organization was in the field in a theater of operations. Accused had not been relieved of his responsibility as senior officer in command of his company. He may, therefore, be considered to have been constantly on duty (Par. 145, MCM). As indicated by the holding in the Fields case, supra, the fact that accused was found drunk in Dum Duma and Penatola, instead of in his company area, is not deemed material. It is the opinion of the Board that the evidence supports the findings of guilty of the Specification and Charge, Charge I.

8. With respect to the Specification and Charge, Charge II, to which accused pleaded not guilty under the 95th Article of War but guilty under the 96th Article of War, except the words "and disorderly", and of which he was found guilty, except the words "and disorderly", a question arises whether there is substantial evidence to support the finding under the charge. There is, manifestly, substantial evidence that accused was drunk at the photographer's stall in Tinsukia. It appears that the stall was a public place, and it may be inferred from the circumstances that the

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accused was in uniform (Thornton, CM IBT 283). However, the evidence does not indicate that he was grossly drunk or that he engaged in any reprehensible or disgraceful conduct. To the contrary, it appears only that he was in high spirits, that he had his picture taken while holding a monkey and a beer bottle, that he appeared to drink from the beer bottle, that thirty or forty enlisted men were present, and that accused was the center of attraction. The court properly found him not guilty of disorderly conduct. Although his condition and behavior was "of a nature to bring discredit upon the military service" in violation of Article of War 96, it was not of the nature contemplated by Article of War 95. (CM 196426; Sec. 453 (11), Dig. Op. JAG 1912-40) (CM 197398, Sec. 453 (12), Dig. Op. JAG 1912-40) (Winthrop's Mil. Law and Prec., Reprint 1920, p. 711) In the opinion of the Board, the evidence sustains only a finding of guilty of the Specification in violation of the 96th Article of War.

9. With respect to the Specification, Charge III, and Charge III, to which accused pleaded guilty, except the words "and disorderly while acting as officer in command of his organization", and of which he was found guilty, the evidence shows that accused was drunk when he arrived in the company area at about 2030, that he engaged in an altercation with a military policeman who asked for his dispatch ticket, and that he was subsequently seen in the area by Lieutenant Robertson and several enlisted men in such a grossly drunk condition that he was unable to stand and had to be helped to his tent. For the reasons indicated in the discussion under Charge I and its Specification, accused was, at this time, acting as officer in command of his organization. It is the opinion of the Board that the evidence sustains the findings of guilty of Charge III and its Specification.

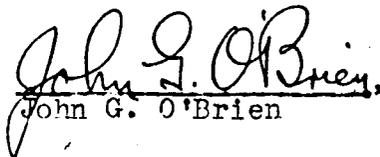
10. The defense, prior to pleading, submitted a motion to strike on the ground of multiplication of charges and asked that "the charges be grouped under one charge and include one transaction" (R. 5). The motion was inappropriate as it pertained to a matter of form only, and it was properly overruled (Par. 71c, MCM, 1928). (Also see CM 129104, Sec. 428 (5), Dig. Op. JAG 1912-1940, and p. 509, Dig. Op. JAG, 1912) The apparent multiplication complained of by the defense may not be exemplary pleading and might well have been avoided, but it is clear that the accused was not thereby prejudiced.

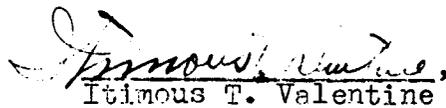
11. The court was legally constituted and had jurisdiction of accused and of the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during

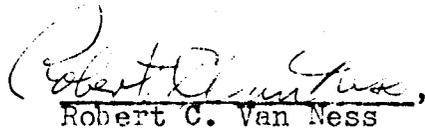
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the trial. In the opinion of the Board of Review the record of trial is sufficient to support only so much of the findings of guilty of the Specification, Charge II, as involves a finding of guilty in violation of Article of War 96, and legally sufficient to support the remaining findings of guilty and the sentence. Dismissal is mandatory under Article of War 85, and is authorized under Article of War 96.

John G. O'Brien, Judge Advocate

Itimous T. Valentine, Judge Advocate

Robert C. Van Ness, Judge Advocate

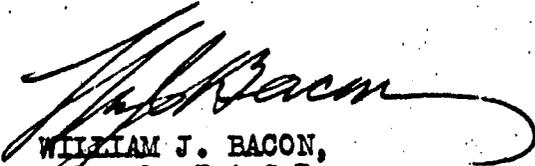
CM IBT # 350 (REYNOLDS, John C. Jr.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885,
c/o Postmaster, New York, N. Y., 23 December 1944.

To: The Commanding General, USF, IBT, APO 885, U. S. Army.

1. In the case of Second Lieutenant John C. Reynolds, Jr., O-1115755, CE, 779th Engineer Petroleum Distribution Company, 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 only so much of the findings of guilty of the Specification, Charge II, as involves a finding of guilty in violation of Article of War 96, and legally sufficient to support the remaining findings of guilty and the 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 IBT 350).


WILLIAM J. BACON,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMD 10, USFIBT, 23 Dec 1944)

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APO 885
16 December 1944

Board of Review
CM IBT 351

U N I T E D S T A T E S)	HQ. INDIA CHINA WING, ATC
)	
v.	)	Trial by GCM convened at
	)	APO 465, % Postmaster New
James A. McPherson, O-510073,	)	York, N.Y. on 19 October
First Lieutenant, 1305th Army	)	1944. Total forfeitures,
Air Force Base Unit, ATC.	)	Dismissal.

HOLDING by the BOARD OF REVIEW
O'BRIEN, VALENTINE and VAN NESS, Judge Advocates

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

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

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

Specification: In that 1st Lt. James A. McPherson, 1305th AAF Base Unit, India China Division, Air Transport Command, having been restricted to the limits of the base for a period of three months by General Court Martial, Order No. 6, promulgated by Headquarters, India China Wing, Air Transport Command, Station #1, APO 192, dated 14 July 1944, and which sentence was adjudged 10 July 1944, at -----, India, on or about 23 September 1944, break said restriction by going to -----, India.

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

Specification: (Disapproved by Confirming Authority)

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Additional Specification Charge II: In that 1st Lt. James A. McPherson, 1305th AAF Base Unit, India China Division, Air Transport Command, was at -----, India, on or about 23 September 1944, grossly drunk and conspicuously disorderly in station in the presence of officers, enlisted men and civilians.

3. Accused pleaded not guilty to all charges and specifications and was found guilty of the Specification, Charge I, and Charge I, guilty of the Specification and Additional Specification, Charge II, and not guilty of Charge II, but guilty of a violation of the 96th Article of War. He was sentenced to dismissal, total forfeitures and confinement at hard labor for three years. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures and forwarded the record of trial to the Commanding General, USF, IBT, for action under the 48th Article of War. The confirming authority disapproved the finding of guilty of the Specification of Charge II and confirmed the sentence as modified by the reviewing authority. The order of execution was withheld and the record of trial forwarded to this office for action under Article of War 50½.

4. The evidence for the prosecution shows that, by General Court Martial Order No. 6, Headquarters India China Wing, Air Transport Command, Station #1, APO 192, % Postmaster, New York, N.Y., dated 24 July 1944, the accused was restricted to the limits of his base for three months (R. 8; Ex. 1). The accused received a copy of this order shortly after 24 July 1944, and understood its contents (R. 125).

On 23 September 1944, accused was assigned to the 1305th AAF Base Unit, ATC, at -----, India (R. 9, 98), which is about twelve miles from the city of ----- (R. 103). At about 1745 on that date, accused was invited into the tent of Captain Theodore R. Hottenfeller and First Lieutenant James W. Gamwell, where he had five or six drinks of straight whiskey with several other officers (R. 10). He left the tent at about 1930, stating that he had an appointment elsewhere (R. 11, 17, 20). He took with him a partly filled bottle of whisky (R. 12). Shortly thereafter, an officer, subsequently identified as accused (R. 51), appeared at the motor pool, was assisted into a truck by an enlisted man (R. 27), and was driven to the passenger terminal by Private John M. Bauer (R. 23). Accused slumped toward the driver, appeared to be "more or less in a daze", and, in the opinion of the driver, was drunk (R. 23). After loading luggage on the truck, the driver found accused laying across the seat

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(R. 24). He was seen in the truck by Second Lieutenant Edwin R. Keller, who stated that accused was awake but appeared "to be a little bit groggy" (R. 51, 57). Accused got out of the truck and urinated on the ground (R. 51, 122). Accused then asked the Indian driver of a government car to drive him to -----, offered the driver a drink, and got into the car (R. 33). When the driver told him that he had no key, accused got out of the car and into another Army car (R. 33) and told the Indian driver to take him to ----- (R. 42). The driver of the second car stated that he would need a trip ticket, whereupon accused snatched the car key from the driver's hand, pushed the driver into the back seat (R. 33, 42, 43), and tried to insert the key in the ignition switch (R. 34, 53). Lieutenant Keller, who had observed accused at the cars, approached, told accused that he had the key upside down, and, when accused inserted the key in the lock, Keller pulled it out (R. 43, 52, 53). Accused hurriedly got out of the car and came toward Keller, who retreated and called an MP (R. 54). Both Indian drivers stated that accused "went to give him (Keller) blows" (R. 35, 43). Keller stated that accused did not attempt to strike him (R. 61), and the MP stated that accused "sort of had his fist in a thrusting manner" (R. 63). Keller further stated that accused was not at any time boisterous and did not speak in a loud voice (R. 60). The MP grasped accused by the wrists, but released him shortly and accused left the scene (R. 63). During all this time, accused appeared to be drunk, weaved when he walked, and his breath smelled of whiskey (R. 60, 63, 64, 67).

At about 2015, 23 September 1944, the accused reappeared at the motor pool, told the dispatcher that he wasn't feeling well, and asked for transportation to his home at #1 Theater Road, ----- (R. 68). Private Charles S. Potter was dispatched to drive him (R. 68). They drove to the MP gate in search of a woman with whom the accused was supposed to have an appointment, returned to the motor pool for gasoline, then started towards ----- (R. 71). The accused had "passed out" when they reached ----- . The driver was unable to arouse him and did not know where the accused lived (R. 73). He left the accused on a concrete block in the center of the street in front of the Lighthouse Theater (R. 71). A master sergeant there said he would look after accused until Private Potter returned on a later trip (R. 80). The accused's eyes were shut and he would not talk (R. 76). The concrete block on which the accused was left is located about one block from one of the main streets in ----- (R. 83) and is a place where busses regularly stop and unload passengers (R. 88). A movie was in progress at the time in the Lighthouse Theater (R. 79). The accused was in uniform of the United States Army and wore the insignia of a first lieutenant (R. 87, 88).

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Shortly after 2120 on the same evening, Lieutenant Fred H. Whittier, MP, Officer of the Day for the 275th Military Police Company in -----, and two military policemen found accused lying on the cement block (R. 81, 84). There were about fifteen officers and enlisted men present (R. 87). Lieutenant Whittier shook him and got no response (R. 85). The accused was carried to military police headquarters where a perfunctory examination indicated that he was definitely under the influence of liquor. He was placed in a cell and kept there during the night (R. 85, 86).

Private Bauer, the truck driver, was unable to identify accused as the officer he drove to the passenger terminal on 23 September 1944 (R. 28). Also, the Indian drivers were unable to identify him. One driver testified that the officer in question looked like Lieutenant Taylor, the defense counsel (R. 37), and the other driver testified that he looked like Lieutenant Gorman, the special defense counsel (R. 48). However, accused's identity as the occupant of Bauer's truck and the officer who approached the two Indian drivers is established by the testimony of Lieutenant Keller who saw accused in Bauer's truck (R. 51) and was present during part of accused's altercation with the Indian drivers (R. 52, 53).

5. The accused, after being advised of his rights, elected to be sworn. He testified that he had been working long and hard hours since March 1944 (R. 105). He had been hospitalized with typhus fever from 14 July to 26 July 1944 (R. 106). When admitted to the hospital he had been in the theater fourteen months without leave (R. 106). His flights up to the valley and back required him to do without sleep for twenty-four hours (R. 107). He returned to the base from a flight to ----- in the early morning of September 22nd. He was unable to sleep during the night of 22 September (R. 115), took a sleeping pill on the morning of 23 September but was unable to sleep that day (R. 108). He accepted an invitation to have a drink in Captain Hottenfeller's tent because " * * * I thought perhaps a drink would do me good" (R. 108). He left the tent about 1930, went to the motor pool and requested transportation to the gate (R. 108). He may have gone to sleep at the passenger terminal but he recalls going to the gate, looking for the cab, and returning to the motor pool, where he requested transportation to his home at #1 Theater Road, ----- . He had no thought at all of breaking restrictions. He tried to stay awake to show the driver where the turn was at Theater Road (R. 109). However, he must have gone to sleep for he recalls very little of what subsequently occurred until he woke up in the MP station (R. 110). He did not knock the Indian driver into the back seat of the car. The driver crawled there. He did not attempt to strike Lieutenant Keller but was merely gesticulating (R. 111). He took

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the bottle from Captain Hottenfeller's tent to his own tent and drank no more of its contents (R. 116). He understood that he was restricted to the base on the night of 23 September 1944 (R. 116).

The operations records section officer testified from his records that the accused had 183 hours flying time from the first of August through the twenty-second of September, 159 hours and 35 minutes of which was logged after the fifteenth of August (R. 99). The average flying time logged by pilots at the base for the month of August was 94 hours and 10 minutes and, for the month of September, 81 hours and 35 minutes (R. 100). The accused had 11 hours and 35 minutes of combat time in this theater (R. 104). Medical statements admitted in evidence indicate that the accused was removed from flying status between 16 June 1944 and 29 June 1944 because of general neurasthenia, and between 11 July 1944 and 13 July 1944 because of fatigue. On 14 July 1944 he was hospitalized because of adenitis and typhus fever. He was released from the hospital on 26 July 1944 and at that time the station surgeon recommended that he be given 15 days convalescent leave. Accused's commanding officer denied leave because accused was under restriction. Accused was restored to full flying status on 31 July 1944 (R. 103; Ex. C).

6. The prosecution's evidence and the accused's own testimony clearly establishes that accused was restricted to his base at the time of the offense alleged and that he broke said restriction by going to ----- . His intent or motive in doing so is immaterial (Par. 139, MCM 1928). The evidence is clearly sufficient to support the findings of guilty of this offense.

7. With respect to the Additional Specification of Charge II and Charge II, there is ample evidence that, at the date and place and under the circumstances alleged, accused was drunk, urinated on the ground, scuffled with civilian employes, assumed a threatening manner toward another officer, abased himself in the presence of enlisted men, and generally conducted himself in a conspicuously unseemly manner. The court was justified in finding him guilty under the 96th Article of War.

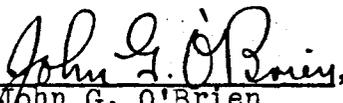
8. The record discloses that only one specification was included under Charge II of the charge sheet as originally drafted. This Specification and Charge were properly sworn to on 3 October 1944. On 14 October 1944 a specification designated "Additional Specification Charge II" was included under Charge II and separately subscribed and verified by the accuser. The designation of

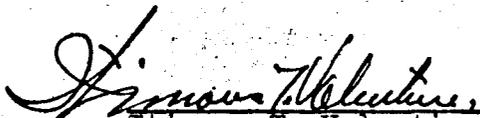
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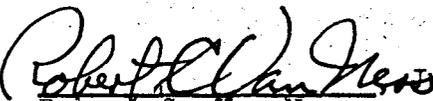
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the last named specification as an Additional Specification under the original Charge II, rather than as a specification under an additional charge was irregular (par. 24, MCM 1928), but was immaterial as to the sufficiency of the charges (par. 28, MCM 1928). However, the report of investigation in this case is dated 8 October 1944 and it does not appear that a new and separate investigation was made as to the mentioned additional specification. Both Specification under Charge II were closely related as to time and substance, and the report of the investigating officer shows that all of the prosecution witnesses called at the trial were interviewed by him and that the offense alleged in the additional specification was thoroughly gone into. The charges were not served on accused until 14 October 1944. Accused made no objection to trial on the additional specification and there is no indication that he was misled. Under these circumstances, it is considered that there was substantial compliance with the requirements of the 70th Article of War and that no prejudicial error was committed (220.26, 30 August 1932; Sec. 428 (1), Dig. Op. JAG 1912-40) (CM CBI 194, Ranson; Sec. 428 (1) Dig. Op. JAG, CBI, Sup. 1).

9. The court was legally constituted and had jurisdiction of the person of the accused and of the subject matter of the offenses charged. No errors injuriously affecting the substantial right of 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.


John G. O'Brien, Judge Advocate
John G. O'Brien


Itimous T. Valentine, Judge Advocate
Itimous T. Valentine


Robert C. Van Ness, Judge Advocate
Robert C. Van Ness

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

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New Delhi, India
17 January 1945

Board of Review
CM IBT # 352

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

) HQ AAF, INDIA BURMA SECTOR

v

William H. Felson, 0270148,
First Lieutenant, AC, 24th
Combat Mapping Squadron

) Trial by GCM convened at APO 671,
) % Postmaster, New York, N.Y. on
) 27 September 1944. Dismissed the
) service, forfeiture of all pay
) and allowances due or to become
) due.

HOLDING by the BOARD OF REVIEW
O'BRIEN, VALENTINE and VAN NESS, Judge Advocates

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

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

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

Specification: In that 1st Lt WILLIAM H FELSON, A.C., 24th Combat Mapping Squadron did without proper leave, absent himself from his organization at APO 690 from about 27 May to about 1 June 1944.

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: In that 1st Lt WILLIAM H FELSON, A.C., 24th Combat Mapping Squadron, did, at APO 690, on or about 2 June 1944 with intent to deceive Major HARRY B ALLEN, officially state to the said Major

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HARRY B ALLEN, his Commanding Officer, that on or about 26 May 1944 he, 1st Lt WILLIAM H FELSON, was taken sick and was treated by a one Major White of the British Armed Forces, such treatment being arranged for by a one Captain Donald Fleming of the British Armed Forces, and did during the period 27 May 1944 to 30 May 1944 inclusive live at the apartment of said Captain Donald Fleming, which statement was known by the said 1st Lt WILLIAM H FELSON to be untrue in that the said Major White did not treat him, Lt FELSON, for illness on or about 26 May 1944, and that during the period 27 May 1944 to 30 May 1944 inclusive, he, Lt FELSON, did not live at the apartment of the said Captain Donald Fleming.

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

Specification 1: In that 1st Lt WILLIAM H FELSON, Air Corps, 24th Combat Mapping Squadron did, at APO 690 and Calcutta India, during the period 8 January 1944 to about 25 May 1944 through neglect, suffer to be lost, funds in the amount of Rupees 12326/14, of a value of about \$3730.00, the property of the Army Exchange Service intrusted to him by the Army Exchange Service.

Specification 2: In that 1st Lt WILLIAM H FELSON, A.C., 24th Combat Mapping Squadron being indebted to the Grand Hotel, Calcutta, India, in the sum of Rupees 798 for quarters furnished to him, which amounts became due and payable on or about 26 June 1944, did, at Calcutta, India, and APO 690 from about 26 June 1944 to about 29 July 1944 dishonorably fail and neglect to pay said debt.

3. The accused pleaded not guilty to and was found guilty of all Charges and Specifications except Specifications 1 and 2 of Charge II of which he was found not guilty. He was sentenced to dismissal and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, United States Forces, India Burma Theater, for action under Article of War 48. The confirming authority confirmed the sentence but withheld the order of execution and forwarded the record of trial to this office for action under Article of War 50½.

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EVIDENCE FOR THE PROSECUTION

4. Major Harry B. Allen, Commanding Officer of the 24th Combat Mapping Squadron and of the air base at Gushkara, India, testified that he was on duty at his station on 27 May 1944. Accused was under his command (R. 7) and, to his personal knowledge, was absent without leave from 27 May to 1 June (R. 8, 9). Accused was sent to Calcutta on 22 May to pick up post exchange supplies and cement to be used in making a swimming pool for his organization (R. 9, 13), and on the 24th or 25th of May he called Major Allen on the telephone and identified himself during the conversation (R. 22). On 2 June accused admitted to Major Allen that he was the person who conversed with him over the telephone from Calcutta. Major Allen recognized accused's voice in the telephone conversation and accused discussed with Major Allen matters known only to him (R. 22). Major Allen ordered accused to return to the base on 27 May with Lieutenant Giannopoulos, who was also in Calcutta, but accused failed to do so (R. 8-9, 21, 22). Lieutenant Giannopoulos returned to the base on 27 May. He brought to Major Allen a note in which accused stated he had been ill (R. 9). Major Allen conducted an investigation and decided that the accused was AWOL (R. 22). He then caused to be made a morning report entry to the effect that accused was AWOL as of 27 May (R. 23-24, 26). In this connection, Major Allen later testified on cross examination that he was on the post or air base all the time between the 27th of May and the 2nd of June; that accused was supposed to have reported there on the 27th of May; that accused was not at his properly appointed station at any time from 27 May to 2 June (R. 21); and that although accused was at Calcutta on detached service, he was told over the telephone by Major Allen to come back to Gushkara (R. 21) with Lieutenant Giannopoulos (R. 22). On 2 June accused returned to his base. Major Allen requested him to account for his absence from 27 May to 1 June. He again stated that he had been sick. The conversation between Major Allen and accused was reduced to writing (R. 10). Accused was first warned of his rights under the 24th Article of War (R. 10, 12). So much of the statement as was agreed upon by the prosecution and defense was received in evidence as Prosecution's Exhibit A (R. 21).

According to his statement (R. 12-20, Ex. A), accused was taken very ill after lunch on Friday and by 6:30 or 7:00 o'clock in the afternoon he was so ill that he had a very high fever. That evening he was visited in his room by Captain Donald Fleming, a British intelligence officer, who later brought a British medical officer to call upon accused in his room. An examination by this British medical officer revealed that accused had

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a temperature of 105. The British medical officer caused accused to be wrapped in blankets, left with him some pills and advised him to stay in bed Friday night. The next morning accused's temperature was down to 101 and he was feeling some better. He was then asked if he desired to go to a hospital but declined to go to the 112th Hospital because it was too difficult to be released. At the suggestion of the British medical officer, accused went to the British General Hospital (R. 14), where his case was diagnosed by the mentioned officer as a "bad case of flu". He was told he should not be up. At that time accused still had a temperature. On Saturday he left the British General Hospital and went to the apartment of Captain Fleming on Harrington Street, where he remained in bed until Tuesday afternoon. By then his fever had broken. He then contacted Lieutenant Norris, the Provost Marshal at the air base, who advised accused that he was to have 24 hours to wind up any necessary business. Accused told Lieutenant Norris that he had not eaten for several days because of his illness. The British medical officer told accused he should take it easy or stay in bed for several days in order to recover his strength. During his illness he had lost a good bit of weight and still had no appetite. He returned to his base on the morning of 2 June. Major White is the British medical officer who attended accused. Accused was never actually admitted to the British hospital because he knew he was not supposed to be in a British hospital. He could not tell what organization Captain Fleming belonged to but thought he could be contacted through British Intelligence Service. During the period accused was at Calcutta he occupied Room 220 at the Grand Hotel. Accused owed the Grand Hotel about Rs 400 and said he intended to send payment down by the next person going to Calcutta. Major Allen then told accused he was expected to pay this bill by 10 June. Major Allen also told accused he was expected to clear up his post exchange account and accused promised to do so immediately (R. 12-20, Ex. A).

Lieutenant Colonel A. A. White of the Royal Army Medical Corps, whose rank was that of Major on 27 May, is supervisor of psychiatry in the Eastern Command and is attached to the 47th General Hospital. He testified that he did not treat accused on 27 May nor was he in accused's room on that day (R. 31). He never saw accused at the British hospital nor did he know Captain Fleming on 27 May. He did not see accused in Captain Fleming's apartment on 27 May. He did not know any other Major White in the hospital although he did not know all the personnel (R. 32). The British hospital is split up into three major sections.

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Colonel White was in Gauhati, Assam, on 27 May and didn't return to Calcutta until 6 July (R. 33).

Captain Donald Willis-Fleming of the Intelligence Corps testified that he is and was on 27 May 1944 the only Captain Donald Fleming in the Intelligence Corps (R. 35). He was and is attached to the Military Base Censor's Office. He met accused in May and visited him in his room in the Grand Hotel, but is uncertain as to the date. He left Calcutta on leave on 27 May and saw accused before he left. He returned about 9 June (R. 35, 36). He does not know a Colonel White, nor did he ever take a British medical officer to accused's room nor accompany accused to the British General Hospital (R. 34). Captain Fleming's apartment on 27 May was at the Grand Hotel and he never had an apartment on Harrington Street in Calcutta (R. 34). Accused was never under a doctor's care in the room or apartment of Captain Fleming (R. 35). The only visit of Captain Fleming with accused was in the latter's room at the Grand Hotel (R. 35). He has no knowledge of any illness of accused (R. 34, 36).

On accused's birthday, 28 May, he went to a party given in his honor at No. 2 Princep Lane (R. 54) at which time, according to his hostess, he came down with a cold and went to bed in her apartment and she "sick-nursed him" until about 2 June (R. 54).

Mr. A. N. Mukherjee (R. 55) is in charge of the billeting department of the Grand Hotel in Calcutta and in that capacity keeps the books and the rent account (R. 56). He had a book containing duplicate copies of the bills of the Grand Hotel. The book is a part of the records of the hotel kept in the regular course of business. The bills are made out by an assistant but checked by the witness. These records are kept under the direct supervision of and are checked by Mukherjee each day (R. 56, 58). The entries thereon were not actually made by him (R. 56). These records show that accused as of 26 June owed the Grand Hotel Rs 798. Bills were taken to accused's room by peons and letters had been sent asking for payment (R. 60). Mr. Mukherjee knows that the bills were delivered to accused although he did not see them actually delivered (R. 63). On or about 24 or 25 July accused went back to the hotel and promised to pay the whole bill (R. 64).

Staff Sergeant Kenneth Johnson, 24th Combat Mapping Squadron, testified that he was manager of Post Exchange No. 886-14 from about 15 April 1944 through 25 May 1944 (R. 71-72) during

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the time accused was post exchange officer (R. 72). There were no books kept except the tally outs, invoices, and scraps of paper and a ledger sheet. There was no record kept of the money received, nor were there any written memoranda in the post exchange (R. 72). There were some invoices for January, February, March, April and May and some tally outs. These were kept in an envelope by Sergeant Johnson (R. 73), who identified the folder containing these invoices which were marked as Prosecution's Exhibits C, D, E, F and G as a part of the post exchange records (R. 74). The business of the post exchange was conducted in what used to be an enlisted man's club. There wasn't sufficient room for all the stock, and beer was sometimes left outside the building and guarded (R. 75). All post exchange sales were for cash. When Sergeant Johnson became manager of the post exchange the cash was kept in four or five cigar boxes in the safe in the office of the intelligence section. The personnel of that office had access to the safe (R. 79), the key to which was kept in a drawer of the desk of Captain Crew (R. 79). This safe was sometimes found open (R. 79). There was at that time no bank account maintained by the post exchange (R. 75-76). Upon becoming manager of the post exchange Sergeant Johnson went through such records as he found in order to familiarize himself with them (R. 77). A folder identified as Prosecution's Exhibit C, which purports to be the file for January, contained an invoice dated the 15th of January. The folder was set up by Lieutenant Cunningham when he came to inspect the records for the months of January, February, March, April and May (R. 77). During a good part of the time accused was post exchange officer he stayed in Calcutta where he had liaison duties (R. 79). Sergeant Johnson made no complaint upon finding the safe open nor did he tell accused about it (R. 79-80). He did not know of anything having been stolen from the safe. At one time there were about two cases of beer stolen from a truck which had brought a load to the post exchange (R. 81) but the beer kept outside the post exchange was counted each morning (R. 80). Accused knew and was familiar with the way the money was kept in the cigar boxes in the safe of the intelligence office as well as the fact that the beer was sometimes left outside the post exchange (R. 81). Although Sergeant Johnson was manager of the post exchange, accused never gave him any instructions to count the money and as far as he knew the money was never counted until Lieutenant Cunningham counted it in May during the preparation of the audit (R. 82). Accused did not take an inventory nor did he require anyone else to do so from 15 April through 25 May (R. 84).

Accused was made post exchange officer by an order of 8 January 1944 (R. 84, Prosecution's Exhibit H) and relieved 25 May 1944

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(R. 84; Pros. Ex. I).

Second Lieutenant Milton S. Dorfman, 24th Combat Mapping Squadron, Gushkara, India, succeeded accused as post exchange officer of the base on 25 May. He identified Prosecution's Exhibit B as the inventory signed by him and which Sergeant Johnson and he had prepared (R. 85).

Lieutenant Cunningham testified that he had worked in the capacity of army exchange auditor since April 1944 and, before taking up his duties here, was auditor of the Sixth Service Command. He also had seven years experience in civil life as an auditor (R. 87, 88). All of the post exchanges in this theater are numbered. When Lieutenant Cunningham went to Gushkara on 25 April for the purpose of conducting an investigation and making an audit of Post Exchange No. 886-14, he failed to find accused. He likewise failed to find him on a second trip (R. 88) but did see and talk to him on a later visit. The 25th of each month is the regular day set apart for the preparation of inventories in all the post exchanges in this theater. Upon an examination of this post exchange on 25 April, Lieutenant Cunningham found that no inventory had been taken. He reported this to the commanding officer who caused an inventory to be made by Lieutenant Cunningham and Sergeant Johnson. As a part of this audit Lieutenant Cunningham counted the cash on hand (R. 89) which he found in three or four cigar boxes in the safe in the intelligence building. The cash so counted amounted to Rs 10,068/14. About a month and a half later accused told Lieutenant Cunningham that he had additional money of the post exchange with him in Calcutta (R. 89). The post exchange at this time did not have sufficient accounts or records. The only records kept were copies of invoices and some receipts. There were no certain or set files "but papers were just scattered from the Post Exchange, some there, some in the headquarters offices' correspondence files, others just stuck in a book sitting on top of a filing cabinet" (R. 90). It was the duty of the post exchange officer to keep a set of books (R. 90). Prosecution's "Exhibit B is the inventories, statements of the Army Exchange Service, orders pertaining to the exchange, financial statements as of the 25th of May, correspondence with the Army Exchange Service". Lieutenant Cunningham had seen and examined Prosecution's Exhibit B before (R. 90) at Gushkara and knew it to be a part of the records of the post exchange (R. 91). He identified Prosecution's Exhibits C, D, E, F and G as a breakdown of the invoices and tally out sheets for the merchandise shipped to the post exchange. Lieutenant Cunningham had seen and examined these exhibits before he was called as a witness at the trial. The mentioned exhibits were not introduced in evidence.

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These invoices and tally outs are broken down by months and are complete. In the 25 April audit a shortage of Rs 2,200 was disclosed (R. 91). When Lieutenant Cunningham returned to Gushkara on 18 June for the purpose of preparing an audit of the post exchange, he saw accused. During the time of the preparation of this audit accused was present and went over the figures and discussed them fully with Lieutenant Cunningham. Accused was shown the audit, and the method used in arriving at the shortage was shown and explained to him. All of the papers of the exchange were gone over thoroughly by accused and Lieutenant Cunningham to see that the exchange had been billed only for such goods as it had received. This examination disclosed no reason for the shortage nor could accused explain it. Prosecution's Exhibit J is a financial statement which is a part of the audit of 25 May. The figures on this exhibit were those used in the discussion between accused and Lieutenant Cunningham (R. 93). Prosecution's Exhibit J includes an inventory made on 25 May and signed by the inventory officer and includes inventories of the 7th Squadron. Lieutenant Cunningham arrived at the figures on page one of Exhibit J by counting the cash, using the inventory obtained from Major King and the accounts payable to the Army Exchange Service from the total amount of moneys received minus the items paid (R. 94). Lieutenant Cunningham explained to accused the figures and the method used by him in arriving at this shortage and accused did not dispute, explain or deny the shortage (R. 95, Pros. Ex. J). They then went over and compared invoices and tally out sheets. There were no sales between the first of December and the 8th of January. All of the invoices were gone over and checked by accused and Cunningham with the tally outs (R. 97). This post exchange had made only one remittance in the amount of Rs 20,800 to the Army Exchange Service (R. 98). There was no record of gross sales kept for the exchange (R. 98). At the completion of this discussion accused told Lieutenant Cunningham that he had brought all the money from Calcutta and that the only way that he could account for the shortage was that he may have missed some of the money when checking out of the hotel. He did not take a receipt for the money he put in the hotel safe but placed it in a sealed envelope upon which he had placed the imprint of his ring in sealing wax (R. 100, 112, 121). Accused said further that on one occasion he went down to send Rs 15,000 to the Army Exchange Service but spent about Rs 3,000 of this amount at Calcutta for some sheets, mattresses and pillow cases to be handled in the post exchange. These sheets, pillow cases and mattresses were not handled through the post exchange (R. 104-105). He then put the balance in the safe

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at the Grand Hotel. Lieutenant Cunningham made a second audit of the post exchange covering the same period as Prosecution's Exhibit J. This audit was marked Prosecution's Exhibit K and corrects an error in the audit previously made (R. 101). When the corrected audit was completed it disclosed a shortage of Rs 12, 326/14 (R. 102, Pros. Ex. K). The difference between the invoices and the money and merchandise on hand is the amount of the sales. This was the method employed by Lieutenant Cunningham in discovering the shortage (R. 99-100). The post exchange council had never had a meeting (R. 105). The amount of cash on hand was discussed with accused who did not question its correctness. Accused gave to Lieutenant Cunningham the information about the tally out sheets used in making the audit (R. 107). It was stipulated that an exchange council was appointed (R. 108).

Major Glendon N. King, 24th Combat Mapping Squadron, is and has been since the first week in May, executive officer of the squadron and the air base (R. 109). He testified that he was president of the board of officers appointed by the commanding officer to investigate the operation of the post exchange. He called a meeting of the board at which accused was present. A complete report of the meeting was identified and marked as Prosecution's Exhibit M (R. 110). It was stipulated by the trial judge advocate and defense that the original of the board's report had been sent to the Commanding General, SOS, under Army Regulations and that the original was therefore inaccessible (R. 110-111). At these board meetings accused was fully warned of his rights under Article of War 24, notified of the amount of the shortage and questioned by Major King concerning it. Accused stated that he did not question the records from which the audit was made but accepted the records of the auditor as being correct. When told by Major King that there was a shortage in the money of the post exchange (R. 128), accused said that Rs 25,000 or 35,000 might be at the Grand Hotel (R. 111-112). He was thereupon dispatched to Calcutta for the purpose of getting the money. The statement of accused made at the board hearing was received in evidence as Prosecution's Exhibit M. In this statement accused admitted that he was familiar with paragraph 28, Army Regulation 210-65. He also admitted that he knew there was a shortage in the post exchange accounts (R. 114-115, Pros. Ex. M). When told that the board had checked the records and could not account for the shortage, accused said he had made the same check with the same result (R. 115). Accused said he knew how the shortage was arrived at (R. 116), but could not determine how it had occurred unless it came about when Rs 15,000 were taken to Calcutta for transmission to Delhi and about Rs 4,000

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of that amount were used for the purchase of mattresses, sheets and so forth. Accused was not sure that this accounted for any of the shortage. The amount of money put into the Grand Hotel safe at this time was later removed to a foot locker but accused could not tell whether there was as much as Rs 15,000 at that time. Accused stated, "The money was kept here loosely too, it's negligence, there's no doubt about it" (R. 116). Accused explained how the money was handled, as follows:

"It was first kept in the Orderly Room safe. I came in twice and found the safe open, so I talked to Captain Carew and then kept the money in the intelligence safe which I think was reasonably secure although several people have access to the safe there. The Post Exchange was broken into once, but so far as we could ascertain there wasn't much taken" (R. 116-117).

Accused said he did not question the honesty of the two enlisted men who worked under him in the post exchange. He admitted that there were no books at the time he took over as post exchange officer. His predecessor turned over to him an inventory but no cash. Nothing had been sold and the entire assets were merchandise (R. 117). Accused said that at the time he took over the post exchange he familiarized himself with Army Regulation 210-65 as to his duties (R. 117). Although accused did not receive proper bills from Delhi, he could have prepared and kept a set of books insofar as the cash involved was concerned (R. 118). The tally out sheets did not show the price for which the post exchange supplies were to be sold. Accused did not discuss directly with his commanding officer the difficulties he encountered in the operation of the post exchange (R. 118) but he did talk to Captain Walker (R. 118-119). Neither did he discuss his difficulties with the post exchange council. As far as he knew, the post exchange council never had a meeting. Nobody ever called on accused for a complete accounting of the affairs of the post exchange during his administration (R. 119). Accused had no reason for suspecting that anyone had taken any of the funds or property of the post exchange. He would not say that the shortage was due entirely to his negligence (R. 119-112). Accused recalled that someone had gone into the intelligence office without his knowledge or authority and taken Rs 4,000 of post exchange money for a monthly liquor ration. The liquor was not handled by the post exchange but through the officers' club and the proceeds turned over to accused along with a return of about Rs 3,000 he had loaned for the purchase of liquor for the officers' club. It was a week or two after the liquor was purchased before accused knew the money had been taken for that

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purpose (R. 120). At one time it was discovered that the account of the officers' club was over Rs 1,000. A check disclosed that the post exchange fund was short the same amount, whereupon Rs 1,000 were turned over to accused (R. 120-121). Accused did not place the responsibility upon anyone for this shortage but added, "I realize that the responsibility is mine, but due to the existing circumstances with the way we had to handle the funds, it is possible that something could have happened to them" (R. 121). Accused contended that he used the best safeguards available for the protection of the post exchange property, but stated that he took no receipts for the money placed in the Grand Hotel (R. 121). At times while accused was at the base he kept some of the money at the Grand Hotel and the other at the base (R. 121-122). Accused also admitted that he was probably negligent in keeping a large sum of money on hand without remitting to the Army Exchange Service more than the payment of Rs 20,800 during the period from 8 January to 30 April. At no time was it necessary to use more than eight or nine thousand rupees during any one month for the purpose of purchasing outside supplies (R. 122). The post exchange fund kept by accused from 8 January until 30 April amounted to about Rs 50,000. During this time accused had no complete records or adequate check upon these funds (R. 122). Accused never discussed with his commanding officer the fact that he was loaning post exchange money to an officers' club for the purpose of buying whiskey or that he was sending supplies to China on a credit, although he discussed it with other officers, including the president of the post exchange council (R. 123). Accused realized that such a practice was in violation of Army Regulations. Major King further testified that upon becoming interested in the manner in which the post exchange was operated, he took over approximately Rs 22,000 while accused was still post exchange officer. This amount was deposited with the finance office and a draft paper to the Army Exchange Service was taken. About 25 May accused turned over to Major King a bank draft for some amount of money (R. 126). About 15 May Major King made an investigation of the post exchange and found a shortage in the cash of about Rs 15,000 and it was then he took charge of the funds above referred to.

EVIDENCE FOR DEFENSE

5. The accused elected to remain silent. Staff Sergeant Johnson was recalled as a defense witness, was handed a paper marked Defendant's Exhibit 1, and identified it as a letter dated 10 May 1944 from the Army Exchange Service, APO 885. This letter,

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which is contained in Prosecution's Exhibit B (R. 129-130), was received subsequent to 10 May 1944 and includes a receipt for the Rs 20,800 sent to the Army Exchange Service. Some mail which was sent to the post exchange had the wrong APO. The first indorsement on this letter is addressed to accused (R. 31).

6. The Specification, Charge I, alleges that accused absented himself from his organization from 27 May to 1 June 1944 in violation of Article of War 61. The evidence shows that accused called his commanding officer over the telephone on 24 or 25 May. He identified himself and was identified by the sound of his voice and the matters discussed between them. The identification of accused over the telephone by his commanding officer was sufficiently proved by competent evidence (20 Am. Jur. p. 326). Accused's commanding officer directed him to return to his organization with Lieutenant Giannopoulos who reported to his base 27 May. The evidence is uncontradicted that accused did not return to his organization as directed but claimed upon his arrival on 2 June that illness had prevented him from reporting at the time and in the manner directed. The following has been held by the Board of Review in a case of absence without leave under circumstances similar to this:

"The evidence shows that on November 18 the accused by telegram explained his illness to his commanding officer. The evidence shows equally clearly that his commanding officer, in response to this telegram, directed the accused to report to his organization on November 19. The evidence is uncontroverted that the accused did not report as ordered, and that he did not report until December 25, 1941. Furthermore, the evidence shows that, although the health of the accused would have been endangered by returning to Fort Bliss at the expiration of his leave of absence, he could have returned without danger by November 27, or at least by December 14.

"The legal elements of the offense of absence without leave are stated in the Manual for Courts-Martial, 1928 sec. 132, pp. 145-146), as follows:

"The article is designed to cover every case not elsewhere provided for where any person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there. * * *.

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"* * * the status of absence without leave is not changed by an inability to return through sickness, or lack of transportation facilities, or other disabilities. But the fact that all or part of a period of unauthorized absence was in a sense enforced or involuntary, should be given due weight when considering the punishment to be imposed" (SPJGH 221686, 13 B.R. 223).

7. In Specification 1 of Charge III accused is charged with suffering to be lost through negligence funds in the amount of Rs 12,326/14, the property of the Army Exchange Service entrusted to him by the Army Exchange Service. The proof upon this Specification shows that accused was appointed post exchange officer on 8 January 1944 and occupied that position until he was relieved on 25 May 1944. During this period he was responsible for the operation of Post Exchange No. 886-14 located at Gushkara. Accused failed and neglected to keep books of account or any other records from which prompt and proper audits could be obtained and the financial status of the post exchange ascertained, nor did he keep sufficient records from which it could be determined whether he had on hand the proper amount of cash derived from the sales of post exchange goods, nor did he take inventory or keep any other appropriate records. He kept part of the cash in several cigar boxes in the safe in the intelligence section. A number of people had access to the safe. At least on one occasion a large sum of money was taken from the safe to be used for the purpose of purchasing a liquor ration, and about this irregularity accused knew nothing for several weeks. Moreover, he made loans from the post exchange funds for the purpose of purchasing liquor without the knowledge or consent of his commanding officer or the exchange council and without making or retaining any records of such loans. He also sent goods to China on credit. He kept a large part of the post exchange cash in the safe at the Grand Hotel in Calcutta without taking receipts for the funds so kept. No bank account was ever opened by him for the safe-keeping of post exchange funds. During his tenure of office as post exchange officer he made only one remittance to the Army Exchange Service although the amount of cash carried amounted to approximately Rs 50,000. After being warned of his rights under the 24th Article of War and while being questioned by Major King concerning the financial status of the post exchange, accused admitted that there had been negligence in the handling of the affairs of the post exchange. The audit marked Prosecution's Exhibit J shows a shortage of Rs 10,264/3, and the corrected audit, Prosecution's Exhibit K, discloses a shortage of Rs 12,326/14. Both of these audits, together with the invoices and all tally out sheets and all other records and sources from

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which the auditor obtained the data with which to prepare the audit, as well as the amount of cash on hand, were gone over and discussed with accused by the auditor, Lieutenant Cunningham, and after a full and fair explanation of the audit and all the records by Lieutenant Cunningham, accused made no question of the correctness of the audit nor was he able to explain or deny the shortage. There was one inventory considered in the preparation of Prosecution's Exhibit J which was obtained by the auditor through Major King. The auditor's testimony with respect thereto is hearsay, making that portion of this exhibit which relates to the inventory so obtained incompetent. However, this inventory was also discussed between the auditor and accused.

We deem it unnecessary to pass upon the admissibility of Prosecution's Exhibits J and K although we think it would have been better practice to have followed the introduction of these audits by the presentation of all the invoices, inventories, tally outs and other papers forming the basis of the computations disclosed by these audits. In view of the fact that these inventories, tally outs and such other records of the post exchange as the auditor could obtain, as well as the cash on hand, were gone over and discussed freely with accused, his failure to deny, explain or otherwise question these exhibits or the papers from which they were made or to deny the shortage makes these exhibits admissible upon the theory of an implied admission. Support for this position is to be found in the following:

"As a general rule, when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing and such statement is not denied, contradicted, or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth. The basis of such rule is that the natural reaction of one accused of the commission of a crime or of implication therein is to deny the accusation if it is unjust or unfounded.* * *" (20 Am. Jur. 483).

There is ample evidence of the corpus delicti in the testimony of Sergeant Johnson, manager of the post exchange during accused's tenure as post exchange officer. This witness gave evidence of such gross negligence as will justify the inference that such negligence resulted in the loss alleged.

Accused, under his own voluntary statement read, familiarized himself with and understood his duties as post exchange officer under Army Regulation 210-65. The evidence discloses that he operat

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and allowed the post exchange to be operated in violation of all good business practices and in utter disregard of the requirements of Army Regulation 210-65. Unquestionably the shortage alleged in the Specification now under consideration resulted either from gross negligence or some misconduct in the discharge of his duties as post exchange officer. It follows that he was properly found guilty of Specification 1, Charge III. The loss with which he was charged and of which he was found guilty, arising as it did from his violation of Army Regulations, constitutes an offense to the prejudice of good order and military discipline and is properly charged under Article of War 96 (SPJGN 237228, Walters; 23 B. R. 323).

8. Specification 2 of Charge I indicts accused for a dishonorable failure and neglect during the period from 26 June 1944 to 29 July 1944, to pay the sum of Rs 798 due for quarters at the Grand Hotel, Calcutta, India. The evidence discloses that accused occupied Room 220 of the Grand Hotel for a sufficient length of time to become indebted to the Hotel in the amount claimed and that about 24 or 25 July 1944 he promised to pay this indebtedness after some negotiations between him and Mr. MacMillan whose duty it was to check up and ascertain when officers were properly charged with room rent at this hotel (R. 63). While the evidence upon this Charge and Specification was very inadequately presented, it does appear that there was a disagreement between accused and the hotel authorities with respect to the date of his checking out and that the manager of the billeting department was relying upon instructions received from a friend of accused concerning the retention of his bed in the room (R. 64). From the evidence it clearly appears that the sum of Rs 2/8 for servant tips was disputed in July by accused. It also appears that there was some further discussion about the hotel bill with which the witness, A. N. Mukherjee, was not familiar (R. 65). Mr. MacMillan, who apparently had complete information about this disagreement, was not called as a witness, as he might well have been to clarify and completely explain the dispute. It does not appear when the accused promised to pay the bill after the amount thereof was finally determined on 24 or 25 July nor that he violated any agreement in that respect. So far as the record discloses, the bill may have been paid within a short time after the controversy over the disputed amount was settled. Under these circumstances, we cannot say that there was a showing of such false representation, fraud, deceit, evasion or dishonorable conduct on the part of accused with respect to the payment of this debt as is necessary for the court to properly find him guilty under this Specification (SPJGN CM 235676, Davis; 22 B.R. 201). While it is entirely probable that with the exercise of sufficient diligence,

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proper available proof could have been adduced to sustain this Specification, the record as a whole fails to disclose such proof.

9. The remaining Specification alleges that accused with intent to deceive his commanding officer made a false official statement in violation of Article of War 95. The evidence as it relates to this Specification is abundantly sufficient to sustain the findings of guilty. The evidence shows that when Major Harry B. Allen called upon accused for an explanation of his absence without leave from 27 May to 2 June, accused stated that he was taken ill on 27 May after his evening meal and that he grew worse until his temperature reached 105; that through his friend, Captain Fleming, he was attended by a British medical officer who directed him to go to a British hospital and from there to the apartment of his friend, Captain Fleming, on Harrington Street in Calcutta. The evidence shows that the British medical officer whom he claimed as his attending physician did not attend him or even see him during the period of his absence. The evidence also showed that Captain Fleming never had an apartment on Harrington Street and that accused was not ill in the apartment of Captain Fleming at any time during his unauthorized absence. In fact the statement of accused stood alone in the assertion of his illness and of his whereabouts from 27 May to 2 June except for the testimony of his friend, Judy, who said that she "sick nursed him" in her apartment during a part of his absence, and this statement contradicted his testimony. From this evidence the court was abundantly justified in reaching the recorded finding on this Specification.

10. At the beginning of the trial defense entered a special plea to Specification 1 of Charge III (R.56) because of interlineation therein specifying the period during which the loss was alleged to have occurred. The charge sheet with the interlineation was served upon accused before the trial commenced. The motion was withdrawn with leave to renew it at a later time (R. 6). To this Charge and Specification accused then pleaded not guilty. Later the court through the law member took up the question of the interlineation again and the court was adjourned to allow the trial judge advocate to obtain from the convening authority the necessary authority to amend the Specification in question so as to insert the period during which the loss was alleged to have occurred. Upon reconvenement of the court the authority obtained by the trial judge advocate for the amendment to this Specification was read and entered into the record. The accused was rearraigned on the amended Specification and offered a continuance in order to make the necessary preparation for a defense.

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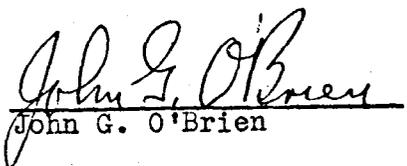
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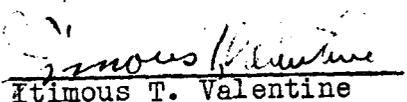
After a full and fair discussion, the defense indicated a desire to proceed with the trial at that time and again pleaded not guilty to the amended Specification.

The investigation of the Charge was conducted in the presence of accused during which he was afforded all the rights and opportunities to which he was entitled under the law, and this investigation covered the entire period from 8 January 1944 to 25 May 1944, which were the exact dates represented by the amendments. Nothing new could possibly have been developed by additional investigation and such was, therefore, unnecessary. The Board of Review is of the opinion and accordingly holds that no substantial right of accused was affected by this procedure.

11. There is in this record considerable hearsay evidence which should have been excluded but we cannot say that any of it prejudiced a substantial right of accused.

12. The court was legally constituted and had jurisdiction of the person of accused and of the subject matter of the offenses charged. The Board of Review is of the opinion and accordingly holds that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge III, and legally sufficient to support the findings of guilty of the Specification, Charge I, and Charge I, Specification 3, Charge II, and Charge II, Specification 1, Charge III, and Charge III, and the sentence.


John G. O'Brien, Judge Advocate


Itimous T. Valentine, Judge Advocate


Robert C. Van Ness, Judge Advocate

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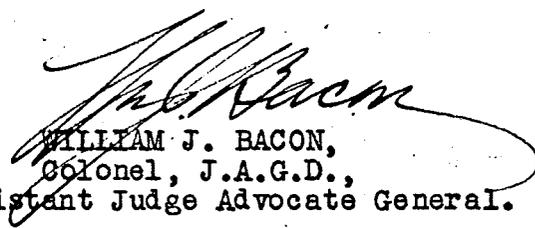
CM IBT # 352 (FELSON, William H.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885,
New York, N. Y., 25 January 1945.

TO: The Commanding General, Headquarters, USF, IBT, APO 885.

1. In the case of First Lieutenant William H. Felson, O-270148, 24th Combat Mapping Squadron, 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 insufficient to support the findings of guilty of Specification 2, Charge III, and legally sufficient to support the findings of guilty of the Specification, Charge I, and Charge I, Specification 3, Charge II, and Charge II, Specification 1, Charge III, and Charge III, and the 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 IBT 352).


WILLIAM J. BACON,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 2, IBT, 25 Jan 1945)

274910

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New Delhi, India
29 January 1945

Board of Review
CM IBT 353

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

HQ. TENTH AIR FORCE

v.

Private Michael (NMI) Stanya,
33262039, 60th Fighter Squad-
ron, 33rd Fighter Group.

) Trial by GCM convened at Kanji-
) koah, Assam, India on 4 Novem-
) ber 1944. Dishonorable discharge
) suspended until release from con-
) finement, total forfeitures, con-
) finement at hard labor for 5 years.
) United States Disciplinary Barracks
) nearest port of debarkation in
) United States designated as place
) of confinement.

OPINION by the BOARD OF REVIEW
O'BRIEN, 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 which submits this, its opinion, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

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

Specification: In that Private Michael Stanya, 60th Fighter Squadron, did, at or near Nagaghuli, Assam, on or about 14 October 1944, behave himself with disrespect toward Major Edward A. Brazil, Captain James H. Johnson, Lt. Clarence R. Remley, Lt. Richard K. Chapman, III, F/O John D. Clifton and Lt. Francis V. Creamer his superior officers by stating, "you are a bunch of bastards and mother fuckers" and other vile and contemptuous language.

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

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Specification 1: In that Private Michael Stanya, 60th Fighter Squadron having received a lawful command from Major Edward A. Brazil and Captain James H. Johnson, in these words, "Stanya, get out of that vehicle" and "keep quiet Stanya", did at or near Nagaghuli, Assam, on or about 14 October 1944, disobey the same.

Specification 2: (Finding of not guilty)

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

Specification 1: In that Private Michael Stanya did, at or near Nagaghuli, Assam, on or about 14 October 1944 attempt to strike Sgt. John B. Pursell, and Sgt Joseph M. Toomey noncommissioned officers with his hand, while said Sgt. John B. Pursell and Sgt. Joseph M. Toomey were in the execution of their office.

Specification 2: In that Private Michael Stanya did, at or near Nagaghuli, Assam, on or about 14 October 1944 use the following threatening and insulting language toward Sgt. John B. Pursell and Sgt. Joseph M. Toomey, non-commissioned officers who were then in the execution of their offices by stating, "You are Mother Fuckers and Bastards" and stating, "I will get you for this".

3. Accused pleaded not guilty to all Specifications and Charges. He was found guilty of all Specifications and Charges except Specification 2 of Charge II of which Specification he was found not 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 at such place as the reviewing authority may direct for a period of 5 years. The reviewing authority approved the sentence but suspended, until the soldier's release from confinement, that portion thereof adjudging dishonorable discharge. The Branch of the United States Disciplinary Barracks nearest the port of debarkation was designated as the place of confinement. The record of trial was examined in the Military Justice Division in the Branch Office of the Judge Advocate General, United States Forces, India Burma Theater. The Military Justice Division was of the opinion that the Specification of Charge II was improperly laid under the 64th Article of War and that it only alleged a violation of the 96th Article of War. They were further of the opinion that the record of trial was legally insufficient to support the finding of guilty of Specifications 1 and 2 of Charge III and Charge III,

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and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for one year. Pursuant to Article of War 50 $\frac{1}{2}$ the record of trial was referred to the Board of Review for its opinion.

4.. About 1500 hours, 14 October 1944, Lieutenant Chapman was sitting in the officers' bungalow at Nagaghuli. A car was stuck behind the basha and he went out to determine what was the trouble and to see if he could be of help. Lieutenant Remley, who had gone out first, was at the car and Lieutenant Creamer and Flight Officer Clifton went out with Lieutenant Chapman. Accused was behind the wheel of the car (R. 16). Lieutenant Remley was dressed in class "A" uniform but Lieutenant Chapman was not (R. 17). Accused addressed Lieutenant Remley as "Bud", and when asked if he knew whom he was addressing said, "Go ahead, turn me in if you want to. It doesn't make a fuck to me" (R. 16). Lieutenant Remley offered to help accused and accused stated to him "Get your God-damned truck and push me out of here" (R. 17). Lieutenant Chapman believed accused knew who they were (R. 17). Lieutenant Remley, who had on his insignia, was told by accused to get his "ass" out of there and get a vehicle to give him a shove (R. 19, 24). Accused told Lieutenant Remley that he was a "chicken shit", pulling rank (R. 19). Lieutenant Chapman, Lieutenant Murray, Lieutenant Creamer, Lieutenant Remley and Flight Officer Clifton were all present and accused was cursing all of them, calling them "Mother-fuckers; no-good bastards" (R. 20). Accused recognized Lieutenant Murray, calling him by his last name (R. 22). The orderly room was called and the first sergeant came to get accused (R. 19). Accused had a bottle of liquor which was empty except for approximately a quarter of an inch from the bottom (R. 22) and he appeared to be "pretty drunk" (R. 24). He could walk unaided and had control of his faculties (R. 34). Lieutenant Creamer was in class "A" uniform but came no closer than twenty feet to accused. Accused told all of them in general to go fuck themselves. Flight Officer Clifton had on his insignia of grade and accused addressed him as "Joe" (R. 26). Accused "told us all to fuck ourselves" (R. 27). Flight Officer Clifton was of the opinion that accused recognized the officers as officers (R. 27). Accused was taken to the orderly room where Captain Johnson told the sergeant to take him to the dispensary (R. 30).

5. At approximately 1600 hours, 14 October 1944, Major Brazil met Captain Johnson in front of the orderly room (R. 7, 8). About five or ten minutes later accused was brought there and Major Brazil went outside to see him. At the time he was seated in the back of a command car. Accused said "Hello, Capt. Johnson,

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you son-of-a-bitch". Major Brazil, executive officer of accused's organization, ordered accused to the dispensary and he refused, telling the Major to go "fuck" himself (R. 9). The Major said, "Stanya, get out of the vehicle and come into the dispensary" (R. 11). Accused refused (R. 8). He was taken into the dispensary where he resisted, and an examination by the flight surgeon could not be made. Major Brazil placed accused under arrest and when he did, accused called the Major a "son-of-a-bitch". Accused was forcibly taken to a car to be carried to the stockade. He was fighting at the time (R. 9). After being put in the car he called the Major a "mother-fucking son-of-a-bitch, cock-sucker, whore master" (R. 9). Major Brazil testified that on the way to the stockade accused was "very pugnacious the whole way, very obscene and vulgar in his language, and called everyone lewd names throughout the trip, and threatened us several times" (R. 9). At the stockade he called all the guards and MP's collectively a "bunch of pricks and bastards" (R. 10). Accused had been drinking but recognized Major Brazil and Captain Johnson. He could stand but weaved noticeably (R. 10).

6. Captain Johnson reiterated substantially the foregoing testimony adduced from Major Brazil as to what happened at the orderly room and the dispensary. He further testified that Major Brazil gave a direct order to accused to sit down but he did not remember accused's answer (R. 14). Captain Johnson ordered accused to sit down and be quiet, but he did not. Accused was resisting all the time and the only examination the flight surgeon could accomplish was to take accused's pulse while he was standing (R. 13).

7. Sergeants Pursell and Toomey were called to the dispensary. When they arrived there Major Brazil told Sergeant Pursell, as the latter and Sergeant Toomey stepped into the door, "to put Stanya under arrest and put him in the command car" (R. 37). Sergeant Toomey testified in this connection that "When Sgt. Pursell and I entered the dispensary, Major Brazil said, 'Sergeant, this man is under arrest. Put him in the command car'" (R. 40). This was addressed to Sergeant Toomey (R. 40). Sergeants Pursell and Toomey placed him in the car and he was struggling and cursing all the time. In the car he tried to hit Sergeant Pursell in the ribs with his elbows several times and attempted to bite him on the shoulder (R. 37). When he did, Sergeant Pursell slapped him (R. 38). Accused succeeded in hitting Sergeant Pursell's ribs (R. 38). Accused said he would "get even" with all of them (R. 38), that "he would get even with us when he got out of the Army" (R. 39) or "I'll beat the hell out of you"

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or "something to that effect" (R. 40). Accused also said, "You're on my shit list" or "You're just a no-good shit". Accused seemed to be under the influence of alcohol but could walk (R. 40) and used the ordinary conversation of a man that had been drinking (R. 41).

8. In the opinion of Sergeant Kusko, first sergeant of the accused, the accused knew Major Brazil and the officers and enlisted men present (R. 33). On the way to the stockade accused "said he would 'get' Major Brazil and also Sgt. Pursell". Sergeant Kusko testified as follows: "That's the only words he used, sir, 'I'll get you, Major', and also to Sgt. Pursell". He did not threaten to strike anyone (R. 32). While riding to the stockade accused used abusive language (R. 32), cursed a great deal against all occupants of the car and wanted to fight Sergeant Pursell (R. 38). He used obscene, vulgar language and called everyone lewd names (R. 9).

9. No threats or effort to strike were made against Sergeant Toomey. Sergeant Toomey testified that they held his arms while they were riding until accused said, "I'll be good if you'll turn me loose". They did so and gave accused a cigarette (R. 41). Neither Sergeant Pursell or Sergeant Toomey were acquainted with accused (R. 36, 39). Sergeant Pursell did not think accused knew him or his rank. He was not wearing his chevrons that day (R. 38, 39). Sergeant Toomey did not know accused before (R. 40) and didn't know that accused recognized him as a sergeant. He thought he had his stripes on (R. 40) but did not know (R. 41).

EVIDENCE FOR THE ACCUSED

10. Captain Johnson testified that accused was awarded the Good Conduct Medal in the last part of 1943 or the first part of 1944, that he had the reputation of being a good worker on the line, and that he worked hard all the time he was in the outfit as far as the Captain knew (R. 46).

11. When accused arrived at the stockade the desk sergeant noticed that he was in rather a stupor and was "beat up a little bit". Accused had a black eye and a few scratches here and there on his arms. He seemed to be under the influence of alcohol (R. 48).

12. Accused, after having his rights explained to him elected to make a statement through counsel. At 1530 on the afternoon of October 14th, the accused drove up to the side of the officers' basha where his vehicle stopped with a dead battery. Accused had been drinking that afternoon and turned up that road

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by mistake. Somebody came out and asked him if anything could be done to help him and he said, "Yes, but", and that this other person said they had a vehicle there to push him. Accused told him to get into the vehicle and give him a push to get started, and after that accused went "asleep". When the individual obtained the other vehicle and came back there were several other officers there and also two enlisted men. The enlisted men awakened accused, took him out of his vehicle, put him in a command car, and took him to the dispensary. At the same time there had been some argument as to rank. The first officer that accused saw objected to being called "Joe" or "Bud" whatever it was. He felt that they were trying to pull their rank on him. Two of them had not been in class "A" uniforms at the time they received this insult from accused. The accused was in a "rather befogged condition" and when the enlisted men attempted forcibly to remove him from his vehicle he naturally resisted. At the dispensary he was surrounded with several more enlisted men and several more officers and taken into the dispensary. They did not tell him what they were going to do but merely rolled up his sleeves and looked at him. Being in a confused condition to begin with, he did not know what they were going to do so he again resisted. He was then put in a command car after being told he was under arrest. On the way to the dispensary, he started to go to sleep and asked for a cigarette which was refused him. One of the sergeants who was guarding him hit him in the eye. At the stockade he was put into solitary confinement where he immediately went to sleep and didn't remember anything until the next morning (R. 49, 50).

13. From the evidence there can be no question that accused was disrespectful as alleged to the commissioned officers named in the Specification of Charge I. However, the allegation as to disrespect to Flight Officer John D. Clifton is improperly laid under Article of War 63. Paragraph 1, Army Regulation 610-50, 5 November 1942, provides that a flight officer shall have the rank of a warrant officer junior grade. Paragraph 8 of the same Army Regulation provides that flight officers may be appointed to the grade of second lieutenant and upon such appointment shall be commissioned in the Army of the United States as second lieutenants. A warrant officer is not an "officer" as that term is used in the Articles of War, and flight officers are warrant officers for this purpose (SPJGJ 1943/979, 21 Jan 1943; 2 Bull JAG 17). In a case decided 18 August 1939 (CM 212091, Hopkins); the accused was charged under Article of War 64 with offering violence against a lieutenant in the Army Nurse Corps, his superior officer. In

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that case the Board of Review said:

"* * * In this connection the 1st Article of War provides:

'(a) The word 'officer' shall be construed to refer to a commissioned officer; * * *.'

Also, Note 2, page 4, Manual for Courts-Martial, 1921, reads in part:

'* * * The word 'officers' is used in this Manual in the same sense as in the first article of war, to designate commissioned officers only.* * *'."

We think the foregoing is applicable here in respect to Article of War 63 and that, therefore, as a flight officer is not a commissioned officer, the Specification does not properly charge an offense as to Flight Officer Clifton. The finding of the court cannot be supported as to disrespect to Flight Officer Clifton, his superior officer, but is legally sufficient to support the findings as to the commissioned officers named therein.

14. The Military Justice Division in this Branch Office examined the record of trial and were of the opinion that the violation alleged in Specification 1 of Charge II was erroneously charged as a violation of Article of War 64. It was stated:

"It is believed that this specification is improperly charged under the 64th Article of War in that it fails to allege that the accused 'willfully disobeyed' the lawful command of his superior officer. In order to convict under AW 64, the following elements must be proven:

'PROOF - (a) That the accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer; and (c) that the accused willfully disobeyed such command'. Par 134b, MCM 1928, p. 149.

It is a well-settled principle of law that, 'proof without allegation is as unavailing as allegation without proof'. (49 C. J. 805). Even though the evidence in this case may have shown a willful disobedience of an order of his superior officer such willfulness was not alleged and therefore cannot sustain a finding of guilty under AW 64.

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'It is the settled rule that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense. This rule is based upon the requirements that the accused shall be definitely informed as to the charges against him, and that he may be protected against another prosecution for the same offense. The indictment or information in a criminal prosecution necessarily confines the state to the charge made against the defendant, in order that the defendant shall know, as the Constitution provides, 'the nature of the accusation against him''. Berger v. United States, 295 U.S. 78, 55 Sup. Ct. 629; Clyatt v. United States, 197 U.S. 207, 25 Sup. Ct. 429; 27 Am. Jur. pp. 722-723.

The specification does charge an offense under AW 96, i.e., failure to obey a lawful order of a superior officer in the execution of his office".

With this we agree.

15. The Military Justice Division was also of the opinion that the record of trial was legally insufficient to support the finding of guilty of the Specifications of Charge III and Charge III because it was not proved that "accused knew or had reason to know that the sergeants were noncommissioned officers in the execution of their office".

To constitute a violation of Article of War 65, the offender must know at the time of the wrongful act that the person maltreated is a warrant officer or noncommissioned officer as the case may be (CM 196854, Snyder). If an accused charged with violation of the 63rd, 64th or 65th Article of War does not know that the officer or noncommissioned officer concerned is such, there is no violation of any of those articles (CM 211996, Giddens).

16. Sergeant Pursell testified that he was not acquainted with accused, did not believe accused knew him or his rank, and that he was not wearing his chevrons that day. The only other evidence as to Sergeant Pursell is gleaned from the testimony of Sergeant Kusko and Sergeant Glidewell. The former testified, "Pvt. Stanya said he would 'get' Major Brazil and also Sgt. Pursell". "That's the only words he used, sir, 'I'll get you, Major', and also to Sergeant Pursell". The latter, in answer to a question asked whether accused recognized Major Brazil and the others

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present, testified, "Yes, sir". This latter statement is obviously a conclusion of the witness and has no basis in fact which in any manner supports this opinion. Even though such were true and accused did recognize Major Brazil and the others present, there is still no showing that accused recognized Sergeant Pursell as a noncommissioned officer at the time although he may have known Sergeant Pursell was an enlisted man. It is clear that accused addressed Major Brazil as "Major", but it is equally clear that he did not address Sergeant Pursell as "Sergeant" but that his words were merely directed to him.

"The court and the reviewing authority must be satisfied of the guilt of an accused beyond a reasonable doubt. However, the Board of Review and The Judge Advocate General in the examination of records of trial, except in cases which require approval or confirmation of the sentence by the President, do not weigh the testimony to determine whether the offense has been proved beyond a reasonable doubt, but must be satisfied that there is some substantial evidence tending to prove each element of each offense (CM 152797, Viens) and unless so satisfied the record of trial will be held to be legally insufficient to support the findings and the sentence (CM 150828, Robles; 150100, Bruch; 150298, Johnson; 151502, Gage; 154854, Wilson; 156009, Green). (7 BR p. 227, CM 203511, Wedmore).

We are of the opinion that it would be a strained and tortuous construction of the foregoing testimony that would warrant an inference that accused knew that Sergeant Pursell was in fact a noncommissioned officer. Every element of the offense charged must be proved by substantial evidence; a mere suspicion is not enough. From all the testimony it is pointedly evident that the prosecution has failed to sustain the burden of proof required.

17. It is clearly apparent from the record that accused was in a high state of intoxication and it is extremely doubtful that he was consciously aware of the seriousness of his acts and conduct after having been discovered and seized by authority of his superior officers. Drunkenness, of course, is, in law, no excuse for crime except wherein the question arises as to the intoxicated person's ability to entertain a specific intent in those cases where specific intent is a necessary element of the offense charged. Having hereinbefore decided that Specification 1 of Charge II was improperly laid under Article of War 64 because of the failure of the language of the Specification to allege willful disobedience of a superior officer, there is no remaining offense involving the element of specific intent.

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However, the high state of inebriation of accused may have a decided bearing on his awareness of the fact that Sergeant Toomey was a noncommissioned officer as alleged in Specifications 1 and 2 of Charge III. Sergeant Toomey testified that when he entered the dispensary, accused was standing, that there was loud talking, and that he was unable to distinguish any remarks being made or any conversation going on. When he entered, Major Brazil called him "Sergeant" and stated accused was under arrest. Sergeants Toomey and Pursell then put accused in the command car. Sergeant Toomey further stated that he had never seen accused before, that he did not know whether or not he had on chevrons and that he could not say that accused recognized him as a sergeant. If the statement made to Sergeant Toomey as he entered the dispensary was made within the hearing of accused under circumstances from which accused should have heard and understood the statement, the court would be well justified in a conclusion that the facts were such that accused knew Sergeant Toomey was a noncommissioned officer. It is self-evident that the dispensary was in an uproar and that accused was vociferous and obstreperous in his objections to the manner in which he believed he was being treated. From the record there is no showing of the loudness or tone of voice in which the order was given by Major Brazil, nor whether accused was actually in hearing distance of Major Brazil at the time the order was given. If, in fact, he was, there is no showing that the situation was such that he must have necessarily heard. On the contrary, the evidence does reveal clamor and din in the dispensary and continued struggle and resistance by accused. If he actually was in hearing distance, his attention would necessarily be distracted from the statement made by Major Brazil. Each case must rest on its own facts, and what in one instance might be sufficient facts to prove knowledge or facts from which knowledge could be inferred would, in another, be wholly inadequate. Under the facts appearing in this record, we are of the opinion that the evidence is insufficient to reasonably warrant the inference that accused was aware of the status of either Sergeant Pursell or Sergeant Toomey as noncommissioned officers.

18. Specification 1 of Charge III alleges an attempt to strike Sergeant Toomey and Sergeant Pursell with "his hand". We fail to find any evidence in the record that accused attempted in any way to strike Sergeant Toomey. Insofar as the latter is concerned, the evidence all points to the resistance of accused in his efforts to release himself from the grasps of the two sergeants. But there is evidence that accused did attempt to and in fact did strike Sergeant Pursell in the ribs with his elbow. Although the allegation is that accused attempted to strike Pursell

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with his hand, and the proof shows that he attempted to strike him with his elbow, we do not believe the variance is fatal.

"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" (6 C. J. S. pp. 972, 973).

"One charged with assault by striking another with his fist could not complain of variance on a conviction supported by proof that he violently caught the injured party by the throat" (Virgil v State, 29 S.W. (2d) 394, 115 Tex. Cr. 123; cited in 6 C.J.S. p. 973, Note 90).

In our opinion the evidence is insufficient to support the finding that accused attempted to strike Sergeant Toomey. It necessarily follows that the finding of guilty of Specification 1 of Charge III is legally sufficient only to support a finding of guilty of an attempt to strike Sergeant Pursell in violation of Article of War 96.

19. In regard to Specification 2 of Charge III, a board of review in the office of the Judge Advocate General in CM 211978, Riddle, was confronted with a problem based upon a specification alleging the use of threatening language toward a noncommissioned officer in the execution of his office. They indicated that unless it was proved that a noncommissioned officer was in the execution of his office, Article of War 65 was not violated and the offense would at most be a violation of the 90th Article of War. The facts before us are comparable and we are of the opinion that the proof here is sufficient only to support a violation of Article of War 90 in view of the fact that there is no substantial evidence proving that accused knew Sergeant Pursell and Sergeant Toomey were noncommissioned officers.

20. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of Specification 1 of Charge II, legally insufficient to support the finding of guilty of Charge II as a violation of the 64th Article of War, but legally sufficient to support a finding of guilty of the 96th Article of War. The Board of Review is further of the opinion that the record of trial is legally sufficient to support the finding of guilty of the Specification of Charge I and Charge I except so much of the Specification thereof as pertains to Flight Officer Clifton, legally insufficient to support the finding of guilty of Specification 2 of Charge III and Charge III, but legally

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sufficient to support a finding of guilty of the Specification in violation of Article of War 90, legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge III as an attempt to strike Sergeant Pursell in violation of Article of War 96, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for one year and six months.

John G. O'Brien, Judge Advocate
John G. O'Brien

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

Robert C. Van Ness, Judge Advocate
Robert C. Van Ness

CM IBT # 353 (Stanya, Michael (NMI) 1st Ind.

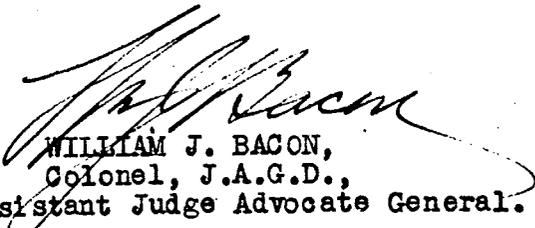
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, India Burma Theater, APO 885, New York, N. Y., 7 February 1945.

TO: The Commanding General, USF, India Burma Theater, APO 885, U. S. Army.

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 Private Michael (NMI) Stanya, 33262039, 60th Fighter Squadron, 33rd Fighter Group, together with the foregoing opinion of the Board of Review constituted in the Branch Office of The Judge Advocate General with the United States Forces in India Burma.

2. I concur in the said opinion of the Board of Review that the record is legally sufficient to support the finding of guilty of Specification 1 of Charge II, legally insufficient to support the finding of guilty of Charge II as a violation of the 64th Article of War, but legally sufficient to support a finding of guilty of the 96th Article of War. The record of trial is legally sufficient to support the finding of guilty of the Specification of Charge I and Charge I except so much of the Specification thereof as pertains to Flight Officer Clifton, legally insufficient to support the finding of guilty of Specification 2 of Charge III and Charge III, but legally sufficient to support a finding of guilty of the Specification in violation of Article of War 90, legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge III as an attempt to strike Sergeant Pursell in violation of Article of War 96, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for one year and six months. It is my recommendation that, under the 5th paragraph of Article of War 50½, the sentence be reduced to one year and six months and the execution of the dishonorable discharge be suspended.

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


WILLIAM J. BACON,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

(Findings and sentence disapproved in part in accordance with recommendation of Assistant Judge Advocate General. Dishonorable discharge suspended. GCMO 6, IBT, 8 Feb 1945)

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New Delhi, India
8 January 1945

Board of Review
CM IBT 356

UNITED STATES

SERVICES OF SUPPLY, USF IBT

v.

Private Andrew (NMI) Ware,
35123636, 235th Ordnance Am-
munition Company.

) Trial by GCM convened at Calcutta,
) India on 5 November 1944. Dis-
) honorable discharge, total for-
) feitures, to be confined at hard
) labor for 3 years. United States
) Disciplinary Barracks nearest port
) of debarkation in United States
) designated as place of confinement.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 which submits this, its holding, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

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

Specification: (Disapproved by reviewing authority)

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

Specification: In that Private Andrew Ware, 235th Ordnance Ammunition Company did, at main entrance of Camp Howrah, Howrah, India, on or about 1900 hours, 20 September 1944 behave himself with disrespect toward Lieutenant Colonel Ralph Ownby, his superior officer, by saying to him "I don't give a fuck who you are" etc. or words to that effect.

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

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Specification 1: In that Private Andrew Ware, 235th Ordnance Ammunition Company having received a lawful command from Lieutenant Colonel Ralph Ownby, his superior officer, to get in a car to be taken to Military Police Station, 6 Lindsay Street, Calcutta, did at main entrance of Camp Howrah, Howrah, India, on or about 1900 hours, 20 September 1944, willfully disobey the same.

Specification 2: In that Private Andrew Ware, 235th Ordnance Ammunition Company having received a lawful command from Lieutenant Colonel Ralph Ownby, his superior officer, to drive truck number Depot 2066 to Camp Kanchrapara by the nearest route known to him and at a rate not to exceed the speed limit, did at Military Police Station, 6 Lindsay Street, Calcutta, India, on or about 1000 hours, 21 September 1944, willfully disobey the same.

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

Specification: In that Private Andrew Ware, 235th Ordnance Ammunition Company did, at Ordnance Ammunition Area, Kanchrapara, India, on or about 1500 hours, 20 September 1944, did lawfully obtain, but after obtaining it did misapply to his own use and benefit a certain truck, to wit, a two and one-half ton, six by four, cargo, without winch, number Depot 2066, of the value of about three thousand (\$3000.00) dollars, property of the United States Government.

3. Accused pleaded not guilty to all Charges and Specifications and was found guilty of all Charges and Specifications. He was sentenced to be dishonorably discharged the service and 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 10 years. The reviewing authority disapproved the findings of guilty as to the Specification of Charge I and Charge I. The sentence was approved but the portion thereof adjudging confinement at hard labor in excess of three years was remitted. The order of execution pursuant to Article of War 50 $\frac{1}{2}$ was withheld and the record of trial was forwarded to the Judge Advocate General's Branch Office, United States Forces, India Burma Theater. The United States Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement.

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4. The evidence for the prosecution shows that United States Government truck No. Depot 2066, worth \$1800, was dispatched to accused about 1500 hours, 20 February 1944, to go to the staging area, Camp Kanchrapara, from the PX at that camp (R. 7). Between 2100 and 2200 hours on the same day Lieutenant Colonel Ralph Ownby, commanding officer of Camp Howrah, was advised that there was a disturbance at the Camp Howrah gate. When he arrived at the scene, he found that the disturbance involved the driver of a two and a half ton GMC truck who was later identified as the accused. Accused was lifted from the truck and Colonel Ownby told his guard to put him in a car and he would send him to the Military Police Headquarters at 6 Lindsay Street. Accused stated that he was not going. Colonel Ownby told accused, "Just a minute, soldier, I am Lieutenant Colonel Ownby, Commanding Officer of Camp Howrah, and as such I am ordering you to get into the car". Accused also told Colonel Ownby, "I don't give a 'fuck' who you are" (R. 7, 10). He was taken to No. 6 Lindsay Street by an MP, two other guards and Colonel Ownby (R. 8). Accused appeared to have been drinking heavily but the officer thought accused knew what he was doing and knew he was in the presence of a superior officer (R. 9). The next morning Colonel Ownby took accused back to Camp Howrah and accused signed a receipt for truck No. Depot 2066 (R. 8, Ex. 2). Colonel Ownby then ordered accused "to report to Camp Kanchrapara by the most direct route which he knew at a rate of speed not to exceed the speed limit" (R. 9). Accused departed between 1030 and 1100 hours. The average time to go from Camp Howrah to Camp Kanchrapara by the most direct route would be about two hours (R. 10). The next day Colonel Ownby was called by the MP's concerning a truck No. Depot 2066 (R. 10). He proceeded to MP headquarters and saw accused there. Accused was brought before Colonel Ownby and was asked "if he knew who I was, and he pronounced my name" (R. 9). Private First Class Lambert, 275th Military Police Company, on 22 or 23 September 1944, was on patrol and had received notice to be on the lookout for truck No. Depot 2066. Such truck was located and accused was driving it. The MP's stopped him and took him in to the desk sergeant (R. 11).

EVIDENCE FOR THE ACCUSED

5. Accused elected to take the stand and testify. He was warned of his rights by the president of the court in the following manner:

" *** you have the right to remain silent, and by remaining silent the court will not assume that you are guilty. You

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also have the right to take the stand and make an unsworn statement. If you make an unsworn statement you cannot be questioned. You also have the right to take the stand and make a sworn statement. If you make a sworn statement, you may be questioned by the Trial Judge Advocate or by the court concerning any of the charges lodged against you".

6. Accused testified that on 21 September he was issued a two and a half ton six by four GMC truck to haul beer bottles. After completing his duty, "I and another fellow began drinking coming to Calcutta". About 8:00 o'clock he started out to the camp, the ammunition area, and realized that he was too drunk to drive the truck. He had some friends at Camp Howrah and thought maybe he would go and spend the night there and "sleep it off". He was unable to do so. He did not remember going to Camp Howrah or meeting Colonel Ownby there. He did not recall going to 6 Lindsay Street with Colonel Ownby. He and the other man drank about seven or eight quarts between the two of them. They were drinking Indian whiskey (R. 13, 14).

7. The Specification of Charge II and Charge II alleges a violation of the 63rd Article of War.

"The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed. * * *

"The officer toward whom the disrespectful behavior was directed must have been the superior of the accused at the time of the acts charged; * * *

"Disrespect by words may be conveyed by opprobrious epithets or other contumelious or denunciatory language. * * *

"Where the accused did not know that the person against whom the acts, etc., were directed was his superior officer, such lack of knowledge is a defense" (MCM 1928 par. 133).

Accused testified that he was too drunk to drive to Kanchrapara and had started to Camp Howrah to spend the night with some friends, but that he was unable to do so. In effect, he states that he was drunk, started to Camp Howrah and the next thing he knew he was being held at military police headquarters. Colonel Ownby testified that although accused had been drinking, he believed accused knew he was in the presence of a superior officer

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and was capable of knowing what he, accused, was saying. Colonel Ownby had told accused that "I am Lieutenant Colonel Ownby, Commanding Officer, Camp Howrah". This presented a fact issue which was within the province of the court-martial as the triers of the facts, and by their finding of guilty, it is self-evident that they decided this issue against accused, that is, decided that accused knew the person to whom his words were directed was in fact his superior officer. There is no question in our minds that the language used by accused constitutes disrespect as contemplated by Article of War 63 (CM IBT 283).

8. Another question, however, arises. Was Colonel Ownby a superior contemplated by the article or does it contemplate a superior in the command of which accused was a member? This question appears to have been settled in CM 203718, Adams, as follows:

"'Superior officer' is defined in the discussion of the 64th Article of War on page 147, Manual for Courts-Martial, 1928, as follows:

'By 'superior officer' is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank superior to that of the accused.'

In the view of the Board this definition is equally applicable to the like phrase used in the 63d Article of War. * * *

9. Specifications 1 and 2 of Charge III and Charge III allege a violation of the 64th Article of War.

"It is a general rule of law that 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" (MCM 1928, par. 126a).

The gravamen of the offense of willful disobedience is intentional defiance of authority, a deliberate refusal or omission to do what was ordered. A conscious, rational mental process is involved in willful disobedience, else the design and purpose, which, according to authoritative definitions, characterize an intentional act, would be absent. It follows that the willfulness or inten-

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tional and deliberate defiance involved in willful disobedience constitutes an element of specific intent. MCM 1928, par. 126a in part provides:

"In certain offenses, * * * 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 act itself" (See Bull. JAG, August 1942, p. 161).

We have hereinbefore discussed the question of drunkenness and have concluded that there is evidence sufficient to warrant the court's inference that accused knew what he was doing. Accused, having been informed who Colonel Ownby was, willfully refused to comply with the order alleged in Specification 1, Charge III. We do not think that it can be contended that the order given by Colonel Ownby, as commanding officer of Camp Howrah, was one which was not authorized under the circumstances to be given accused.

10. In regard to Specification 2 of Charge III we fail to find evidence in the record to substantiate the finding of the court. Accused was ordered "to drive truck No. Depot 2066 to Camp Kanchrapara by the nearest route known to him and at a rate not to exceed the speed limit". There is no evidence that accused did not comply with this order. For aught that appears in the record accused may have obeyed. There is no competent evidence that accused was AWOL during the period from the time that he was given the order to drive to Kanchrapara up to the time he was picked up in truck No. Depot 2066 in Calcutta by the MP's one or two days later. Pursuant to instructions to the MP's to be on the lookout for the truck and to bring in the driver who was reported AWOL, accused was apprehended. We are unable to say that accused was AWOL or that he never returned to Camp Kanchrapara as ordered by Colonel Ownby.

11. Where an act charged is not per se an offense, words such as "wrongful", "unlawful", or the like, must be used in the Specification to make it an offense (Bull. JAG, September 1944, p. 380). The Specification of Charge IV, charges misapplication to his own use and benefit of certain government property. Ordinarily when property of the United States furnished and intended for the military service thereof is applied to one's own use and benefit, the charge is laid under Article of War 94 and the property is alleged to have knowingly and willfully been so used.

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The word "misapply" is defined as to apply wrongfully or to use for a wrongful purpose (Webster's New International Dictionary, Second Edition, Unabridged). It is our opinion that the word "misapply" in itself connotes wrongfulness and though it may not be the best pleading it is sufficient to apprise the accused of the offense of which he is charged--a wrongful application of the truck to his own use and benefit. As such, we hold that it is a sufficient Specification under Article of War 96 and is properly laid under that article in view of the fact that there is no allegation that the government truck was intended and furnished for the military service. The proof only reveals the value of the truck to be \$1800. Therefore, we are of the opinion that as to value the proof only supports so much of the finding that accused misapplied a government truck, value of about \$1800.

12. The explanation of the rights of accused were erroneously explained to him. The president stated:

"If you make a sworn statement, you may be questioned by the Trial Judge Advocate or by the court concerning any of the charges lodged against you".

Paragraph 121b, Manual for Courts-Martial, 1928, provides:

"Where an accused is on trial for a number of offenses and on direct examination has testified about only a part of them, his cross-examination must be confined to questions of credibility and matters having a bearing upon the offense about which he has testified".

It is apparent that the explanation given to accused was too broad, and was erroneous as to the right of the trial judge advocate or the court to question concerning any charges lodged against him. The trial judge advocate did not cross examine accused and we can not say, therefore, that accused was in any manner prejudiced.

13. The affidavit to the charge sheet reveals that the accuser swore only to the Specifications and not to the Charges. As stated in CM CBI 165, the affidavit to the charge sheet should be so completed as to verify both the Charges and the Specifications. An affidavit as to the truth of the Specifications only is not sufficient, but the defect is waived by failure of the defense counsel to interpose any objection to the sufficiency of the affidavit.

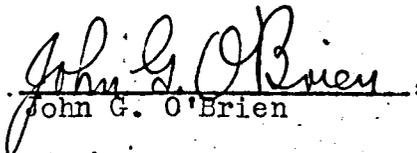
14. Prosecution's Exhibit 4 contains prejudicial matter which should not have been before the court in their deliberations

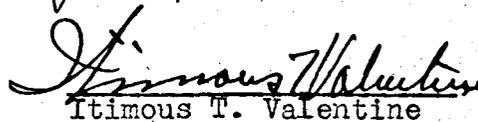
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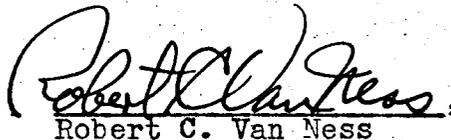
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upon the findings. However, after reviewing the record as a whole, we can not say that the result would have been any different if this matter had not been in evidence.

15. For the foregoing reasons the Board of Review is of the opinion that the record is legally insufficient to support the findings of guilty of Specification 2 of Charge III and legally insufficient as to the Specification of Charge IV to support the finding of a value of about \$3000, but legally sufficient to support a finding of a value of about \$1800, and legally sufficient to support the finding of guilty of Charge IV, legally sufficient to support the findings of guilty of the Specification of Charge II and Charge II, Specification 1 of Charge III and Charge III, and legally sufficient to support the sentence as modified by the reviewing authority.

 Judge Advocate
John G. O'Brien

 Judge Advocate
Itimous T. Valentine

 Judge Advocate
Robert C. Van Ness

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APC 885,
12 December 1944.

Board of Review
CM 4BT 358

UNITED STATES)
) HQ. NORTHERN COMBAT AREA COMMAND
) v.)
) Trial by GCM convened at APO 689,
Private Leo W. Clifford,)
11052183, Casual Detachment,)
5307th Composite Unit (Pro-)
visional).) \$25.00 pay per month for 6 months.
) Assam, place of confinement. Forfeit

OPINION of the BOARD OF REVIEW
C'BRIEN, 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 opinion, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

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

Specification: In that Private Leo W Clifford, Casual Detachment, 5307th Composite Unit (Provisional), having received a lawful command from Captain ROBERT P. MAXON, 5307th Composite Unit (Provisional), his superior officer, to return to his platoon, did, at Sitapur, Burma, at about 1600, 15 July 1944, willfully disobey the same.

3. Accused pleaded not guilty to the Charge and its Specification. The court made the following findings:

"Of the Specification of the Charge 1: Not Guilty.
Of the Charge I: Not Guilty, But Guilty of the violation of the 96th Article of War" (R. 7).

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He was sentenced to be:

"confined at hard labor at such place as the reviewing authority may direct, for a period of six months, and to forfeit two-thirds of his pay per month for six months".

"The court was opened and the president announced the findings and sentence.

"The court then, at 1700 o'clock, A. M., 4 October, 1944, adjourned to meet at the call of the President" (R.8).

The record was authenticated by the president and the trial judge advocate, and the defense counsel executed the usual certificate that he had examined the record before it was authenticated (R. 8). The record of trial was received by the staff judge advocate on 19 October 1944. Thereafter, to wit, on 14 November 1944, at 1300 hours, the court reconvened, at which reconvened session all members present at the previous adjournment were present except Major Milligan Bethel; the Trial Judge Advocate, Lieutenant Kenneth E. Stager; Defense Counsel, Captain Richard C. Brown; and Assistant Defense Counsel, Second Lieutenant Oliver A. Campbell. Accused was not present at the reconvened session. The assistant trial judge advocate made this statement:

"The reviewing authority has returned the record of trial for proceedings in revision. He has orally indicated that the findings of guilty of the 96th Article of War must of necessity be based on a finding of guilty of a specification under such article. The court did not announce its finding of the specification. The court should indicate the form and specification of which the accused is found guilty. The sentence should be in dollars and cents, rather than as stated" (underscoring supplied).

The record of the reconvened session states further:

"The court was closed and revoked its former findings and sentence, and upon secret written ballot, three fourths of the members present at the time the vote was taken concurring in each finding of guilty, the court finds the accused of the specification guilty except the words 'willfully' of the excepted words 'not guilty', of the charge 'not guilty' but guilty of the violation of the 96th Article of War.

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"The court upon secret written ballot, three fourths of the members present at the time the vote was taken concurring, sentences the accused to be confined at such place as the reviewing authority may direct, for a period of six months, and to forfeit twenty-five (\$25.00) dollars of his pay per month for six months. (underscoring supplied)

"The court was opened and the president announced the findings and sentence.

"The court then at 1400 hours, 14 November 1944, adjourned to meet at the call of the president".

This part of the record was authenticated by the president and the assistant trial judge advocate in the absence of the trial judge advocate. The assistant defense counsel in the absence of the defense counsel signed the following receipt just below the authentication: "I acknowledge receipt of copy of the above for delivery to the accused". The reviewing authority on the 28th of November 1944 approved the sentence and designated the Stockade at Ledo, Assam, as the place of confinement.

4. It is unnecessary to recapitulate or discuss any portion of the evidence in this case. A discussion of the one question upon which the validity of this record depends is sufficient. The controlling parts of AW 40 are as follows:

"No authority shall return a record of trial to any court-martial for reconsideration of--

- (a) An acquittal; or
- (b) A finding of not guilty of any specification; or
- (c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some Article of War; * * *

"And no court-martial in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited". (underscoring supplied)

It is, therefore, clear from the language of AW 40 that the court had no right to reconsider its findings upon the specification of which it had found accused not guilty. This was the only specification ever before the court in this case. MCM 1928 par. 78a says:

"An acquittal automatically results from findings of not guilty of all charges and specifications".

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And further, in par. 87b it is said:

"Neither an acquittal nor a finding of 'not guilty' requires approval or confirmation; and neither should be disapproved. Such disapproval can not in any event affect the finality of a legal acquittal or of a legal finding of not guilty".

The record discloses that accused was present in court at its original sitting and was arraigned and plead to the issues. The finding of not guilty of the only specification before the court and the announcement thereof to the accused and his counsel in open court, as the record shows was done by the president, was final and accused could not thereafter under any pretext be convicted of that specification or any lesser included offense thereunder even though an effort was made to find accused guilty of a charge under AW 96. Of the question here presented, Winthrop's Military Law and Precedents, reprint 1920, page 379, has this to say:

"But to find Not Guilty, (or Guilty without criminality,) of the specification, or of all the specifications where there are several, and then Guilty of the charge, is an inconsistent and incongruous verdict, since the finding on the specification or specifications deprives the charge of support,-- leaves it wholly without substance, -- and a finding of Guilty upon it is a nullity in law".

In CM 152731 (1922) the President, on 24 August 1922, approved the opinion of the Acting Judge Advocate General that:

"When the record of trial of a court-martial is finally approved and adopted by the court as a body and authenticated by the signatures of its president and the president and trial judge advocate, the accused is entitled as of a right to have it forwarded to the appointing authority. Until the "legal record" is thus brought into existence, the court has plenary power over it for the purpose of making it "speak the truth" and for the further purpose of revising its sentence in accordance with the truth and justice * * *".

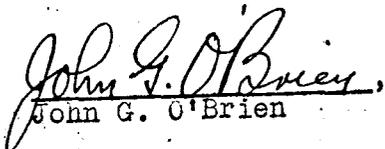
In this case accused not only had the right to have this record forwarded to the reviewing authority but this was actually done. The reviewing authority was without legal authority to return this record of trial for such action as the court attempted to take. The court likewise was without authority in revoking a finding of not guilty. No such action is authorized by any of the Articles of War or precedent of military law. Under certain

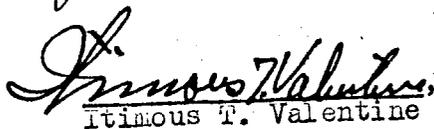
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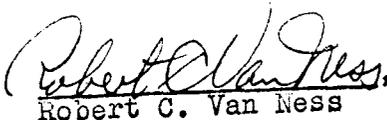
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circumstances the reviewing authority may order a proceeding in revision for the purpose of correcting the record so that it may speak the truth with respect to the findings or the other parts of the record in which minor errors appear, but is never authorized to order a proceeding in revision for the purpose of setting aside an acquittal or a finding of not guilty. In CM 233806 (1943), Vol. II Bull. JAG p. 184, the Board of Review was faced with practically the exact question as presented in this case. The only difference was that the sentence of "confinement at hard labor at such place as the reviewing authority may direct for five (5) years" was amended in revision proceedings so as to add after the word "years", "and to be dishonorably discharged the service, and to forfeit all pay and allowances, due or to become due". This action was declared void under AW 40.

At the revision session of the court the assistant trial judge advocate made the statement that the court did not announce its findings of the specification. The record proper does not support this statement. On the contrary, the record discloses that the findings and the sentence were properly announced in open court (R. 8). In no view of this case can the findings or the sentence be sustained. It is therefore the opinion of the Board of Review that the record of trial is legally insufficient to support the findings and the sentence.

 Judge Advocate
John G. O'Brien

 Judge Advocate
Itimous T. Valentine

 Judge Advocate
Robert C. Van Ness

(250)

CM IBT # 358 (Clifford, Leo W.) 1st Ind.

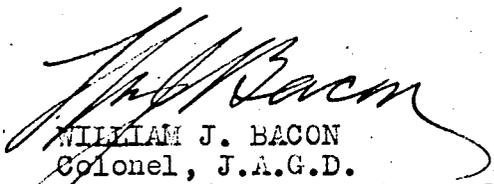
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, India Burma Theater, APO 885, c/o Postmaster, New York, N. Y., 16 December 1944.

To: The Commanding General, USF, India Burma Theater, APO 885, U. S. Army.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, 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 Private Leo W. Clifford, 11052183, Casual Detachment, 5307th Composite Unit (Provisional), together with the foregoing opinion of the Board of Review constituted in the Branch Office of The Judge Advocate General with the United States Forces in India Burma.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

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


WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

2 Incls.
Record of Trial
Action Sheet

(Findings and sentence vacated. GCMO 11, IBT, 25 Dec 1944)

WAR DEPARTMENT
BRANCH OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER

(251)

New Delhi, India
3 January 1945

Board of Review
CM IBT 370

UNITED STATES

SERVICES OF SUPPLY, USE IBT

v.

Private First Class David L.
Johnson, 34108840, Company F,
Forty-Fifth Engineer Regi-
ment (GS).

) Trial by GCM convened at APO
) 689, % Postmaster, New York,
) N.Y. on 9 November 1944. Dis-
) honorable discharge, total for-
) feitures, confinement at hard
) labor for 10 years. United States
) Disciplinary Barracks nearest
) port of debarkation in United
) States designated as place of
) confinement.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 which submits this, its holding, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

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

Specification: In that Private First Class David L. Johnson, Company F, 45th Engineer Regiment (GS) did, at Tingkawk, Burma, on or about 17 June 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Punu Bohra, 1st Nepalese Porter Corps, a human being, by cutting him with a knife.

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

Specification: In that Private First Class David L. Johnson, Co. F, 45th Engineer Regiment, (GS), did, at Tingkawk, Burma, on or about 17 June 1944, with intent

to commit murder, commit an assault upon Punu Bohra, 1st Nepalese Porter Corps, by shooting at him with a dangerous weapon, to wit: a pistol.

3. Accused pleaded not guilty to all Charges and Specifications. Of the Specification, Charge I, he was found guilty except the words "with malice aforethought", "deliberately", and "with premeditation", substituting the word "and" before the word "unlawfully", of the excepted words, not guilty, and of the substituted word, guilty, and not guilty of Charge I but guilty of a violation of the 93rd Article of War. He was found not guilty of 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 for 10 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 order of execution was withheld and the record of trial was forwarded to this office pursuant to the provisions of Article of War 50½.

4. The evidence for the prosecution is substantially as follows: It was stipulated (R. 6) between the prosecution, accused and his counsel that if Captain Franklin R. Black, Medical Corps, were present, he would testify as follows:

"That my name is Franklin R. Black, Captain, Medical Corps, 385th Medical Collecting Company, 151st Medical Battalion, that on the 18th of June 1944 at 3:00 p.m. I was called upon to examine the body of an Indian laborer identified to me by Lieutenant M. Newberg, 502nd M.P. Battalion, as Punu Bohra of the 1st Nepali Corps. This body was lying on the ground face down, legs drawn up, and right arm extended over the head. The skin was cold and the condition of the body was consistent with the reported time of death twenty-four hours previously. The chief wound and probable cause of death was a four inch incised wound in a plane perpendicular to the long axis of the body at the level of the fifth cervical vertebrae. The wound was about two and one half inches in its maximum depth. It had severed the skin, subcutaneous tissues, posterior spinous muscles and ligaments, and the spinal cord. This wound was sufficient to cause almost instantaneous death. The injured man would certainly have been unable to walk or otherwise move himself from the site of its incurrence. Besides this wound there was a shallow laceration of the scalp extending from front to rear along

the crest for about four inches. There were minor scratches on the lower legs."

Corporal Robert C. Hiatt testified that on or about 17 June 1944 he was working on his bulldozer "alongside the outskirts" and saw accused fire a gun at a native (R. 7, 8). The accused was about ten or twelve feet from the native and the witness was about forty or fifty yards away (R. 9). The native was sitting or standing on a log. The witness could see only a part of the native's body from the waist up. He did not see the native move before the shot was fired and could not say whether he was then alive. The native fell down when the shot was fired. Accused said nothing to the witness and the latter kept on working and did not examine the body or see anyone else do so (R. 8). Hiatt did not know the native, had never seen him before and has not since. It would have been possible for someone to have crawled out from the jungle and reached the native without Hiatt seeing him (R. 9).

Sergeant George A. Johnson was working on the airstrip on 17 June 1944. He "noticed a native sitting up on a log, or standing, he seemed way over, I saw blood on his face". Witness started to turn and heard a shot, and before he got turned accused passed him. He did not see accused shoot but saw him put his gun back into his scabbard. The native "was down between the log from where he was sitting or standing". Witness asked accused what happened. Accused said he went into the woods to relieve himself and while he was out there the native slipped up on him with a knife. "I understood him to say he killed him". Witness told accused to report it (R. 10). On cross examination the witness stated he was not sure that accused said he killed the native but that he said he killed him or cut him. The native seemed to be moving one hand. Witness was about fifty or sixty feet from the native. The native's arm or hand did not appear to be supported in any way, but it would have been possible for the arm to have been propped in position by a small branch (R. 11). Witness did not examine the body afterwards. Lieutenant Stewart sent him for the medical officer, and an M.P. came out. It would have been possible for someone to have crawled out from the jungle and reached the body without being seen by the witness. Accused was eight or ten feet from the native when he shot. He was on the side of the witness, "kind of in front of" him. The native seemed to be beckoning to someone with his arm. The witness did not see a knife (R. 12). There were no knife wounds or cuts on accused (R. 13).

Second Lieutenant Nathan S. Glazier, 700th Military Police Company, testified that on 17 June 1944 he was stationed about four miles below Tingkaw at the 45th Engineers. He had a call from Lieutenant Newberg that there was a body lying at the

Tingkawk airstrip and that Major Johnson from Road Headquarters had asked for a military police officer to come up there. Glazier and Newberg started for the airstrip at about 1830 and arrived at 2100 or 2130. Major Johnson and Lieutenant Brown took them to a place where a body was lying near the airstrip. It appeared to be a Nepalese porter. It was in a crouched position, with the legs drawn up, the left hand in the crotch, and the head lying on the right wrist (R. 14). There was no pulse, the body was cold, and rigor mortis had set in. An examination by the witness disclosed a cut on the top of the head and a large gash on the rear of the neck. It was decided to move the body from the logs and cover it. It had developed that a soldier from "F" Company had turned himself in to one of the officers, so it was decided to investigate. The officers were asleep, it being about 0030. The first sergeant said that one David Johnson was under arrest. They questioned Johnson about what had happened. He was "in a sort of excited state". He stated in effect that during the afternoon he was relieving himself in the woods when he saw an Indian approach him with a knife in his hand. Accused grabbed the knife, hit the Indian over the head with it, threw it down and went back to work. Accused further stated that while he was working on the airstrip with a caterpillar he saw the same Indian crouching over some logs, looking at him, so he fired once with his pistol and kept right on working. The witness asked accused if he caused some blood on the body and he said "no", that he saw a white hole in the man's chest. Accused's statement was "Voluntary, absolutely". On the following day, a further investigation was made (R. 15). A caterpillar had pushed some dirt up toward but not on the place where the body was found. A subadar of the Nepali Corps reported some missing articles had been found. They went to a place about one hundred yards east of where the body was. There they found a wool knit cap of the type worn by the Nepalese Corps, British type shoes, and a knife which was turned over to the CID. There were blood stains there. The witness saw no bullet wound on the body and no white hole in the man's chest (R. 15). When asked whether accused was warned that anything he might say could be used against him, the witness replied, "He was not. I was just trying to get the story. He was excited at the time". There was "a trace" from where the knife and other articles were found to where the body was found. Logs had been scuffed and it "appeared as though he may have been dragged". There were very light foot prints of shod feet. There was more blood where the knife was than where the body was found. The witness replied in the negative to a question by the president of the court whether any attempt was made to find out if the hat and shoes "would fit the man that was murdered" (R. 16). The articles were found about twenty yards in the woods. Accused was sober when questioned but was excited and nervous. The witness did not

ask accused for the knife. It was found the next day (R. 17). He stated that a knife shown to him by the trial judge advocate, but not offered in evidence, was similar to the one found. Foot prints were found where the clothing was but not where the body was found (R. 18).

Second Lieutenant Robert W. Davis, Criminal Investigation Division, identified a native knife as one that was received by him from Lieutenant Mulloy at the CID. He took the knife to the 20th General Hospital laboratory. The knife had been "in our vault" since it was returned from the 20th General Hospital, and witness took it from the vault. He could identify it as the same knife because "it has two initials carved in there 'B & B', and it was tagged by Lieutenant Mulloy". The knife was received in evidence without objection as Exhibit P-1 (R. 19). The witness identified a certain sworn statement as one bearing his signature and signed in his presence by accused. Lieutenant Mulloy, in the witness' presence, warned accused of his rights under the 24th Article of War. Accused was sworn prior to signing. He was offered no reward or remuneration and signed it of his own free will without threat or fear of punishment. The statement was received in evidence as Exhibit P-2 over objection by the defense that there had "not been sufficient showing of a corpus delicti" (R. 20). Prosecution's Exhibit P-2 was read to the court as follows (R. 21, 22):

"On 17 June 1944 while working on Airstrip No. 30 at Tingkawak during a period when there wasn't much to do at approximately 1500 hours I walked away from the R-4 tractor that I was working on in order to have a bowel movement. I walked down the road a ways. I noticed a coolie sitting on a log. As I approached he got up and walked across the road into the woods. Then I turned and went across the road also in order to go into the woods to relieve myself. While I was squatting down facing the road I heard some noise in back of me. I turned to see what it was and all I could see was a knife coming through the bushes. I remained hidden in front of a stump until I saw a coolie approaching on his hands and knees. I believe this was the same coolie I had seen before. When he approached near to me I jumped out, grabbed his right arm, twisted his arm until he dropped the knife, and I then grabbed the knife. I tried to ask him his name but he was just mumbling and I couldn't understand him. Then I got mad and clipped him over the back of the neck with his knife. This was a sort of a hawk billed knife about 15" to 18" long. I left the knife and the coolie laying there and walked back to my tractor. Sometime, about less then a half hour later, I saw the same coolie

coming across a log. He did not have his knife or no other weapon that I could see. Sergeant George Johnson, who was in charge of my detail, started to walk up to him and I said, "Don't touch him." Then Sergeant Johnson backed out of the reach of both the coolie and me. I drew my .45 automatic pistol and fired once at the coolie. He was about from fifteen to twenty yards away from me when I fired. The coolie fell right down. Sergeant Johnson and I went up to look at him, and he appeared to be dead with a bullet through the heart. I could see the cut he had back of the neck from the blow I had given him in the woods. Sergeant George Johnson told me to report to Lieutenant Stewart, and I told Lieutenant Stewart that I had a little accident with a coolie and had killed him. Lieutenant Stewart asked me for my .45 pistol and I gave it to him. I was then taken to my own company and was placed under guard."

The witness identified a second statement as one witnessed by himself and Captain McCulley and signed in his presence by accused after warning to accused by Captain McCulley under the 24th Article of War. This statement was signed voluntarily by accused without promise of reward or remuneration and without fear of punishment or threat (R. 22). The defense objected to the introduction of the statement on the same grounds as to Exhibit P-2, and further objected to a designated portion of the statement on the ground that it related to the character of the accused. The statement, less the designated portion, was received and read in evidence as Exhibit P-3 and the court was instructed to ignore that portion of the statement which refers to accused's character. The portion read is as follows (R. 23, 24):

"Question: Johnson, have you ever seen this knife before? This bamboo knife with the rag grip? Answer: Yes, that's the one I hit the Indian with that I killed. Question: Why did you hit him with this knife? Answer: Because I thought he'd kill me if I didn't. Question: Which hand was he carrying the knife in when you saw him? Answer: In his right hand. Question: How did you get it from him? Answer: I grabbed his right hand with my right hand and twisted it away from him and then I struck him once with the knife in back of the neck, with the middle of the blade of the knife. Question: Did he cry out when you took the knife away from him? Answer: No, he didn't. I asked him his name and he just mumbled so I hit him across the neck. Question: Why did you think he'd kill you? Answer: Sir, I don't know what was the matter with him, you see I was sitting down behind a stump taking a break, I'd just finished taking a 'crap' and was sitting there resting and heard a noise behind the stump and I couldn't see anything but a knife

parting the weeds and he was crawling on his knees towards me. I got down on my knees and waited until he got close enough for me to catch his arm and take it away from him. Question: How was the Indian clothed? Answer: He had on a sweater, tan shorts, black British shoes, white socks, white tam on his head and a rag, dirty gray color, tied around his neck. Question: When you struck him with the knife what did he do? Answer: When I struck him on the back of the neck with his knife he fell on his knees then fell backwards across a little wood pile. He was bleeding freely and you could see the blood all over his sweater. He didn't cry out, just mumbled something. I threw the knife down beside him, I don't know which side of him and I went back to work. Question: Had you ever seen this native before? Answer: No, sir. Question: Did you think you'd killed him? Answer: Yes, sir, I did think I'd killed him. Question: When did you tell Sergeant Johnson and T/5 Hiett that you'd killed this native? Answer: After I'd shot him about fifteen or twenty minutes after I'd struck him with his bamboo knife, and left him for dead. Question: What did you think when you saw him coming across the log? Answer: He was coming slow across the log with his hands close together in front of him sorta low shaped. His head was tilted back and laying over towards his right shoulder. There was blood all over his sweater, on the front and back. He was the same native who I'd struck across the back of the neck with his own bamboo knife. Question: What did you shoot at him with? Answer: A .45 caliber U.S. Army automatic pistol which belongs to First Sergeant Willie L. Wilson who I'd borrowed it from. I fired only one shot. I turned the automatic over to Lieutenant Stewart when I reported the killing of the native to him."

On cross examination the witness testified that when the statements were taken he did not tell accused that there was no other evidence against him (R. 24); that Lieutenant Mulloy took the first statement and Captain McCulley the second; that he only acted as a witness to the signing of the statements and was present when accused was warned; that he made no investigation of the case himself (R. 25).

5. After the prosecution had rested, the defense submitted a motion for a "directed verdict of not guilty on the first charge and specification on the grounds that insufficient evidence has been introduced". In this connection, defense counsel stated that the only evidence connecting the accused with the crime is his own statements, that there is no showing that he actually had

killed the native or which of the two wounds were inflicted by accused (R. 25). This motion was overruled (R. 26). Defense counsel then moved that the second Specification and Charge "be struck out" and that there be a finding of not guilty on such Specification and Charge. He urged that the evidence seems relatively clear that the deceased was dead at the time the gun was fired at him, and that an assault cannot be committed on a corpse. This motion was overruled (R. 26).

6. The defense called no witnesses, and the accused, after being warned of his rights, elected to remain silent (R. 27).

7. Because of a patently fatal error appearing in the record, the Board deems it unnecessary to recapitulate or discuss the evidence as a whole. It should be observed, however, that the record is replete with errors and irregularities other than that hereinafter discussed. Among these are the apparently uncontrolled admission of hearsay testimony, the failure to establish a chain of possession as a basis for the introduction in evidence of Exhibit P-1, and the failure to establish more clearly that the body examined by Captain Black was the body found at the airstrip. Furthermore, serious doubt arises as to the admissibility of accused's statement to Lieutenant Glazier, which was made without warning under Article of War 24, and of Exhibits P-2 and P-3 (See CM ETO 1486, 3 Bull JAG, p. 227).

8. As stated in a previous opinion of this Board of Review (CM CBI 49), 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. The rule is stated in 30 Corpus Juris at page 288, as follows:

"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". (Also see 41 CJS, p. 23)

9. The only reference in the testimony to the identity of the person alleged to have been killed, namely, Punu Bohra, is found in the stipulated testimony of Captain Franklin R. Black, Medical Corps, who stated, in pertinent part, that "on the 18th of June 1944 at 3:00 p.m. I was called upon to examine the body of an Indian laborer identified to me by Lieutenant M. Newberg, 502nd M.P. Battalion, as Punu Bohra of the 1st Nepali Corps".

Captain Black's statement as to the identity of the body is, on its face, hearsay and incompetent and without probative value. No other witness even purported to identify the deceased and there is no circumstantial evidence in the record from which his identity may be inferred. The failure of proof in this respect is too manifest to warrant further discussion. Consonant with the statement of law set out in the preceding paragraph, the Board of Review is impelled to the conclusion and holds that the record of trial is legally insufficient to support the findings of guilty under Charge I and its Specification.

John G. O'Brien Judge Advocate
John G. O'Brien

Itimous T. Valentine Judge Advocate
Itimous T. Valentine

Robert C. Van Ness Judge Advocate
Robert C. Van Ness

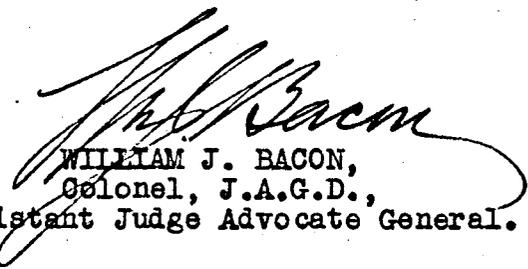
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CM IBT # 370 (Johnson, David L.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 8 January 1945.

TO: The Commanding General, Services of Supply, USF, IBT, APO 885, U. S. Army.

1. In the case of Private First Class David L. Johnson, 34108840, Company F, Forty-Fifth Engineer Regiment (GS), 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 insufficient to support the findings of guilty under Charge I and its Specification and the sentence, which holding is hereby approved and concurred in. The record of trial is returned herewith for such action as may be proper.



WILLIAM J. BACON,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

(Sentence disapproved. GCMO 89, IBT, 19 May 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(261)

New Delhi, India
10 January 1945

Board of Review
CM IBT # 374

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

v.

Private Sherman W. Layton,
35744685, Company C, 748th
Railway Operating Battalion

) SERVICES OF SUPPLY, USF IBT

) Trial by GCM convened at APO
) 629 1/2 Postmaster, New York,
) N.Y. on 24 November 1944.
) Dishonorable discharge, total
) forfeitures, confinement at
) hard labor for 1 year. United
) States Disciplinary Barracks
) nearest port of debarkation in
) United States, place of con-
) finement.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Sherman W. Layton, Company C, 748th Railway Operating Battalion, did, at Tinsukia, Assam, India, on or about 14 September 1944, wrongfully introduce into camp about two ounces of ganja.

Specification 2: In that Pvt Sherman W. Layton, Company C, 748th Railway Operating Battalion, did, at Tinsukia, Assam, India, on or about 14 September, 1944, have in his possession two ounces more or less of a habit forming drug, to wit ganja, said drug not having been ordered by a medical officer of the Army.

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
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3. Accused pleaded not guilty to both Specifications and the Charge and was found guilty of both Specifications and the Charge. He was sentenced to dishonorable discharge, total forfeitures, confinement at hard labor at such place as the reviewing authority may direct for the period of one year. The reviewing authority approved the sentence, withheld the order of execution pursuant to Article of War 50 $\frac{1}{2}$, and forwarded the record of trial to the Branch Office of the Judge Advocate General, United States Forces, India Burma Theater. United States Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement.

4. The evidence for the prosecution is substantially as follows: Private First Class Wilcox testified that on 14 September 1944 he and accused went from their camp to Tinsukia where they drank some rum, later going to Makum Junction where they drank beer and rum. After dark they returned to Tinsukia and at that time "were pretty well intoxicated". In Tinsukia accused talked to an Indian on the street, asked Wilcox for five rupees, and purchased two packages of something which, he said, "if you smoke it it makes you drunk" (R. 7). Accused told Wilcox, when the money was borrowed, that he was going to buy "That weed" "A weed the Indians smoke that makes you high" (R.9). Each package had about enough to fill the bowl of a small pipe (R. 8). Accused gave one of the packages to Wilcox and put the other in his pocket (R. 7). The packages were something wadded up in newspaper or some other kind of paper (R. 8). They then ate at a Chinese restaurant with Corporal Kenneda and afterwards returned to camp (R. 7, 8). Wilcox had been wearing clothes of accused and after returning from work in the morning returned the clothes with the package accused had given him still in one of the pockets. Later in the morning accused came to Wilcox's tent and rolled a cigarette with "some of this stuff that he had purchased". Wilcox took a couple of drags and went back to sleep. Early in the afternoon Wilcox, after being questioned, found "a small package laying on the floor, after telling him I didn't have any". This he disposed of. Accused told Wilcox it was "ganja" or something like that (R. 8). He said it was what they bought in Tinsukia the night before (R. 9). Accused smoked the cigarette from which Wilcox took two drags (R. 12).

5. On 14 September 1944, Corporal Kenneda saw accused and Wilcox in Tinsukia about 7:00 or 8:00 o'clock in the evening. Wilcox was "pretty well under the influence of liquor and didn't know what he was doing" and accused "was about half drunk" (R.13).

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The three went to the Chinese restaurant where accused rolled a cigarette from "some stuff out of his pocket wrapped in a newspaper". He called it marihuana and said he had bought it that evening or that day for five rupees. He took a big drag and explained how to smoke it to obtain the maximum "effect". He put the package in his pocket. After that they left and returned to camp (R. 14). The next day, 15 September, accused was brought to headquarters and there "he told where the marihuana was of his own free will". Accused was taken to his tent and when the officers couldn't find what they were looking for in his bed, accused looked, pulled it out and said that this was it. The witness examined Exhibit A and said it was similar to the package but the contents were much drier than on 15 September (R. 15).

6. On 15 September Captain Jones saw accused at battalion headquarters and from there they went to accused's tent. At the tent accused took a package from his bed and handed it to the Captain saying "Here it is". He admitted he had ganja in his possession. Captain Jones identified Prosecution's Exhibit A as the package accused handed him (R. 17). Accused told Captain Jones he had brought it into camp (R. 18).

7. Lieutenant Duever was present in accused's quarters when the package was handed to Captain Jones and he believed accused said "This is the ganja you are looking for". Accused stated he bought it in town and brought it to camp (R. 19). Lieutenant Duever identified Prosecution's Exhibit A. Accused called it ganja (R. 20).

8. An attempt was made to introduce a confession of accused taken by the Criminal Investigation Division agents, but the court rejected it as it did not appear that the confession was voluntary. Accused was called to the stand for the express purpose of testifying only as to the circumstances surrounding the taking of the confession (R. 22). He admitted having signed the statement but testified that he wouldn't sign it until after they "told me it might help me" (R. 24), and that it would make it lighter on him (R. 25). The objection to the admissibility of the "document" was sustained (R. 25). Another effort was made to introduce the statement and defense objection was sustained, the president stating "I don't see the need for it with the evidence that has been submitted" (R. 28).

9. The package which accused handed to Captain Jones was examined by Captain Carr, Biochemist of the Ninth Medical Laboratory, and determined to be *Cannabia sativa*, marihuana or

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ganja (R. 30)--synonyms for the same thing (R. 31). Captain Jacobs, Medical Corps, 358th Medical Service Detachment, on duty with accused's organization, testified that ganja or marihuana is a habit-forming drug (R. 32) and that he had not prescribed it for accused. Captain Dressler, Medical Administrative Corps, 69th Medical Depot Company, testified that marihuana or ganja in the fluid extract form of the drug is an item of issue by the army but never is in the leaf or stem form (R. 32).

10. The defense rested without presenting any witness, and there is no showing that accused was warned of his right to testify, remain silent or make a statement. However, it may be presumed that defense counsel properly advised accused (CBI 35, 36; sec. 395(32), Dig. Op. BOJAG CBI).

11. There is no showing that accused's statement to Captain Jones and Lieutenant Duever that he had bought the marihuana, smoked some and brought it into camp was voluntarily made. It is well established that any confession made to a superior officer by an enlisted man should be closely scrutinized and that the circumstances should be clearly established in order to determine the voluntary character and nature of such confession. There is no showing that accused was warned, or of the circumstances under which accused's oral confession was obtained by the officers. The testimony of Corporal Kenneda to the effect that accused told where the marihuana was of his own free will is inadequate in this respect. We do not believe that a proper foundation was laid or that sufficient inquiry was made into the voluntary nature of his confession and therefore are of the opinion that his statements that he had bought and smoked the ganja and brought it into camp should be excluded.

12. "Although a confession may be inadmissible as a whole because it was not voluntarily made, nevertheless the fact that it furnished information which led to the discovery of other evidence of pertinent facts will not be a reason for excluding such other evidence; and when such pertinent facts have thus been proved, so much of the accused's statement as relates strictly to those facts becomes admissible. For example, where an accused held for larceny said 'I stole the articles and I tore up a board in the floor of my room and I hid them there', the fact that the confession was improperly induced by promises or threats would not exclude evidence that the articles were discovered in the place indicated by him, and after the introduction of such evidence, it would be proper to

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prove that the accused made the statement, "I tore up a board in the floor of my room, and hid them there."
(MCM 1928, par. 114a) (Also see Winthrop's Military Law and Precedents, Second Edition, 1920, page 328, note 6).

Consonant with the foregoing principle insofar as Specification 1 is concerned, the accused's statements as to "Here it is" or "This is the ganja you are looking for" and the fact that he removed it from his bedding are, we believe, admissible. Furthermore, we believe that the testimony of Captain Jones and Lieutenant Duever as to the acts and statements of accused at the time he handed over the package are admissible as to Specification 2. His acts led to the recovery of what was later, by proper evidence, proved to be ganja, a habit forming drug. His statements, "Here it is", or, "This is the ganja you are looking for", at the time he handed over the package, were merely incidental to his action. Although those statements, together with his act, clearly warrant an inference of possession, part of the offense charged in Specification 2, yet we cannot say that such amounted to a confession but were rather in the nature of admissions against interest. They did not amount to a confession of guilt of the complete offense charged.

13. We believe that the testimony of Captain Jacobs is admissible to show that ganja is a habit forming drug and presented competent evidence from which the court was warranted in so finding (20 Am. Jur. p. 671). Nor do we think there can be any question of the competency of the testimony of Captain Carr as to the identity of Prosecution's Exhibit A as ganja (22 C.J. p. 649). However, the testimony of Captain Dressler as to the habit forming characteristics of ganja was incompetent as it appears therefrom that he was not qualified as an expert witness.

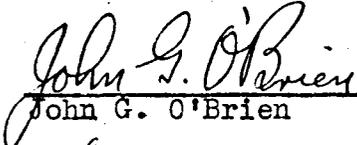
14. Specification 1 contains no allegation nor does the proof show the existence of any law or order prohibiting the introduction of ganja into camp. However, it is common knowledge that the use of ganja or marihuana produces a deleterious effect upon human conduct and behavior, for which reason we are of the opinion that its introduction into a military station is prejudicial to good order and military discipline within the meaning of Article of War 96 (SPJGK CM 250475, Ellington). The evidence before the court-martial was abundantly sufficient to justify the findings of guilty as to both Specifications and the Charge.

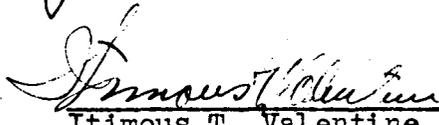
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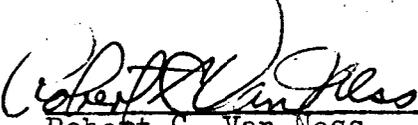
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15. There are a number of minor errors in the record, including hearsay and numerous assumptions of the fact that the substance involved was ganja, but, in view of the record as a whole, we can not say that the substantial rights of the accused have been prejudiced.

16. 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 sentence 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 findings and the sentence.

John G. O'Brien, Judge Advocate
John G. O'Brien

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

Robert C. Van Ness, Judge Advocate
Robert C. Van Ness

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New Delhi, India
19 January 1945

Board of Review
CM IBT 375

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

v

Corporal Felix (NMI) Arbolaez,
33326772, 4155th Quartermaster
Truck Company

) SERVICES OF SUPPLY, USF IBT

) Trial by GCM convened at Calcutta,
) India on 1 December 1944. Dis-
) honorable discharge, total for-
) feitures, confinement at hard
) labor for 5 years. United States
) Disciplinary Barracks nearest
) port of debarkation in the
) United States designated as place
) of confinement.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 which submits this, its holding, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that Corporal FELIX (nmi) ARBOLAEZ, 4155 Quartermaster Truck Company, Camp Howrah, India, was at Calcutta, India, on or about 3 November 1944, found drunk while on duty as a military police at the Cosmos Club.

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

Specification 1: In that Corporal FELIX (nmi) ARBOLAEZ, 4155 Quartermaster Truck Company, Camp Howrah, India, did at Calcutta, India, on or about 3 November 1944, with intent to do him bodily harm, commit an assault upon Dila Mia by shooting him with a dangerous weapon, to wit, a 45 calibre automatic pistol.

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Specification 2: In that Corporal FELIX (nmi) ARBOLAEZ, 4155 Quartermaster Truck Company, Camp Howrah, India, did at Calcutta, India, on or about 3 November 1944, with intent to do him bodily harm, commit an assault upon Inder Singh by shooting at him with a dangerous weapon, to wit, a 45 calibre automatic pistol.

3. Accused pleaded not guilty to all Specifications and Charges and was found guilty of all of them. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor at such place as the reviewing authority may direct for the period of 7 years. The reviewing authority approved the sentence but remitted two years of the portion thereof adjudging confinement at hard labor and withheld the order of execution pursuant to Article of War 50 $\frac{1}{2}$ and forwarded the record of trial to the Branch Office of the Judge Advocate General, United States Forces, India Burma Theater. United States Disciplinary Barracks nearest the port of debarkation in the United States is designated as the place of confinement.

4. On 2 November 1944, Sergeant Price was in charge of the military police detachment at Camp Howrah, of which organization accused was a member. On that day Sergeant Price issued six .45 caliber pistols with full clips of seven rounds of ammunition. One pistol had serial number 831491, but Sergeant Price did not know whether that particular pistol was issued to accused (R. 7, 8). That night accused was placed on duty at the Cosmos Club by Sergeant Price (R. 7) at about 1900 hours (R. 19) and at the time was sober. Sergeant Price on direct examination testified as follows:

Question: "How long was his tour of duty to last?"
Answer: "Until the club closed and then they stay until the next morning to keep down any further disturbance."

Question: "Then their tour of duty runs all night long?"
Answer: "Yes sir."

On cross examination the following testimony was adduced:

Question: "** * *and you previously informed the court that the tour of duty was until the club closed and then they stayed all night to keep any further disturbance down. His tour of duty was until the club closed, is that right?"
Answer: "Yes sir."

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On redirect examination the following question was asked and answer received:

Question: "If some disturbance came up at the club, would it still be his responsibility to take care of it as an MP?"
Answer: "That is right sir."

On recross examination he testified as follows:

Question: "Sergeant, if any further disturbance had arisen the MP who was there or any other soldier would naturally take care of it; but any disturbance which came up after closing of the club was not part of the duty of the MP?"
Answer: "Yes sir. That is why they stayed there all night."
Question: "But his tour of duty was until the club closed?"
Answer: "That is right." (R. 7, 8).

The statement of accused reveals the tour of duty ran until 0700 hours the following morning (R. 19).

5. About 0600 hours on 3 November 1944 Technician Fifth Grade Guziel, a military policeman, together with Staff Sergeant Wright, Private First Class Watts and a Mr. Jewell, went to the Alifnagar Yards where accused was found asleep. He had a .45 caliber pistol, number 831491, which was taken from him. The chamber and the magazine were empty and the barrel smelled of powder as if it had been fired (R. 8, 9, 11). Guziel testified: "I could say that he had been drinking" (R. 9). Accused was taken to military police headquarters and among other things two live rounds of ammunition were found on him (R. 10).

6. At 0330 hours, 3 November 1944, Inder Singh, a lorry driver for the Director General, Munitions Production, picked up accused, who was wearing a band similar to those worn by military police (R. 13), about thirty or forty yards over the bridge at Kidderpore (R. 11). The driver went to Alifnagar and as he was turning into the godown accused told him to stop. Accused stated that he wanted to go to Camp Howrah. When the driver told him he couldn't go but that accused should get a taxi, accused drew a pistol, pointed it at him and said, "You know". Accused said, "I would have to go". "He then fired at me and the bullet went in the door at my right". The driver started the vehicle

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and when he did two shots were fired in his direction. The driver stopped and accused pressed the pistol against the driver's leg. The driver grabbed his wrist and "threw it away, and at that time a shot was fired". Six shots were fired altogether (R.12). Accused was a foot away from the driver and "the bullet went in about six inches from me" (R. 13).

7. Early in the morning of 3 November 1944 Dila Mia was sleeping by his rickshaw outside 129 Lower Circular Garden Reach Road (R. 14). Surath Chamer, who lived at that address, heard a hue and cry, came out and picked up Dila Mia who had been injured in the neck (R. 14). A bullet was handed to Surath Chamer by Samir Mia and this was given to the police. The bullet was in the road (R. 15). Mullah Chamer was awakened by a shot being fired. Dila Mia "was shouting that he had been hit by a bullet". He was injured in the neck and the wounds were bleeding profusely. This occurred about three o'clock in the morning and about half past three Dila Mia was taken to the hospital (R. 17).

8. The rickshaw of Dila Mia was examined by the police about 0730 or 0800 hours on 3 November 1944 on Circular Garden Reach Road (R. 24) near No. 129 (R. 25) and a bullet was found (R. 23) underneath the seat (R. 24). This bullet was introduced in evidence over the objection of defense after the police officer who found it stated that from the markings it looked like the one he had found (R. 25, 26). This bullet was examined by an arms and ballistics expert and determined to have come from a .45 caliber automatic pistol and as having been fired from pistol number 831491 (R. 26, 27).

9. A Criminal Investigation Division agent made an investigation and found a round of ammunition on the outer right side of the cab of the truck and on the right side of the floor board "near the driver's foot pedals was a hole made by a spent round of ammunition" (R. 18). After being duly warned, accused made a statement to the Criminal Investigation agent, which was received in evidence as Exhibit 1 (R. 18). According to this statement, accused had been doing military police duty at the Cosmos Club for about three months. While on duty he carried a .45 caliber automatic pistol which was issued by Sergeant Price who was in charge of the military police at Camp Howrah. Accused went on duty at the Cosmos Club at approximately 1900 hours on 2 November 1944 and his tour of duty "is over the following morning at 0700 hours". Before going on duty that night he had about ten cans of beer. During his tour of duty and before 2300 hours he

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drank "a good third of a bottle or so" of gin, "about five or six large drinks of gin" (R. 19). When the club closed at 2300 hours he and the man on duty with him took two of the hostesses home and returned before 2400 hours. Accused remained outside for some air. He met an American colored soldier with a quart of gin which they drank together. Accused "was pretty intoxicated". He still had his weapon with him after drinking the gin. "I don't know what I did, but I have a faint recollection of being in a truck and talking to some foreman or superintendent who could speak English around a fire, in some storage yard, and while crying asking this foreman to call the Military Police because I thought that I had hurt some one with my pistol". He remembered shots going off from his pistol and "being on the truck, on the right side of the truck". He was in too much of a stupor to remember why he took his pistol out of the holster (R. 20). After drinking the gin with the colored American soldier "From there my mind lapsed until I found myself in a yard. I was inquiring to an Indian that could speak English to get in touch with the Military Police for I could recall my .45 going off and I felt I did some wrong. He assured me not to be worrying for the shots had went astray and no one was hurt. Then my mind lapsed again and I next found myself at the Military Police Headquarters at 6 Lindsay Street" (R. 21).

10. The accused, after having been advised of his rights, elected to remain silent (R. 28).

11. The statement made by accused amounts to a complete confession as to the specification of Charge I. However, before such may be considered as evidence against him there must be other evidence in the record, 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 a 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. 149a). The fact that accused was found at the Alifnagar Yard asleep and had been drinking was some evidence of a part of the charge. There can be no question but that he was placed on duty as a military policeman at the Cosmos Club on the night in question. The evidence adduced from Sergeant Price as to the hours of duty of accused is apparently conflicting. However, it is not our function to determine the meaning of the testimony of any witness. That is the function of the court-martial and the reviewing authority and where the evidence is not clear it is within the province of the court, as the triers of the facts, to construe the meaning of the testimony

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drawn from the witness. We believe that the testimony of Sergeant Price, together with the other testimony, constituted sufficient proof of the corpus delicti to admit accused's confession.

12. Specifications 1 and 2 of Charge II allege offenses of which the element of specific intent is a vital part and must be proved to substantiate the allegations (CM 200047, Plants; 4 B.R. 233). This gives rise to consideration of the effect of accused's drunkenness on his capacity to entertain a specific intent (See par. 126a MCM, 1928). In this connection, the evidence shows that at about six o'clock in the morning, approximately two and one half hours after the alleged assaults, accused was found asleep at Alifnagar Yards. He was awakened and stood on his feet. He made inquiry as to where he was being taken and when told, got into the jeep and was taken to headquarters. From this it is apparent that he was not at that time greatly intoxicated although it appeared that he had been drinking. When examined by the Criminal Investigation Department agent he stated that he did not know what he did but had a faint recollection of asking someone to call the military police because he thought he had hurt someone with his pistol. He further stated that he had asked an Indian who could speak English to get in touch with the military police for he could recall his pistol going off and he felt that he had done some wrong. If the evidence as revealed from accused's statement is believed, it unmistakably shows that accused was drunk at the time of the assault. However, from the evidence as a whole it is manifest that he was capable of such mental control as to enable him to know that he was not on his way to camp and to demand that he be taken to Howrah even after it was suggested that he take a taxi. Physically he could stand, move and speak and there is no evidence revealing that such physical acts were done in other than a normal manner. It is clear that his recollection was not so impaired that he had no knowledge of his previous actions and conduct. Under all the facts and circumstances, we cannot say that the court was not justified in its conclusion that accused was not too drunk to entertain the requisite intent.

13. The intent to do bodily harm may be inferred from the circumstances (CM 236503, Jerls; 23 B.R. 21). The instrument used, a pistol, is dangerous per se, and its use by the accused evidences his intent to do bodily harm with a dangerous weapon. It may be contended that accused merely intended to scare Inder Singh, the lorry driver, because he missed him when he fired from such a short distance away. However, the evidence shows that accused held the pistol against the leg of the lorry driver and when the driver wrenched it away, accused fired. Apparently if the driver had not acted in such a manner he would have re-

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ceived a serious leg injury. In any event, it is clear that there is substantial evidence that accused intended to do bodily harm to Inder Singh. It is not our function to weigh such evidence.

14. There is no showing that accused saw or knew that Dila Mia was nearby or that he shot at him. The proof reveals that a bullet shot from the pistol of accused was found under the seat of the rickshaw. Such, we think, is a circumstance from which the court could infer that the wound of Dila Mia was caused by a bullet fired by accused. In discussing assault with intent to kill, 26 American Jurisprudence, page 580 states:

"There is a sharp difference of opinion as to whether a conviction of assault with intent to kill may rest upon proof of intent against any person generally, or whether it must be against the person assaulted. According to one group of decisions, the very essence of the crime is the specific intent to take the life of the person assaulted, and it is vigorously maintained that a person who, while shooting at or assaulting another with intent to kill him, unintentionally injures a third person is not guilty of the offense of assault with intent to kill the third person. Many courts, however, deem the rule stated to be impracticable in the administration of the law, and its foundation to be too subtle to be adopted with safety. These courts assert that although the defendant inflicted the injury on a third person unintentionally, he may nevertheless be found guilty of an assault with intent to kill or murder. Under this rule, if A shoots at B and hits C, he may be convicted of an assault with intent to kill B".

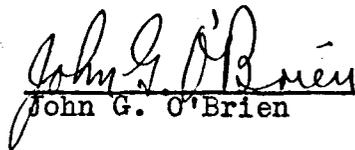
It appears that the latter view has been followed by Boards of Review in other cases (CM 248102, Roberts; 31 B.R. 121) (CM 238-389, Kincaid; 24 B.R. 247). The principle, we think is applicable in the instant case and therefore conclude that accused is equally as guilty of an assault on Dila Mia with a dangerous weapon with intent to do bodily harm as he is on Inder Singh.

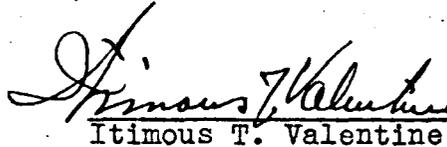
15. The court was legally constituted and had jurisdiction of the subject matter of the offense and the person of the accused. No errors injuriously affecting the substantial rights of accused were committed during the trial. The sentence was within the authorized limits. Therefore, the Board of Review

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is of the opinion and accordingly holds that the record of trial is legally sufficient to support the findings of guilty and the sentence.

 , Judge Advocate
John G. O'Brien

 , Judge Advocate
Itimous T. Valentine

 , Judge Advocate
Robert C. Van Ness

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New Delhi, India
10 March 1945

Board of Review
CM IBT 380

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

v

Staff Sergeant Gene E. Yacavone,
31047650, Headquarters and
Headquarters Squadron, Fourteenth
Air Force.

FOURTEENTH AIR FORCE

) Trial by GCM convened at Kun-
) ming, China on 24 November 1944.
) Dishonorable discharge (suspend-
) ed by reviewing authority until
) release from confinement), to
) forfeit all pay and allowances
) due or to become due, to be con-
) fined at hard labor for 3 years.
) United States Disciplinary Bar-
) racks nearest port of debarka-
) tion designated as place of con-
) finement.

OPINION of the BOARD OF REVIEW
O'BRIEN, 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 which submits this, its opinion, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

CHARGE I: (Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In that Staff Sergeant Gene E. Yacavone, Headquarters and Headquarters Squadron, Fourteenth Air Force, did, in conjunction with Private William M. Morris, Headquarters Detachment, Air Transport Command, Luliang, China, at Barracks A-2, Hostel 3, Kunming, China, on or about 22 December 1943, feloniously

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take, steal and carry away one Thompson Sub-machine Gun, number S327905, of the value of more than fifty dollars (\$50.00), property of the United States, furnished and intended for the military service thereof.

ADDITIONAL CHARGE: (Finding of not guilty)

Additional Specification: (Finding of not guilty)

3. Accused pleaded not guilty to all charges and specifications and was found not guilty of the Specification of Charge I and Charge I; guilty of the Specification, Charge II, except the figure "22", substituting therefor the words "the month of", and except the words and figures "S-327905", of the excepted words, not guilty, of the substituted words, guilty, and guilty of Charge II; not guilty of the Specification of the Additional Charge and the Additional Charge. No evidence of previous convictions was offered. 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 three years. The reviewing authority approved the sentence and ordered its execution but suspended the execution of the dishonorable discharge until the soldier's release from confinement. The United States Disciplinary Barracks nearest the port of debarkation was designated as the place of confinement. The record of trial was examined in the Military Justice Division in the Branch Office of the Judge Advocate General, United States Forces, India Burma Theater, and, having been found legally insufficient to support the findings and sentence, was forwarded to the Board of Review pursuant to Article of War 50½.

4. Accused was found guilty only of the Specification of Charge II and for that reason only such evidence in the record as bears upon that Specification will be narrated and discussed.

During the month of December 1943 Private Morris visited the accused in his room in Barracks A-3, Hostel 3, Kunming, China (R. 12, 15). It was agreed between accused and Morris that they would get a gun somewhere and take it to town for sale and divide the proceeds between them (R. 18). Together they went to Barracks A-2 and in one of the rooms there saw a Thompson sub-machine gun in a corner of the room (R. 21). Accused said, "Let's get this one" (R. 12). Private Morris thereupon went into the room and field stripped the weapon (R. 20) while accused stayed in the hall or doorway (R. 15) and prevented a

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Chinese houseboy from interfering or observing what Morris was doing. Morris and accused then returned with the gun to the accused's room. After borrowing accused's overcoat (R. 20, 21), Morris took the gun to Kunming where he sold it to an American woman (R. 12) for about CN \$35,000 or \$40,000 (R. 16, 17). Morris actually made the sale of the weapon but divided the money with accused. Morris never looked at the serial number of the stolen gun and did not recall seeing any identification marks on it or the sling (R. 18).

Master Sergeant Robert W. McGregor, Headquarters and Headquarters Squadron, 14th Air Force, was living in Barracks A-2, Hostel 3, Kunming, China in December 1943 (R. 7-8). A Thompson sub-machine gun (R. 7) had been issued to him on 20 April 1942 at Jefferson Barracks: He kept this gun strapped to the back side of his bed "between the wall and the bed proper" (R. 8). He checked and cleaned it on 18 December (R. 8). The serial number of this weapon as shown by Sergeant McGregor's property list was SN-372904 (R. 7). This property record was not the original one but had been made up at 14th Air Force Headquarters on 20 April 1943. Sergeant McGregor had not checked the serial number of his gun with that shown on the property list and could not say positively that the serial number was the same. The serial number and his name were on the strap but the strap was removable (R. 9). The gun was taken from the quarters of Sergeant McGregor without his consent on or about 22 December 1943 and has not been returned to him (R. 8).

5. Evidence for the defense:

Accused, after being warned of his rights under the 24th Article of War, was sworn and testified as a witness in his own behalf. He denied any knowledge of or connection with the larceny of the Thompson sub-machine gun (R. 52). He stated that the witness Morris smoked opium and, "Lots of times Morris is not responsible for what he says. He said he doesn't care what he says he has been given immunity" (R. 53). Accused further stated that Morris owed everybody money (R. 57).

6. Accused was charged under the Specification of Charge II of the theft at Barracks A-2, Hostel 3, on 22 December 1943, of a Thompson sub-machine gun bearing serial number S 327905. However, the prosecution's evidence with respect to this specification does not purport to show that machine gun S 327905 was stolen on the date alleged. Instead, it tends to show that an

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entirely different machine gun--i.e.--one bearing serial number SN-372904--was stolen from Barracks A-2, Hostel 3, sometime in December.

It is a fundamental principal of law that the prosecution must prove the taking by accused of the identical thing charged in the specification to have been stolen (36 C.J. p. 850). Thus, a conviction for larceny is wholly unsupported by evidence which shows that accused took and carried away, from a different place from that charged in the indictment, similar, but entirely distinct property from that referred to in the indictment (36 C.J. p. 851, note 30(b)), or, where an animal found in defendants possession is to be identified by its marks, the identification necessarily fails if there is a material variance (ib., note 33(a)). Similarly, it has been held in the larceny of a hog that the allegation, "a crop off the left ear and a split in the right", is not supported by proof of "a crop off the right ear and a split in the left" (Sec. 1064, Wharton's Criminal Evidence, 11th Ed.). Applying this principle to this case, it seems clear that the allegation that accused stole a Thompson sub-machine gun, S 327905, on or about 22 December 1943 is not supported by proof that he stole a Thompson sub-machine gun, SN 372904, in December 1943.

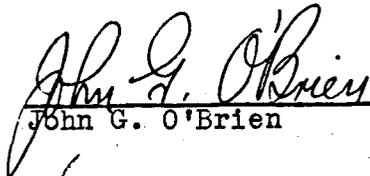
A court-martial may make findings with exceptions and substitutions as to figures, dates, amounts and other details "provided that such action does not change the nature and identity of the offense charged" (Par. 78c, MCM 1928; CM 211866, 10 B.R. 147). However, as indicated by the quoted proviso, the authority of a court to make exceptions and substitutions in its findings is subject to the fundamental principle that a court may convict an accused only of the offense of which he is charged or of a lesser included offense or, as otherwise stated, an accused cannot be hailed to court for the commission of one crime and there convicted of another (State v. Ferguson, 191 N.C. 668) and a conviction cannot be sustained upon a different theory than that on which the case has been tried (State v. Mason, 98 Vt. 363). The accused in this case was brought to trial and the prosecution proceeded on the theory that the accused stole a particular machine gun on or about a particular date. The accused presumably prepared his defense accordingly. The state failed in its proof of the specification but did present evidence tending to prove that the accused stole a different machine gun sometime during the month in question. The proof manifestly was inexplicably at variance with the allegations of the specification and the court,

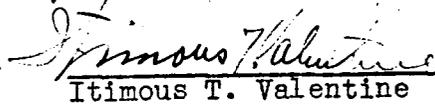
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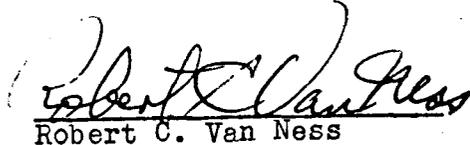
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in an apparent attempt to obviate the variance, acquitted accused by exceptions and substitutions of the theft of the Thompson sub-machine gun described in the specification but found him guilty of the theft of an unidentified Thompson sub-machine gun. The substituted finding necessarily referred to the theft of a gun other than that described in the specification and was not based on the theory of guilt under which the case was tried. It was, in effect, a finding of guilty of an offense not charged. It follows the finding was illegal (See CM 128088, Lee).

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

 , Judge Advocate
John G. O'Brien

 , Judge Advocate
Istimous T. Valentine

 Judge Advocate
Robert C. Van Ness

(250)

CM IBT 380 (Yacavone, Gene E.)

1st Ind.

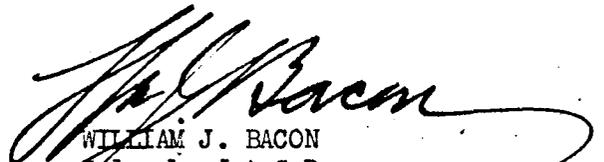
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, INDIA BURMA THEATER, APQ 885,
c/o Postmaster, New York, N. Y., 13 March 1945.

To: The Commanding General, USF, China Theater, APO 879, U. S. Army.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, 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 Staff Sergeant Gene E. Yacavone, 31047650, Headquarters and Headquarters Squadron, 14th Air Force, together with the foregoing opinion of the Board of Review constituted in the Branch Office of The Judge Advocate General with the United States Forces in India Burma. This Branch Office is also empowered to perform for the United States Forces in the China Theater the duties which The Judge Advocate General and the Boards of Review in his office would otherwise be required to perform in respect of all cases not requiring approval or confirmation by the President.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored. This soldier departed this Theater pursuant to par. 2, S.O. 52, Headquarters Port of Debarkation, Transportation Service, Services of Supply, APO 881, dated 28 February 1945. It is recommended that the Adjutant General in Washington be informed by radio of your action in this case.

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


WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

2 Incls.
Record of Trial
Action Sheet

(Findings and sentence vacated. GCMO 1, CT, 13 Apr 1945)

293414

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(281)

New Delhi, India
22 February 1945

Board of Review
CM IBT 389

UNITED STATES

v.

Private John M. Gregal, 20547553, and
Private Frank E. Hamelburg, 12036587,
both of Medical Department (M & DS)
20th General Hospital.

) SERVICES OF SUPPLY
) Trial by GCM convened at
) APO 689, % Postmaster, New
) York, N. Y. on 20 November
) 1944. Dishonorable discharge,
) total forfeitures, confine-
) ment at hard labor for 30
) years at United States Dis-
) ciplinary Barracks nearest
) port of debarkation in the
) United States.

HOLDING by the BOARD OF REVIEW
O'BRIEN, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the above named soldiers has been examined by the Board of Review which submits this, its holding, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

2. Accused were tried on the following Charges and Specifications:

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

Specification 1: In that Private John M. Gregal and Private Frank E. Hamelburg, Detachment Medical Department (M & DS) 20th General Hospital, acting jointly, and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 12 August 1944, with intent to do him bodily harm commit an assault upon Dr. S.N. Nandy, Medical Doctor, Assam Oil Company, by pointing at the said Dr. S.N. Nandy with a dangerous weapon to wit, a .25 caliber Mauser pistol.

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Specification 2: In that Private John M. Gregal and Private Frank E. Hamelburg, Detachment Medical Department (M & DS) 20th General Hospital, acting jointly, and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 13 August 1944, unlawfully enter the dwelling of Mathias D. Rosario, with intent to commit a criminal offense, viz, assault with intent to do bodily harm, therein.

Specification 3: In that Private John M. Gregal and Private Frank E. Hamelburg, Detachment Medical Department (M & DS) 20th General Hospital, acting jointly, and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 13 August 1944, with intent to do her bodily harm commit an assault upon Belinda Rosario, by willfully and feloniously lifting her up.

Specification 4: In that Private John M. Gregal and Private Frank E. Hamelburg, Detachment Medical Department (M & DS) 20th General Hospital, acting jointly, and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 13 August 1944, with intent to do him bodily harm commit an assault upon Mathias D. Rosario, by pointing at the said Mathias D. Rosario, and Pulling the trigger of a dangerous weapon to wit, a .25 caliber Mauser pistol.

Specification 5: In that Private John M. Gregal and Private Frank E. Hamelburg, Detachment Medical Department (M & DS) 20th General Hospital, acting jointly, and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 13 August 1944, with intent to do him bodily harm commit an assault upon Sergeant Charles L. Joyner, by striking the said Sergeant Charles L. Joyner on the head with a dangerous weapon to wit, a .25 caliber Mauser pistol.

Specification 6: In that Private John M. Gregal and Private Frank E. Hamelburg, Detachment Medical Department (M & DS) 20th General Hospital, acting jointly, and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 13 August 1944, feloniously take, steal, and carry away Rupees 38/-, value of about \$11.50, the property of Sergeant Earl R. Driskill.

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Specification 7: In that Private John M. Gregal and Private Frank E. Hamelburg, Detachment Medical Department (M & DS) 20th General Hospital, acting jointly, and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 13 August 1944, unlawfully enter the dwelling of Mg Nyien Mg, with intent to commit a criminal offense, viz, rape, therein.

Specification 8: In that Private John M. Gregal and Private Frank E. Hamelburg, Detachment Medical Department (M & DS) 20th General Hospital, acting jointly, and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 13 August 1944, with intent to do him bodily harm commit an assault upon Mg Nyien Mg, by pointing at the said Mg Nyien Mg, a dangerous weapon to wit, a .25 caliber Mauser pistol.

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

Specification: In that Private John M. Gregal and Private Frank E. Hamelburg, Detachment Medical Department (M & DS) 20th General Hospital, acting jointly, and in pursuance of a common intent, did, at Digboi, Assam, India, on or about 13 August 1944, forcibly and feloniously, against her will have carnal knowledge of Ma Chit Tin, Burmese woman (known in English as Sophia).

3. The accused each pleaded not guilty to and were found guilty of all charges and specifications. There was introduced, as to Gregal, evidence of one previous conviction by special court-martial for violations of the 61st, 94th and 96th Articles of War and one by summary court-martial for violation of the 61st Article of War, and, as to Hamelburg, one by summary court-martial for violation of the 61st Article of War. Each accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentences, reduced the periods of confinement to thirty years, designated the United States Disciplinary Barracks nearest the port of debarkation in the United States as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

EVIDENCE FOR THE PROSECUTION

4. Mr. John A. Borah saw Privates Gregal and Hamelburg, the accused herein, at the Digboi railway station early in the evening of 12 August 1944. He had known Private Gregal about one year.

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Both accused had been drinking, and had two bottles of whiskey with them (R. 10). They invited Mr. Borah to have a drink. Mr. Borah told accused that he had invited a Dr. Nandy to dine with him that evening. Gregal said he knew Dr. Nandy and wanted to see him, so Borah invited both accused to accompany him to his quarters (R. 8, 9, 10). Dr. Nandy was there when they arrived (R. 13). They drank the two bottles of liquor, ate and then the accused and Dr. Nandy left (R. 11). Dr. Nandy walked a short distance with the accused, said "goodbye" to them, went to his home and prepared to go to bed (R. 14). About fifteen or twenty minutes later, the accused came to Dr. Nandy's home and were admitted by him. He gave them seats and they talked. The accused wanted liquor and Dr. Nandy told them that he had none. Hamelburg went to the bathroom and after he returned Dr. Nandy went there to see if he had left a window or door open. When he came back Gregal had a pistol in his hand. Dr. Nandy asked if it was loaded and, when told that it was, he said, "What do you mean by taking a pistol in a friend's home?" Hamelburg took the pistol from Gregal, pointed it at Dr. Nandy and said, "You have got to get us a bottle, I need more drink". Dr. Nandy said, "Well, gentlemen, I told you I have no drink", and Hamelburg said, "You go bring me a bottle of drink or I'll shoot you". Dr. Nandy then ran to the bathroom, closed the door, and ran outside, saying, "If you, gentlemen, don't leave at once I'll call the police". Shortly thereafter they left his house (R. 14, 16, 17).

Mathias D. Rosario had a party at his bungalow in Digboi on the evening of 12 August 1944. Sergeants Joyner and Driskill, both of the 698th Military Police Company, had been invited as guests. At about 1800 hours the accused came to Rosario's bungalow. Rosario had known Gregal over a year. Rosario told the accused he was having a party and that they would have to leave. They left in ten or fifteen minutes (R. 18, 19). After the party, Rosario, his wife and child went to bed in the drawing room and the two sergeants occupied a bedroom (R. 24). Two British officers, who had sought sleeping accommodations for the night, were in the dining room (R. 24, 25). At about 2400 or 0030 hours, Mrs. Rosario felt "someone raising her up by the legs" (R. 24) or "picking up her legs" (R. 25). He did not shake her (R. 25). A lamp was burning on the table (R. 20). She woke up her husband and ran to the room occupied by the British officers (R. 25). Rosario saw Hamelburg standing in the room and grappled with him (R. 19). He also saw Gregal put a pistol through the bars of the window and point it at him (R. 19, 21). After waking the

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British officers, Mrs. Rosario returned to the dining room, saw Hamelburg in the room and Gregal pointing the pistol at her husband through the window, and heard the pistol clicking. She was afraid and ran into the bathroom (R. 24, 25). Hamelburg tried to run away but fell on the steps (R. 21) and Rosario fell on top of him (R. 19). Gregal then hit Rosario on the head with the pistol (R. 19). Sergeant Joyner heard Rosario calling for help and tried to go to where he was but someone hit him over the head. He was unable to recognize anyone (R. 29). Sergeant Driskill was awakened by someone crying out, "Get this man off of me, he is killing me". He saw an unidentified person come out from behind the door and strike Joyner, who had run out of the door first, on the head. Driskill stepped back, tried to find something with which to protect himself, and by that time the intruders had gone (R. 30). Sergeant Joyner was treated by a medical officer on 13 August for head wounds that were described as characteristic of those inflicted by direct blows from a blunt-edged instrument (R. 27).

Driskill identified Exhibit P-3 as a wallet belonging to him and bearing his name (R. 30). He stated that he knew he had it in his pants pocket when he went to bed on the night in question but "didn't check it" (R. 32). The wallet then contained thirty-eight rupees, which, he believed, were made up of three 10 rupee notes, one 5 rupee note, and the rest in one rupee notes (R. 30, 31). He missed the wallet when he put on his pants after the disturbance (R. 31, 32).

Ma Chit Tin, otherwise known as Sophia, is a Burmese woman, the wife of Mg Nyien Mg, hereinafter referred to as Mg (R. 39). She went to school in Rangoon, speaks English, was married to Mg in 1941, and is a child nurse (R. 49). She was introduced to Gregal in May by one Mohamood in the latter's quarters adjoining her own (R. 51), and saw him on only one other occasion when she returned to her quarters from work and found him lying drunk on her bed (R. 43). Her husband was present at both times. She never saw Hamelburg before 13 August (R. 52). During the early morning hours of that date, she heard someone knocking at Mohamood quarters, then at her front door. She and her husband did not reply. The front and back doors were locked and there were bars on the windows (R. 47). She next saw Hamelburg at the back window. He pointed a pistol through the window and said, "You see this; you see this gun; you open the door" (R. 40). Mg opened the front door (R. 54). Hamelburg entered first, carrying a gun, and was followed by Gregal, who had a handkerchief tied on his face. Hamelburg took Mg into an adjoining room, gave the pistol to Gregal and told him to guard Mg. Hamelburg then told Sophia to pick up her child, who was sleeping, and give it to her husband

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in the next room. When she did this, Hamelburg pulled her into the bedroom where, she stated, he made her take off her clothes. He thought she was too slow in doing so and twisted her hands and legs and made her lie on the bed. He had a stick about a yard long and a table knife. He said, "Don't you shout or speak to your husband". He then started to have intercourse with her. While having intercourse, he had the knife on one side and the stick on the other (R. 41). She testified as follows: "He said, 'you see this?' 'If you say anything I am going--' knife like that". (R. 45, 46), and, "I was frightened, I don't know what to do, I was afraid they would kill my husband and child. My eyes were all the time on my child and my husband. When they go to my husband I am all the time watching them" (R. 44). When Hamelburg finished his first act of intercourse, he said, "You will have your intercourse with Johnnie too, if you say anything I'll shoot" (R. 50). He also threatened to shoot her, her husband and baby if she spoke to her husband (R. 41). She begged him not to do so but to do what he liked to her, and she explained that her husband did not speak English or Hindustani and asked him to speak to him through her (R. 41). Hamelburg went into the next room and she followed him to the door. He started to change his clothing in front of Mg and told Gregal, "You go in and have your time with her" (R. 41). Gregal said, "Come on, you go in and have intercourse with me". He pulled her to the bed (R. 46) and had intercourse with her (R. 41). He had the stick and knife but did not hit or threaten her (R. 50). After resting, he performed another act of intercourse, then went to the adjoining room. Hamelburg said, "All right, I am going to have another one. You take this gun and keep this gun right on him". Gregal then guarded Mg, and Hamelburg had intercourse with Sophia (R. 41). When he finished he wiped his penis in her hair (R. 42). He said, "Now we are going away, you better not report this to M.P., nor your boss. If you do report this we are coming back in a week's time and we'll shoot the three of you" (R. 42). They went into the next room and Hamelburg wanted a drink of water. He held the cup with his shirt tail. Sophia asked why and he replied that he might leave fingerprints. She said, "That's all right, I won't do anything" (R. 42). When the prosecutrix was asked on cross examination why she did not put up any struggle, she replied, "I made my mind up I wasn't going to get myself hurt, if I struggle or say anything I get the pain and at the same time he would do it" (R. 51). She denied that she had ever had intercourse with any American soldier before, that the accused offered her any money, that she had cooked food in her rooms for

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American soldiers or gotten girls for them (R. 45), Mg testified one of the accused pointed a pistol at him while the other was in the next room with Sophia (R. 54). When asked why he didn't help his wife, he stated, "Because I was afraid that I would be shot at with the pistol, and at the same time I didn't mind if I did, but I was worried about my wife and child, that's why I didn't get up and help" (R. 56).

Dr. N. Chaliha, a woman doctor who has practiced in India since 1939 and is a graduate of Calcutta Medical College, examined Sophia on 13 August 1944. She found the latter's private parts were tender and had abrasions which, in her opinion, were caused by forcible intercourse (R. 37, 38, 107).

Sergeant Raymond Holden, 698th Military Police Company, and two other military police, answered a call to Digboi on 13 August. He found the accused sleeping on the porch of the railroad station. When awakened, they said they had been stuck in Digboi for the night. When asked if they knew anything about a woman being raped, they said no but that they were around a cottage and had intercourse with a woman. The military police and the accused then went to Sophia's cottage (R. 59). She was in the yard and immediately pointed to the accused and said, "That's the two men that had intercourse with me" (R. 60). The sergeant got the accused out of sight and, after talking with Sophia, asked Gregal what he had done with the gun. Gregal produced the gun and holster from under his shirt and gave them to the sergeant, who later delivered them to Lieutenant Fox. Holden stated that accused's statements to him were voluntary, that he did not force them to make any statements (R. 62).

Lieutenant Floyd W. Cox, Assistant Provost Marshal, conducted an investigation at Digboi on 13 August (R. 66). He saw Exhibit P-3, the wallet identified by Sergeant Driskill as his own, lying in the rear of Ma Chit Tin's quarters. He also identified a pistol, cartridge belt, cartridges and holster as having been delivered to him at Digboi, on 13 August, by Sergeant Holden. The pistol, a .25 caliber Mauser automatic, was received in evidence as Exhibit P-8 (R. 66). Private Edwin Garl identified a pistol, which was not marked for identification or otherwise described but presumably was Exhibit P-8, as one belonging to him and loaned to Private Gregal, together with some cartridges, on 10 August 1944, and not subsequently returned (R. 7, 8).

Sergeant Stephen R. Turk, 240th Military Police Company, was on duty on the morning of 13 August at the stockade where

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Gregal was confined. He let Gregal out of one of the solitary confinement cells and put him to work, then returned to the cell to check it. He found three folded 10 rupee notes, one 5 rupee note, and three 1 rupee notes on the floor of the cell (R. 33). He placed the notes in an envelope in the safe (R. 34). The envelope and contents were received in evidence as Exhibit P-4 (R. 34). He testified that prisoners were ordinarily searched when brought into the stockade but, in some cases, when they were drunk and came in at a late hour, they were placed in a cell and searched the next morning. He was not on duty when the accused were confined and has no knowledge whether they were searched (R. 35).

5. The prosecution offered in evidence two statements signed by Hamelburg (Exs. P-7 and P-12) and two signed by Gregal (Exs. P-10 and P-11). The defense objected to the admissibility of Exhibits P-10 (R. 68) and P-11 (R. 71) on the ground that they were made under duress but announced that it had no similar objection to Exhibits P-7 and P-12, which were received in evidence. After examination of several witnesses called by the prosecution and the court, and after Gregal had testified with respect to his statements, the objection to Exhibit P-10 was overruled (R.105) and that to Exhibit P-11 sustained (R. 115).

The evidence pertaining to the admissibility of the mentioned statements may be summarized as follows:

The accused were admitted to the stockade at about 1130 hours, 13 August (R. 112). First Lieutenant Archibald Howell, C.M.P., Assistant Provost Marshal, who was investigating the case, told the sergeant in charge to keep them separated so they could not talk (R. 101). They were placed in solitary confinement (R. 86, 110) in brick cells approximately five feet high, five feet long and two feet wide (R. 75, 92). The cells are referred to by various prosecution witnesses as "sweatboxes" or "boxes" (R. 64, 68, 94, 103). There were no beds in the cells (R. 93). Gregal was released from his cell at about 1300 hours in order to go to work under guard. Hamelburg remained in his cell (R. 113). During the afternoon Gregal had trouble with the guard. Sergeant Turk heard him swearing and told him that "you better go to work and take it or we'll just pick on you and make it miserable for you" (R. 96). Gregal kept saying, "Don't bother me; don't bother me" (R. 97). Lieutenant Dennis, the prison officer, had a conversation with Gregal while the latter was working. Gregal said that he had a hangover and would

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not be able to work, and Dennis told him to get some aspirins or go into solitary confinement. He finished out the day working and was returned to the cell at 1700 hours (R. 99). Hamelburg had been in a cell while Gregal was working but was released from it at 1700 hours and placed in the stockade proper (R. 113). Gregal's confinement in the solitary confinement cell was recommended by Staff Sergeant Merle James, who was on duty in the stockade, and was authorized by the assistant prison officer, Lieutenant Mackin (R. 112, 113). When asked if this was done in order to keep the accused separated, Sergeant James replied, "Yes, and also disciplinary action because of back talk to a sentry and myself" (R. 111). The prison officer testified that he had no records to show how long Gregal was in the sweatbox or what diet he was given during that time (R. 90), and he denied that Gregal was confined as a punishment measure (R. 87). Sergeant James testified that Gregal was not given any food during the day of 13 August. He did not know whether Gregal was fed that night. He was given bread and water the next morning (R. 114). He was kept in the "sweatbox" for three or four days until the investigation was completed (R. 111). During that period he was given a "punishment diet" consisting of eighteen ounces of bread and two canteens of water daily (R. 97, 111).

Lieutenant Howell questioned Gregal on 13 August, prior to the time the accused were placed in confinement, at a place designated as Traffic Control Station No. 1 (R. 104). Referring to Exhibit P-10, Howell testified that "All I did was give him a preliminary examination to see if I had the right man, then I questioned him a little further and typed the statement up and explained his rights under the 24th Article of War, and he signed it" (R. 104). Howell transcribed the statement in longhand on 13 August, had it typed, and Gregal signed it on 15 August (R. 104, 105). Howell made no threats to Gregal on the morning of the 13th and Gregal did not object to signing the statement on the 15th (R. 105).

First Lieutenant Floyd W. Cox, C.M.P., Assistant Provost Marshal, administered the oath to Gregal when he signed Exhibit P-10. He stated that he interviewed Gregal in his office, that Exhibit P-10 is the result of the interview, that the statement was prepared in his office, that Gregal signed the statement within one hour after the conclusion of the interview, that Lieutenant Howell and Gregal were in his office while the statement was being prepared, and that he had been told Gregal had been in the sweatbox. He further testified that Gregal was warned of his rights under the 24th Article of War, that he read

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the statement before signing it, and that he was not threatened or promised any reward or remuneration. He expressly denied threatening to put Gregal back in the sweatbox if he did not sign (R. 68, 70).

According to the testimony of Lieutenants Howell and Cox, the statement signed by Gregal, dated 16 August 1944, and marked Exhibit P-11 for identification but not received in evidence, was recorded in pencil by Lieutenant Howell in the prison office at about 1100 hours and signed by Gregal at about 1500 hours (R. 72, 103). Gregal was warned of his rights under the 24th Article of War (R. 71) and was told that if he didn't want to, he didn't have to sign (R. 102). He was not threatened or promised any reward or remuneration (R. 71). Gregal was in the sweatbox from the time Howell recorded the statement until it was signed (R. 103).

The following is an excerpt from the testimony of Lieutenant Howell (R. 103):

- "Q: Before you started questioning Private Gregal about anything concerning this matter did you warn him of his rights?
A: I questioned him at the Traffic Control Station Number 1 to find out if he was involved in this case. At that time I didn't warn him of his rights under the 24th Article of War, I just wanted to find out if he knew anything about it.
Q: But all the testimony that is compiled in the statements marked 10 and 11 for identification purposes, before that was given, was he warned of his rights?
A: He was."

Lieutenant Cox administered the oath to Hamelburg before he signed Exhibit P-12, dated 15 August 1944. Lieutenant Howell was present (R. 100). Hamelburg read the statement before he signed it, was warned of his rights under the 24th Article of War, and was not threatened or offered any reward or remuneration (R. 74).

The only evidence as to the circumstances under which Exhibit P-7 was made appears in the testimony of Technical Sergeant William P. Foley, Investigation Section, 158th Military

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Police Company (R. 62-64). The statement was sworn and subscribed to before Lieutenant Dennis, Prison Officer, on 21 August 1944. Foley went to the stockade and spoke to Lieutenant Dennis who sent for Hamelburg. Foley did not know whether Hamelburg was in the sweatbox (R. 64). Hamelburg was warned of his rights under the 24th Article of War and signed the statement voluntarily (R. 63).

Private Gregal, after being warned of his rights (R. 76), elected to testify under oath as to the statements in question. He stated that Exhibit P-10 was taken by Lieutenant Howell at about 0900 hours, 13 August, approximately forty-five minutes after they were picked up at Digboi. It was signed after he was confined. Hamelburg was in another tent with Lieutenant Cox. He and Hamelburg had orders not to talk to each other after they were picked up. He was placed in a solitary confinement cell in the stockade. He could not stand up in it. Lieutenant Cox asked the sergeant of the stockade if there was any way the accused could be kept apart. He had an argument with the guard and Sergeant James the first morning when Sergeant Turk took him out to work. He told James he wanted to eat before going to work, but didn't say he wouldn't work. He worked that afternoon about fifteen feet from the sweatbox and was returned to it about 1600 hours. He was not returned to it because he would not work. Sergeant James told him it was an order from the Provost Marshal's office. This was the only day he worked. He was given one canteen of water and a half loaf of bread at 0700 hours and a canteen of water at 1900 hours. He was released from solitary confinement on Thursday (17 August). Lieutenants Cox and Howell told him on the 13th that he would go back in the sweatbox until he gave a statement. Gregal stated, "I couldn't remember saying such a thing or doing such a thing and then they would tell me I did, that people already said that we did, and they told me that Private Hamelburg had already made his statement saying that I did this and I did that" (R. 83). He signed Exhibit P-10 because he wasn't to be let out until he signed the papers. He did not sign it voluntarily. Exhibit P-11 was taken in pencil. They kept coming to the cell three or four times on the first day and on the second and third days they took him to the prison office. The statement was not made as a whole but was secured over a period of three days. Lieutenant Howell asked some questions and Lieutenant Cox asked some. He was in the office when he signed the statement but was in the sweatbox when the pages were initialed. He initialed it to indicate that it was all right to cross certain things out. He was questioned for an hour or less on the afternoon of the

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day he was admitted and on the second and third days. He was returned to the sweatbox after each questioning. He read each statement before he signed it. He was in solitary for two days after signing the last statement (R. 76-86).

Exhibit P-10 bears Gregal's signature and that of Sergeant Foley as witness and was sworn to on 15 August 1944 before Lieutenant and Cox. It reads as follows:

"Having been read AW 24 and his rights thereunder duly explained to him, Pvt. JOHN M. GREGAL, 20547553, 20th General Hospital, deposes as follows:

My name is Pvt. JOHN M. GREGAL, 20547553, 20th General Hospital. Myself and Frank Hamelbuig left Ledo at approximately 1700 hours with plans to visit Digboi. We had two bottles of beer. I also had a .25 Caliber Mauser Pistol and holster. Upon arriving in Digboi we purchased one quart of Country Gin at Railroad Station, then went over to a tea stall and bought some soda. About 2100 hours we left the tea stall, thence, we proceeded to Bungalow #83. Upon arriving we were feeling pretty good. We knocked on the door of a native woman whom I knew; her husband opened the door. I asked for Mahamood, they stated he did not live there anymore. Frank made for intercourse with Sophia and I was in adjoining room with her husband. I had my pistol in the holster, her husband acted scared so I pulled the pistol and waved my hand back and forth and told him that I was not going to harm him. Then Frank called me and told me to go into the other room which I did. Frank asked for my pistol and I gave it to him. I walked into the room where Sophia was and she was laying on the bed with a slip on. She greeted me with 'Hello' then I sat on the corner of the bed. She said, 'If you are going to fuck, let's fuck.' Then I proceeded with my intercourse. After finishing I put on my pants and shirt and she said, 'Come back Monday at seven o'clock, my husband is working.' Then Frank and myself left the scene and walked to the Railroad Station. We went to sleep. Then an M.P. Sergeant woke us and asked us our names, and we told him. We got in a truck under orders of the M.P. Sgt., and a British civilian drove us to Bungalow 83. We sat beside the building until we were taken to Ledo.

QUESTION: Have you had intercourse with this woman before?

ANSWER : Yes, I have four or five times.

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QUESTION: Who witnessed the intercourse before?

ANSWER : Frank Hamelbuig and some other fellow from the 14th Evac.

QUESTION: Did you ever pay this woman?

ANSWER : No, I paid this fellow, Mahamood, 30 Rupees.

QUESTION: Were you ever at her quarters for dinner. If so, who was present?

ANSWER : About two months ago, Theodore Carlson, 20th General Hosp.: Charles Moran, 151st Med. Bn.: a fellow nicknamed, Lamb; Sophia; her husband; Mahamood; a Khasi woman, Mahamood's wife; and myself. Lamb had intercourse with the Khasi, so did Moran; at Burmese house which is in the same building. Moran said he would pay off for me as I did'nt have any money.

Further the deponent sayeth not:"

Exhibit P-12 was sworn to by Hamelburg before Lieutenant Cox on 15 August 1944 and bears the signatures of Sergeant Foley and Lieutenant Howell as witnesses. It reads as follows:

"Having been read AW 24 and his rights thereunder duly explained to him, Pvt. FRANK E. HAMELBURG, 12036587, 20th General Hospital, deposes as follows:

My name is Pvt. FRANK E. HAMELBURG, 12036587, 20th General Hospital. At about 1600 hours, 13 August 1944, Pvt. Gregal and myself left the 20th General Hospital area on pass. We went to Digboi to see 'Mike Rosario'. We stayed at his home and had a few drinks and something to eat. Then Mike said he was expecting company. I got a quart of whiskey from him, then Gregal and myself left. We went to the railroad station and drank our liquor. By this time we were feeling pretty good so we started wandering around. We then bought two (2) more bottles of liquor from a native near the railway station. We started drinking again. We went to sleep in the railway station and did wake up about 0100 hours. We then finished the remainder of one (1) bottle, by that time we were feeling very good again. We then went back to 'Mike's' house. I went in the house and picked up somebody. I did not know it was his

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wife. At that time someone grabbed me and we started to fight, everybody in the house woke up and joined the fight. I remember somebody laying on top of Johnnie, then I started to punch and kick until Johnnie was free. We then left Mike's house. I do not remember if we went direct to the quarters of Ma Chit Tin. I do remember walking there. When we got to the house Johnnie knocked on the door and called her by her first name. She said, 'What do you want, Johnnie, it is late.' We kept knocking on the door and finally she opened it. We went inside, her husband and baby were in the next room. I started talking to her about an intercourse. She did not want it because her husband was there. I told her I would 'give her 'Buccachi's'. She said, 'No.' Johnnie went into the other room to keep her husband busy so he would not come out. I told her that her husband was talking to Johnnie and it would only take a minute, and I'd give her plenty of Buccachi's. When I finished intercourse she whispered, 'Buccachi'. Then I told her when Johnnie gets finished. Johnnie came out and I went into the other room. I started playing with the baby and talking to her husband about how nice the baby looks, and that Johnnie was an old friend of his wife; they were just talking. I kept looking in the next room to see when He was finished. When Johnnie was finished I said, 'Let's get to hell out of here,' and she started yelling for the money. I told her to fuck herself. We then left and went out. We went to Digboi station and went to sleep. Someone woke us up when we were laying on the table. We got up and went over to a bench and layed around on the bench until the M.P.'s picked us up. Johnnie had a gun which he carried in a shoulder holster. I seen the gun but it was not taken out of the holster during the night. When I went on pass I had about Rupees 20/0/0. I do not know how much money Gregal had in his possession. The liquor cost about Rupees 8/0/0 per quart. I took the bill fold out of the pants pocket of someone pants at Mike's house. I do not remember what I did with the papers. I took them out and threw them away. I had no reason for taking the bill fold, it was just some crazy notion.

Further the deponent sayeth not:"

Exhibit P-7 was sworn to by Hamelburg before Lieutenant Dennis on 21 August 1944 and bears the signature of Sergeant Foley as a witness. It reads as follows:

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Having been duly warned that anything I say may and/or will be used against me in the event of Courts-Martial, and knowing that I may elect to remain silent, I, Frank E. Hamelburg, Pvt., 12036587, 20th General Hospital, hereby make the following supplemental statement to Tech. Sgt. William P. Foley, Investigation Section.

QUESTION: What did you do with the wallet you stole from Mike Rosario's house?

ANSWER : I put it in my back pocket and when the Lt. was questioning the woman I threw it behind the house.

Q. What did you do with the money?

A. I don't remember what I did with the money. I might have spent it or threw it away.

Q. How much money was in the wallet?

A. I don't know how much money there was.

In making the above supplemental statement I have not been placed in any fear, nor have I been subjected to duress of any kind. I have made the above supplemental statement entirely of my own volition without being promised or offered anything. I have read this entire document in the presence of Tech. Sgt. William P. Foley, Investigation Section.

Further deponent sayeth not".

EVIDENCE FOR THE DEFENSE

6. Privates First Class Theodore Carlson (R. 116), Howard Stockett (R. 135), John S. Cyran (R. 137), Charles O. Moran (R. 143), Technician Fifth Grade Clair J. Franks (R. 131), Corporal Virgil Lamb (R. 141) and Private Ralph Vanderground (R. 124) each testified that they visited Sophia's quarters on various occasions for the purpose of obtaining food, liquor and sexual intercourse. Carlson stated that two women came while he was there, that Sophia took part in a discussion as to how much they should be paid, that he paid Rs 25 for having intercourse with one of the women, that Gregal had intercourse with another woman, and that he did not have intercourse with Sophia or know of anyone else doing so (R. 117-124). Vanderground stated that he asked Sophia to get a Khasi woman for him and that one Lomo went after her, that he had intercourse with the Khasi woman but

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not with Sophia, that Sophia's husband was usually present and tried to contact the Khasi woman for him, that Sophia told him of being the paid mistress of an American tourist at Rangoon when she was eighteen years old (R. 124-131). Franks testified that he has known Sophia about one year, that he had intercourse with her and other women at her quarters, that he paid her Rs 10 (R. 131-135). Stockett stated that a Burmese man who lived next door usually went after the women, that he usually paid the women for having intercourse with them but that he saw Sophia take the money from the women, that he didn't have intercourse with Sophia (R. 135-136). Cyran stated that he visited Sophia's quarters twenty-five or thirty-five times, that Sophia or her husband obtained women for him, that he had intercourse with them in quarters next door to Sophia's but in the same building, that he paid Sophia or the women, that Sophia took the money from the women, that he did not have intercourse with Sophia (R. 137-140). Lamb testified that Sophia sent her husband and another man to get girls with whom he had intercourse (R. 141-143). Moran stated that Sophia sent a man after girls, that he had intercourse with Sophia twice and paid her Rs 20, that he did not have intercourse with other girls (R. 144-146).

The accused, having been advised in open court of their rights, elected to remain silent (R. 147).

7. In Exhibit P-10 Gregal stated, in substance, that he and Hamelburg went to Sophia's cottage at Digboi and had intercourse with her. He further stated that he had had intercourse with her previously and he indicated that she was a prostitute. So far as the statement discloses, Sophia entered into the act freely and voluntarily. The facts stated, if true, would establish or tend to establish the innocence of the accused of the crime of rape. The statement is, therefore, exculpatory in nature and, in the opinion of the Board, constituted an admission against interest and not a confession (See Sec. 581, Wharton's Criminal Evidence, 11th Ed.; CM 141755, Sec. 395(10), Dig. Op. JAG 1912-40). As an admission, it was admissible in evidence without any showing that it was voluntarily made, except that the court, in the exercise of its discretion, might exclude it if it should be shown that it was procured by means of such character that the accused may have been caused to make a false statement (Par. 114b, MCM, 1928). In this connection, it appeared from the uncontradicted testimony that Exhibit P-10 was based on an oral statement made by Gregal prior to his confinement and in response to questioning by Lieutenant Howell. Although Gregal was not then advised of his rights under the 24th Article of War, there is no showing that any coercive means or

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other wrongful inducements were employed. It is true that he signed the statement after he was confined in the sweatbox. However, he was warned of his rights before signing and, in any event, the imputation of coercion which may attach to the signing does not necessarily reflect on the truthfulness of the statement itself. Apropos of the latter, it is significant that the accused had previously made to Sergeant Holden an apparently spontaneous statement in effect admitting what is stated in Exhibit P-10. The court carefully inquired into all the circumstances under which Exhibit P-10 was obtained and had the benefit of observing Gregal on the witness stand. In view of all the facts, and with due regard for the judgment of the court, the Board of Review can not properly say that the court abused its discretion in receiving the mentioned exhibit in evidence.

Gregal's statement of 16 August 1944, which was marked Exhibit P-11 for purposes of identification but was not received in evidence, is a complete confession as to several of the offenses alleged. It clearly appears that it was made while Gregal was being confined in the sweatbox under conditions strongly militating against its voluntary nature, and the defense objection to its admission was properly sustained.

Exhibit P-12, dated 15 August 1944, and Exhibit P-7, dated 21 August 1944, contain confessions of guilt as to several of the offenses alleged and admissions as to others. Except for the evidence to the effect that Hamelburg was warned of his rights before signing, there is little information of record as to the circumstances involved in the making of these statements, and it is doubtful that the court would have been justified in receiving either of them in evidence solely on the basis of the foundation laid. However, it should be noted that when Exhibit P-7 was offered in evidence and an objection as to its identification had been properly overruled, the defense counsel expressly stated that there was no other objection to its admission (R. 63). Similarly, when Exhibit P-12 was offered, accused's counsel stated, "No objection on this statement" (R. 74). Paragraph 126c of the Manual provides, in pertinent part, that,

"* * * if it clearly appears that the defense or prosecution understood its right to object, any clear indication on its part that it did not desire to assert that right may be regarded as a waiver of such objection".

It is believed that this rule is applicable as to Exhibits P-7 and P-12, that is, that the statements by the defense that it had no objections clearly indicate a desire not to assert its right to object and may be regarded as a waiver thereof. The defense manifestly understood its right to object,

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for it asserted objections to Exhibits P-10 and P-11 on the ground that they had been obtained through coercion. Exhibits P-7 and P-12 are competent on their face and there is no clear showing or convincing inference that they were improperly obtained. To the contrary, Hamelburg's acknowledgment in the mentioned statements to the effect that he had read Article of War 24 and that his rights thereunder had been explained is evidence, although not conclusive, that the confessions were voluntary (Par. 114a, MCM, 1928). In view of the evidence pointing toward the voluntary nature of Exhibits P-7 and P-12, and the lack of evidence to the contrary, the Board does not believe that the announcements by the defense that it had no objections to the admission in evidence of the mentioned exhibits may properly be considered inadvisable or that the court abused its discretion in treating such announcements as waivers.

In receiving Exhibits P-7, P-10 and P-12 in evidence, the court was properly instructed that the confession or admission of one accused is inadmissible against the other (Par. 114c, MCM, 1928).

8. There is evidence that the accused had been drinking and it may be inferred that they were drunk. However, there is no evidence, nor was it urged as a defense, that the accused were so drunk as to be unable to entertain a specific intent as to those offenses alleged of which specific intent is a necessary element. To the contrary, the evidence as a whole indicates that they were able to entertain such intent.

9. a. Specification 1, Charge I (assault on Dr. S. N. Nandy with intent to do bodily harm with a dangerous weapon, to-wit, a pistol): The uncontradicted evidence shows that the accused went to Dr. Nandy's home in search of liquor. While there, Gregal produced a pistol and told Dr. Nandy, in response to the latter's question, that it was loaded. Hamelburg took the pistol from Gregal, pointed it at Dr. Nandy and said, "You have got to get us a bottle, I need more drink", and "You go bring me a bottle of drink or I'll shoot you". Dr. Nandy then fled, threatening to call the police.

Although it appears that only Hamelburg pointed the pistol at and expressly threatened Dr. Nandy, Gregal's possession of the pistol and his act of drawing it under the circumstances described is evidence of his entry into the unlawful design (CM 240646, CM ETO 1052; sec. 451(2), 3 Bull. JAG 188). The evidence as to the use of the pistol, accompanied as it was by a threat to shoot, clearly justified the court in inferring an

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intent to do bodily harm (Sec. 451(10), Dig. Op. JAG, 1912-40). The Board of Review is therefore of the opinion that this specification is supported by the evidence.

b. Specification 2, Charge I (unlawfully enter dwelling of Mathias D. Rosario with intent to commit a criminal offense, viz, assault with intent to do bodily harm): The evidence pertinent to this specification shows that the accused Hamelburg unlawfully entered Mr. Rosario's dwelling on the night alleged. While in the house, he took a billfold from Sergeant Driskill's pocket. His presence became known when Mrs. Rosario felt someone, apparently Hamelburg, lifting up her legs. Hamelburg stated in his confession that he picked up someone but did not know who it was. Mrs. Rosario awakened her husband, who grappled with Hamelburg. Gregal, in the meantime, was standing outside a window, pointing through it a pistol which he "snapped" at Rosario. Hamelburg fell when he tried to flee and Rosario fell over him, whereupon Gregal hit Rosario on the head with the pistol. Sergeant Joyner was struck on the head by one of the accused when he tried to go to Rosario's assistance.

One of the elements of the offense of housebreaking is unlawful entry of another's building. Hamelburg's entry is clearly established, and it is believed that Gregal's action in putting the pistol through the bars of the window in itself constituted an entry.

"An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient; and an insertion into the house of an instrument except merely to facilitate further entrance is a sufficient entry" (Par. 149d, MCM, 1928).

Both entries were committed under circumstances evidencing their unlawful nature.

It is well established that the offense of housebreaking is not committed by an unlawful entry without a then existing intent to commit an offense (CM 202846; sec. 451(33), Dig. Op. JAG, 1912-40), and when an entry is charged with intent to commit a specific criminal offense the intent to commit that offense or a lesser included one must be proved to sustain a conviction (CM 163107; sec. 451(34), Dig. Op. JAG, 1912-40).

It is considered that there is ample evidence to support a finding that the unlawful entries were effected with the intent alleged, that is, to commit an assault with intent to commit

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bodily injury. The fact that such assaults were committed on Rosario and Joyner (see subparagraph 9d, infra) is evidence that the entries were made with that intent (12 C.J.S. pp. 720, 732) (Outlines of Criminal Law, Kenny, p. 177). On the same basis, it may be inferred that larceny was intended (see subparagraph 149e, infra) but the evidence that the accused were armed indicates that their intent at the time of the entries was not solely larcenous in nature and that violence was contemplated: in fact, Gregal's entry, which was manifestly in furtherance of the joint design, was concomitant with the assault on Rosario and in itself constituted the offense of house-breaking regardless of the intent that existed at the time of Hamelburg's entry. In this general connection it has been held, with respect to burglary, that,

** * * if a felony is actually committed, this fact is prima facie pregnant evidence of an intent to commit it; and a man who commits one sort of felony in attempting to commit another, cannot excuse himself on the ground that he did not intend the commission of that particular felony" (Russell on Crimes and Misdemeanors, Vol. II, 8th Ed., p. 1053, citing 1 Hale, 560. 2 East, P.C. 509, 514, 515. Kel. (J) 47).

Applying this rule to housebreaking and in view of the evidence as to the commission of the mentioned assaults, it follows that the accused cannot excuse themselves on the ground that their intent in entering the Rosario dwelling was to commit larceny. The Board therefore concludes that the court was justified in finding the accused guilty of housebreaking as alleged.

c. Specification 3, Charge I (assault with intent to do bodily harm to Belinda Rosario, by willfully and feloniously lifting her up): The evidence as to this specification shows that Mrs. Rosario was sleeping with her husband when she felt "someone raising her up by the legs". Hamelburg, in his confession, admitted picking up someone but denied knowing who it was. Mrs. Rosario awakened her husband, who grappled with Hamelburg while she fled to another room.

An assault with intent to do bodily harm is defined in paragraph 149n of the Manual for Courts-Martial as:

** * * an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. * * *

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The specification in this case does not allege nor does the evidence establish any acts by the accused which would warrant the legal inference that bodily harm was intended (CM 238970, Jennings; 25 B.R.1) (CM 229366, Long; 17 B.R. 125). It is clear, however, that Hamelburg committed an assault and battery on Mrs. Rosario. Gregal's presence at the scene and his participation in the enterprise was such as to justify a finding that he was guilty of the same offense (Sec. 1674, Wharton's Criminal Law, 12th Ed.). The Board of Review, therefore, considers that the evidence is legally insufficient to support a finding that the accused committed a felonious assault, in violation of the 93rd Article of War, but legally sufficient to support a finding of assault and battery in violation of the 96th Article of War.

d. Specification 4, Charge I (assault on Mathias D. Rosario with intent to do bodily harm by pointing and pulling the trigger of a dangerous weapon, to wit, a pistol); Specification 5, Charge I (assault on Sergeant Charles L. Joyner with intent to do bodily harm by striking him on the head with a dangerous weapon, to wit, a pistol): The undisputed evidence as to Specification 4 shows that Gregal pointed a pistol directly at Rosario and pulled the trigger when the latter discovered Hamelburg in the house and had engaged him in a struggle. The evidence as to Specification 5 shows that one of the accused struck and injured Sergeant Joyner on the head with an instrument. The instrument was not identified by any of the witnesses but, in view of Gregal's use of a pistol in striking Rosario, the court could reasonably infer that the same instrument was used on Joyner. In any event, as the allegation was that the pistol was used as a club and not a firearm, and as the evidence shows that a club of some nature was actually used, the failure to prove the exact nature of the instrument did not prejudice the substantial rights of the accused (cf. CM 144295; sec. 451(11), Dig. Op. JAG, 1912-40). As to each specification, the evidence shows that a dangerous weapon was used under circumstances warranting an inference that bodily harm was intended (Sec. 451(10), Dig. Op. JAG, 1912-40). The court was justified in its findings of guilty.

e. Specification 6, Charge I (larceny of Rs 38, the property of Sergeant Earl R. Driskill): As to this specification there is evidence, aliunde Hamelburg's confession, that Sergeant Driskill had in his possession on the night in question a wallet bearing his name and containing three 10 rupee notes, one 5 rupee note and three 1 rupee notes. The wallet was in his pants pocket when he went to bed. He missed the wallet after the disturbance

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caused by Hamelburg's unlawful entry. Several hours later, and after accused had been apprehended, the wallet was found by military police at the rear of Ma Chit Tin's quarters. The accused had gone there after their appearance at the Rosario house and it appears that they sought entry through the rear door. The accused were taken to the stockade and placed in solitary confinement cells at about 1130 hours. Gregal was released from his cell at about 1300 hours in order to go to work and the noncommissioned officer who had released him returned to the cell to inspect it. He found on the floor of the cell folded rupee notes in the same amount and denominations as those missed by Sergeant Driskill.

Hamelburg's statements (Exs. P-7 and P-12) include a confession of his guilt of the alleged larceny. However, such confession was not admissible against Gregal and the conviction as to the latter must be supported, if at all, by other evidence (cf. CM 202225, sec. 395(4) Dig. Op. JAG, 1912-40). Such support, it is believed, is found in the undisputed evidence that each accused participated in the trespass into the Rosario home, that they resisted and fled when their presence was discovered, that shortly thereafter Sergeant Driskill's wallet and money was found to be missing, that the wallet was found a few hours later at a place where both accused had been, and that money in the same amount and denominations as that missing was found in Gregal's cell after his confinement. Convictions on substantially less circumstantial evidence than that related have been upheld on appellate review (Peo. v. Wilkinson, 14 N.Y.S. 827) (Jameson v. State, 25 Neb. 185, 41 N.W. 138). The Board is of the opinion that the evidence, aliunde Hamelburg's confession, is legally sufficient to support the findings of guilty as to each accused.

f. Specification 7, Charge I (unlawfully entering a dwelling of Mg Nyien Mg with intent to commit a criminal offense, viz, rape); Specification 8, Charge I (assault on Mg Nyien Mg with intent to do bodily harm by pointing at him a dangerous weapon, to wit, a pistol); Specification, Charge II (rape of Ma Chit Tin): The evidence of the prosecution as to these specifications shows that during the early hours of 13 August 1944 the accused went to Sophia's quarters. They knocked at the doors and received no reply. Hamelburg then pointed a pistol through the back window and demanded that the door be opened. After the accused had thus gained admission, Hamelburg gave the pistol to Gregal and told Sophia to give her sleeping child to Mg who held it while Gregal kept him covered with the pistol. Hamelburg then took

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Sophia into an adjoining room and had intercourse with her. There is evidence that he twisted her hands and legs, that he had a stick and a knife within reach during the act, that he threatened to injure her with the knife if she said anything to her husband, and that she feared he would kill her husband and child. When he finished, he told her he would shoot her unless she had intercourse with Gregal. Gregal then had intercourse with her twice while Hamelburg guarded Mg with the pistol. Gregal had the stick and knife but did not threaten her. On concluding, Gregal again guarded Mg while Hamelburg had another act of intercourse with Sophia. On leaving, Hamelburg threatened to return in a week and shoot Sophia, Mg and the child if Sophia reported to the military police or her employer, and he took precautions not to leave fingerprints on a cup from which he drank. Later in the day the accused were found sleeping at the railway station at Digboi. They admitted having had intercourse with a woman and later admitted in their statements (Exs. P-10 and P-12) that they had intercourse with Sophia on the night in question but indicated that no force was used.

The evidence as to Specification 7, Charge I, clearly shows that the accused unlawfully gained entry into the dwelling of Mg Nyien Mg by threatening the occupants with a pistol. The existence at the time of the entry of an intent to commit an offense may be inferred as a fact from proof that the offense was actually committed or attempted after the entry (12 C.J.S. p.732). As hereinafter indicated, the Board is of the opinion that the evidence shows that rape was actually committed in Mg's quarters. It follows that it may be inferred that the accused entertained an intent to commit rape at the time of their entry and that the court was justified in finding them guilty of Specification 7, Charge I.

The evidence as to Specification 8, Charge I, shows that each of the accused pointed the pistol at Mg while the other was having intercourse with Sophia. Where, as in this case, an assault with a dangerous weapon is accompanied by a demand or condition which the assailant has no legal right to make or impose, an intent to do bodily harm may be inferred (CM 170158, sec. 451(10), Dig. Op. JAG, 1912-40). There is clearly substantial evidence to support this specification.

The prosecution's evidence as to the Specification, Charge II, discloses that Sophia disrobed and had sexual intercourse with each accused without offering any substantial physical resistance. However, there is evidence that Hamelburg threatened her and her husband and child with bodily harm unless she submitted to him and Gregal, that each accused had within reach a stick and a knife while engaging in coition, and that her husband was held at

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all times at the point of a pistol. Indicative of her state of mind at the time is her testimony that, "I was frightened, I don't know what to do, I was afraid they would kill my husband and child. My eyes were all the time on my child and my husband. When they go to my husband I am all the time watching them", and, "I made my mind up I wasn't going to get myself hurt, if I struggle or say anything I get the pain and at the same time he would do it".

The evidence for the defense as to the Specification, Charge II, was to the effect that Sophia was a woman of bad character, had entertained and acted as a procuress of women for American soldiers, and had herself engaged in prostitution with Gregal and other soldiers. That a woman is unchaste or a common prostitute is no defense to a prosecution for rape, although such evidence is admissible as tending to prove that the woman consented (44 Am. Jur., pp. 923, 928). It is not the function of the Board to consider what weight should be attached to the evidence of Sophia's previous unchastity as bearing on the question of consent. That question is one peculiarly within the province of the court and it is sufficient, so far as the Board is concerned, that there is substantial evidence that the act was done by force and without consent (Sec. 402, Dig. Op. BOJAG, CBI).

The evidence of rape in this case is strikingly similar to that reported in NATO 3940, Maxey et al (Dig. Op., BOJAG, NATO, Suppl. June - Nov. 1944, p. 12) as follows:

"Two accused were found guilty of rape in violation of Article of War 92. There was substantial evidence that while one accused held the victim's husband, at the point of a rifle, the other accused, with his rifle, forced the victim from her house to a point about 50 yards away, at which place he 'pushed her shoulder' to indicate she should lie on the ground. He thereupon had sexual intercourse with her. Upon completion of the act the woman, crying and shaking, rushed to her husband, screaming 'I've been raped'. As to whether or not she resisted, the victim testified, in part, that 'At the time, I thought if I ran away or yelled, he was going to kill me. I wanted to live for my baby and husband' and 'I was scared, I didn't know what I was doing' and 'I was shaking with fright. When he pushed my shoulder, I laid down. I was so scared, I didn't want to resist'. That the act of sexual intercourse was accomplished with force and without the woman's consent was inferable from the circumstances. The phase of her testimony that she did not want to resist was explicable by her fear-engrossed state

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of mind induced by the accused's violent conduct. It is rape, though a female may yield through fear."

The Board is of the opinion that there is substantial evidence to justify the court in its conclusion that the prosecutrix did not consent, that accused had carnal knowledge of her by force, and that any lack of or cessation of resistance was attributable to her fear of great bodily injury or death. Such being the case, the evidence is legally sufficient to support the findings of guilty of rape.

10. The following quotation is applicable to this case:

"Insofar as accused were actual perpetrators of independent rapes, their joinder was improper pleading. In view of the common venture and concerted action, however, each was guilty as a principal of each rape and, upon this principle, their joinder was appropriate. The substantial rights of accused were not injuriously affected by the joinder" (NATO 1121, Bray et al; Dig. Op. BOJAG, NATO, 31 May 44, p. 27)(Also see sec. 450; 3 Bull. JAG, pp. 61, 62).

11. The following appears at page three of the record of trial:

"1st Lt. Dha Htin was sworn as Burmese interpreter as follows:

"Prosecution: I now hand you a piece of paper on which are written these curses, 'May I be a cripple for the rest of my life. May I be struck by lightning immediately. May I be killed in action.' And ask that you be sworn.

"1st Lt. Dha Htin: I'll tell the truth and nothing but the truth, and if I don't tell the truth may all the curses written on this paper fall on me."

Article of War 19 reads in part as follows:

"Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.'

"In case of affirmation the closing sentence of adjuration will be omitted".

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The following quotations are deemed pertinent:

"The prescribed oaths must be administered in and for each case and to each member, trial judge advocate, assistant trial judge advocate, reporter, and interpreter before he functions in the case as such. * * * In addition to the prescribed oath there may be such additional ceremony or acts as will make the oath binding on the conscience of the person taking it. * * *" (par. 95, MCM, 1928).

"Persons who have peculiar forms which they recognize as obligatory and believers in other than the Christian religion may be sworn in their own manner, or according to the peculiar ceremonies of the religion which they profess and which they declare to be binding. Whenever the attention of the person to be sworn is called to the fact that his statement is not a mere asseveration, but must be sworn to, and, in recognition of this, he is asked to do some corporal act, and does it, this is considered to be a statement under oath. Persons whose conscience will not permit them to swear at all are usually allowed to declare or affirm.

"Statutes prescribing the form of an oath are not intended to prescribe an inflexible iron formula, admitting of no deviation in words, but intended rather to direct and point out the essential matters to be embraced in an oath, and while it is the duty of the officers to follow the forms prescribed by law, and they should always do so, mere formalities are not, in cases of this kind, essential to the validity of the act, and if there is a substantial compliance with the statute the oath is obligatory and binding" (39 Am. Jur., p. 498).

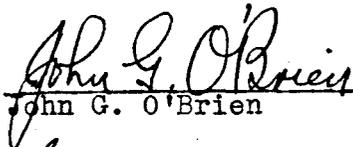
Although the oath administered to Lieutenant Htin did not expressly obligate him to interpret truly, he undoubtedly was aware of the functions of an interpreter, understood that he was being sworn as such, and intended to be obligated accordingly. Under such circumstances, and in view of the principles stated in the last quotation, it is believed that there are substantial reasons for regarding the oath valid. In any event, as Lieutenant Htin functioned as interpreter only in connection with the testimony of Mg Nyien Mg, and as there is ample evidence to support the findings even though the latter's testimony is disregarded in toto, it is clear that any seeming error committed in the administration of the oath did not prejudice the substantial rights of the accused (cf. sec. 376(3), Dig. Op. JAG, 1912-40).

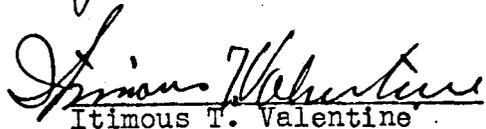
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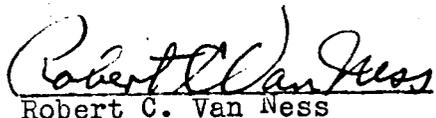
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12. The charge sheet shows that Gregal is 23-0/12 years of age and enlisted at Bedford, Ohio, on 15 December 1939; and that Hamelburg is 22-4/12 years of age and enlisted at New York City, on 13 December 1941. Neither accused had prior service.

13. The court was legally constituted and had jurisdiction of the person and subject matter. Except as otherwise indicated, no errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of Specification 3, Charge I, as involves findings of guilty of assault and battery as alleged, in violation of the 96th Article of War, and legally sufficient to support the remaining specifications of Charge I and Charge I and the Specification, Charge II, and Charge II, and the sentence.

 , Judge Advocate
John G. O'Brien

 , Judge Advocate
Itimous T. Valentine

 , Judge Advocate
Robert C. Van Ness



New Delhi, India
2 February 1945

Board of Review
CM IBT #390

U N I T E D S T A T E S	)	S E R V I C E S O F S U P P L Y
v)	
Thurman G. Baird, O-1320812, First Lieutenant, Infantry, 5307th Composite Unit (Provisional).	)	Trial by GCM convened at APO 689, s/o Postmaster New York, N.Y. on 22 November 1944. Dismissal, total forfeitures, confinement at hard labor for 5 years.

HOLDING by the BOARD OF REVIEW
O'BRIEN, VALENTINE, and VAN NESS, Judge Advocates.

1. The record of trial in the case of the officer above named has been examined by the Board of Review which submits this, its holding, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India-Burma Theater. _____

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

CHARGE: Violation of the 75th Article of War.

Specification 1: In that 1st Lt. Thurman G. Baird, 5307th Composite Unit (Provisional), did at Myitkyina, Burma on or about 28 July 1944 misbehave himself before the enemy in that, having received a lawful order from 1st Lt. David B. Lovejoy, 5307th Composite Unit (Provisional), to "take over C Company phone from Technical Sergeant Raymond Sexton", or words to that effect, the said 1st Lt. David B. Lovejoy being in the execution of his office, failed to obey the same at a time when his unit was then engaged with the enemy.

Specification 2: (Finding of not guilty).

3. Accused pleaded not guilty to the Charge and the Specifications. He was found not guilty of Specification 2 of the Charge but guilty of Specification 1 and guilty of the Charge. He was sentenced to be dismissed the service, to forfeit all pay and allowances due and to become due to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, United States Forces,

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India Burma Theater pursuant to the provisions of Article of War 48. The confirming authority confirmed the sentence but withheld the order of execution pursuant to Article of War 50¹/₂ and forwarded the Record of trial to the Branch Office of the Judge Advocate General, United States Forces, India Burma Theater. No place of confinement has been designated.

4. On 12 July 1944 at Kunming, China, accused, along with forty-nine other officers of "Z" Force, was selected by Colonel W.J. Tack for combat duty in Burma (R. 6-7, 10). These officers were given a physical examination before reporting for duty in Burma. Accused was found in physical condition to engage in combat duty (R. 7). He was then transferred for combat duty (R. 7) to Burma where he was detailed as commander and observer of a mortar platoon (R. 16, 18, 32) with D Company, First Battalion, 5307th Composite Unit (Provisional) (R. 15-16) or such other duties as his company commander might designate (R. 12). He never took part in any action with his platoon (R. 19). On 28 July 1944, accused was a mortar platoon commander of company D, 5307th Composite Unit (R. 16), which organization was in combat duty in Burma and in contact with the enemy (R. 10, 16) at a distance of about fifty yards from the enemy (R. 12, 18). Company D was in support of Company C during the offensive then in progress. Lieutenant David B. Lovejoy was the commanding officer of Company D (R. 16) and, as such, ordered accused to report to him at the telephone station which was at the command post of Company C. When accused reported to his company commander, he was ordered by him to take over from Sergeant Raymond Sexton the operation of the telephone (R. 16, 21) so that Sergeant Sexton could direct an ammunition detail to the gun positions and himself take over a machine gun section (R. 17). This order he failed to obey (R. 16, 17). About two hours later, Lieutenant Lovejoy took over the telephone himself so that Sergeant Sexton could take over the machine gun section (R. 17-18). Mortar fire orders and corrections were at the time being relayed back to the advanced platoon by means of this telephone (R. 16, 18). The telephone was near enough to the mortars for an officer standing at the telephone position to give orders directly to the batteries (R. 20). Lieutenant Lovejoy further informed accused that an ammunition detail had been ordered and should be checked up on by him if it did not arrive immediately (R. 21). After Lieutenant Lovejoy had delivered these orders to accused, the latter failed to execute them, but returned to the command post of Company D which was located about eight hundred yards to the rear. Accused gave as the reason for his conduct and behavior with respect to the orders of his superior officer the fact that he lacked some of the necessary qualities of a combat officer (R. 11, 14, 18, 23). Accused did not relieve Sergeant Sexton from his telephone duties as directed and thereby prevented him from taking the ammunition up to the positions (R. 33) and taking over the machine guns according to the battle plan of the company commander (R. 16-17, 28, 32, 33, 34).

EVIDENCE FOR THE DEFENSE

5. Accused, after being warned of his rights under the 24th Article of War, elected to testify as a witness in his own defense.

He was, on 28 July 1944, a mortar platoon leader in Company D, First Battalion, 5307th Composite Unit and, as such, had the responsibility of the operation of the mortars of this platoon. On the afternoon of 28 July 1944, accused received a message directing him to report to Lieutenant Lovejoy at C Company command post (R. 32). Accused admitted that he was told by Lieutenant Lovejoy that an ammunition detail was coming up and that he was expected to see about it. He admitted also that Lieutenant Lovejoy told him, "when the detail gets here you can relieve the sergeant, on the phone and have him take the ammunition up to the positions". About this time Lieutenant Kadgihn came up and engaged in conversation with accused. He said that his outfit had just moved up seventy-five yards and that he thought one of his aid men had been killed. Lieutenant Kadgihn asked accused about the ammunition and was told that it had not arrived but was expected. While these two officers were talking, several men came up from the rear but upon inquiry it was discovered that these were not the ammunition detail, although they had some information about this detail. Accused then asked Lieutenant Kadgihn, "are you going to take care of the ammunition detail?" At this time accused picked up his rifle and, while in the process of leaving, he could hear Lieutenant Kadgihn in conversation over the telephone inquiring about the ammunition. Accused left during the telephone conversation (R. 33). Accused then decided that since Lieutenant Kadgihn, for whose company the ammunition had been ordered, was using the telephone, there was no need for him to stay longer (R. 33-34). On the way from the telephone station to accused's mortar platoon, he met the ammunition detail coming up but did not go back with it. Accused understood that his primary responsibility was with his mortar platoon and that his services were not required after Lieutenant Kadgihn had taken over at C Company command post (R. 34). Accused said of the conversation between him and Lieutenant Lovejoy, "He told me to take over the telephone when the ammunition detail got there and relieve Sergeant Sexton so that he could take the ammunition detail on up to the positions" (R. 34). When asked if he relieved Sergeant Sexton, he said, "I did not relieve him", and added that he did not stay at the command post until the ammunition train arrived. Lieutenant Kadgihn was in command of Company C while accused was a platoon commander of Company D, of which Lieutenant Lovejoy was the commanding officer (R. 35). Accused admitted that Lieutenant Lovejoy never relieved him from the order in connection with the ammunition detail and relieving Sergeant Sexton on the telephone (R. 35). Accused understood that under the orders of Lieutenant Lovejoy, he was to relieve Sergeant Sexton from the telephone so that the latter could carry the ammunition to the gun positions because Sergeant Sexton knew where they were. He did not relieve the Sergeant as directed, nor was he at the telephone station when the ammunition arrived.

6. The evidence is clear and cogent that accused was told by his company commander to relieve Sergeant Sexton from his telephone duties so that the latter could proceed with the ammunition detail to the gun positions, the locations of which he knew and take over the operation of the machine guns. No particular language is required to convey an order within the meaning of Articles of War, provided the language employed clearly carries a mandate to do or

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not to do the act referred to. Whether Lieutenant Lovejoy said to accused, "Relieve the sergeant on the phone" or "Take over the phone from Sergeant Sexton" is of little importance, since either phrase is sufficiently clear to support the language of the Specification that accused had been told "to 'take over C Company phone from Technical Sergeant Raymond Sexton', or words to that effect ***". The test is whether the language used amounted to an order or merely a suggestion or direction. It is significant to note that accused in his testimony said, "you can relieve the sergeant" but on cross examination made this more specific when he said that Lieutenant Lovejoy "told me to take over the telephone ***". (R. 34). It also appears from the testimony of Lieutenant Lovejoy and Sergeant Sexton that the order of Lieutenant Lovejoy was not equivocal or in the nature of a suggestion, but was a clear mandate and delivered as an order. The court, which had the opportunity of hearing and observing all the witnesses, reached the conclusion that it was an order rather than a suggestion or direction. It is immaterial whether the duty placed upon accused by the order of Lieutenant Lovejoy was conditioned upon the arrival of the ammunition train or not. He left and did not relieve Sergeant Sexton before the ammunition train had time to reach that position. His own testimony discloses that he met the ammunition train on his way back to the position of his mortar platoon some eight hundred yards behind the front lines. His intention not to carry out this order of his company commander is supported further by the fact that when he met the ammunition train and knew where it was going, he did not then go back to relieve the sergeant so that he could pilot the ammunition train to the gun positions and take over a machine gun. His contention that he thought his mortar platoon was his primary responsibility is far from convincing. It appears as an afterthought and an alibi. He must have thoroughly understood that the order of Lieutenant Lovejoy, who was his commanding officer, served to relieve him of any responsibility as platoon leader and detail him to duty at the telephone in place of Sergeant Sexton. His contention that he was relieved by Lieutenant Kadgihn, who was commanding officer of Company C, is untenable. He must have known that some other company commander had no right to relieve him of duty to which his own company officer had assigned him by a direct order, even though the two companies were working in close co-ordination.

The Specification of which accused was found guilty indicts him for misbehaving himself before the enemy, in that he failed to obey an order at a time his unit was engaged with the enemy. The pertinent part of Article of War 75 is as follows:

"Any officer or soldier who, before the enemy, misbehaves himself, *** or by any misconduct, disobedience, or neglect endangers the safety of any *** or by any misconduct, disobedience, or neglect endangers the safety of any *** . command which it is his duty to defend. *** shall suffer death or such other punishment as a court-martial may direct" (under-scoring supplied).

The misbehavior contemplated by Article of War 75 is not confined to acts of cowardice, but includes misconduct which departs from the historical standard of behavior expected of our arms before the enemy. When a military unit is engaged with the enemy a failure to obey an order to render certain service or to do a certain act is a deviation from the usual standard of behaviour of an officer, and such conduct is properly chargeable under Article of War 75. Under the Specification as drawn in this case it is not necessary to allege "endangering the safety of the command". A refusal to perform a particular service or duty when before the enemy constitutes misbehavior before the enemy (Winthrop's Military Law and Precedents, Reprint 1920, page 623). An accepted meaning of "refuse" is to decline to do a thing (Webster's New International Dictionary, Second Edition, Unabridged, page 2595). "Decline" had been defined as the act of failing to accept, or to "deviate or stray" (Ib.). It thus appears that a failure to accept a duty or deviating or straying from a duty imposed by the lawful order of a superior officer constitutes a refusal to do such duty. If from the language and nature of the order an obligation to perform a duty or service is clearly established, then the allegation of a failure to obey the order necessarily also charges the failure or refusal to perform the specific duty or service. The Specification in this case alleges that the accused was ordered to take over the company phone from Sergeant Sexton. As such, the Specification sufficiently charges that a duty was imposed upon the accused and his failure to obey the order constituted a failure and a refusal to perform that duty which constituted misbehavior before the enemy within the historical meaning of Article of War 75. In this connection it is noted that Colonel Winthrop states (page 623) that an officer or soldier who "culpably fails to do his whole duty before the enemy will be equally chargeable with the offense (of misbehavior before the enemy) as if he had deliberately proved recreant".

7. In view of all the evidence, it is considered that the court was justified in finding accused guilty of Specification I, Charge I, and Charge I:

8. The court was legally constituted and had jurisdiction of the subject matter of the offense and of the person of the accused. No errors injuriously affecting the substantial rights of accused were committed during the trial. The sentence was within the authorized limits. Therefore, 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.

/s/ John G. O'Brien Judge Advocate

/s/ ITIMOUS T. VALENTINE Judge Advocate

/s/ ROBERT C. VAN NESS Judge Advocate

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CM IBT #390

(Baird, Thurman G.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885,
New York, N.Y. 5 February 1945.

TO: : The Commanding General, USF, India Burma Theater, APO 885, U.S. Army

1. In the case of First Lieutenant Thurman G. Baird, O-1320812, Infantry, 5307th Composite Unit (Provisional), 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 the sentence, which holding is hereby approved and concurred in. Under the provision 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 IBT # 390).

/s/ William J. Bacon
/t/ WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 4, IBT, 5 Feb 1945)

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
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New Delhi, India
7 February 1945

Board of Review
CM IBT 407

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

) S E R V I C E S O F S U P P L Y

v.

Private James F. McLeod, 34317803,
4276th Quartermaster Service Com-
pany.

) Trial by GCM convened at APO
) 689, % Postmaster, New York,
) N.Y. on 4 December 1944. Dis-
) honorable discharge, total
) forfeitures, confinement at
) hard labor for 3 years and
) 2 months. United States Dis-
) ciplinary Barracks nearest port
) of Debarkation in United States
) designated place of confinement.

OPINION, by the BOARD OF REVIEW
O'BRIEN, 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 which submits this, its opinion, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

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

Specification 1: In that Private James F. McLeod, 4276th Quartermaster Service Company did, at Ledo, Assam, on or about 20 August 1944, behave himself with disrespect toward Captain Clifford A. Falkenau, 4276th Quartermaster Service Company, his superior officer, by saying to him, "I'll kill you, you white mother fucking son of a bitch," or words to that effect.

Specification 2: In that Private James F. McLeod, 4276th Quartermaster Service Company did, at Ledo, Assam, on or about 20 August 1944, behave himself with

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disrespect toward Captain Philip M. Gleason, 20th General Hospital, his superior officer, by saying to him, "I'll kill you, you white mother fucking son of a bitch," or words to that effect.

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

Specification 1: In that Private James F. McLeod, 4276th Quartermaster Service Company, having received a received a lawful command from Captain Clifford A. Falkenau, 4276th Quartermaster Service Company, his superior officer, to produce articles concealed beneath his shirt, did at Ledo, Assam, on or about 20 August 1944, wilfully disobey the same.

Specification 2: In that Private James F. McLeod did, at Ledo, Assam, on or about 20 August 1944 offer violence against Captain Clifford A. Falkenau, 4276th Quartermaster Service Company, his superior officer, who was then in the execution of his office, in that he, the said Private James F. McLeod, did throw a chair at the said Captain Clifford A. Falkenau.

Specification 3: In that Private James F. McLeod did, at Ledo, Assam, on or about 20 August 1944 offer violence against Captain Philip M. Gleason, 20th General Hospital, his superior officer, who was then in the execution of his office, in that he, the said Private James F. McLeod, did kick him, the said Captain Philip M. Gleason, on the leg.

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

Specification 1: In that Private James F. McLeod, 4276th Quartermaster Service Company, did, at Ledo, Assam, on or about 20 August 1944, use the following threatening and insulting language toward Corporal Marcel St. Onge, 20th General Hospital Military Police, a noncommissioned officer who was then in the execution of his office, "I'll kill you, you white mother fucking son of a bitch," or words to that effect.

Specification 2: In that Private James F. McLeod, 4276th Quartermaster Service Company, did, at Ledo, Assam, on or about 20 August 1944, use the following threatening and insulting language toward Corporal Ernest

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L. Jackson, 20th General Hospital Military Police, a noncommissioned officer, who was then in the execution of his office, "I'll kill you, you white mother fucking son of a bitch," or words to that effect.

3. Accused pleaded not guilty to all Charges and Specifications and was found guilty of all of them. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for twenty years. The reviewing authority approved only so much of the finding of guilty of the offense alleged in Specification 1 of Charge II and of Charge II as finds the accused guilty of the lesser included offense of failure to obey the lawful command of a superior officer in violation of Article of War 96, only so much of the finding of guilty of the offense alleged in Specification 2 of Charge II and of Charge II as finds the accused guilty of the lesser included offense of assault and battery in violation of Article of War 96, only so much of the finding of guilty of the offense alleged in Specification 3 of Charge II and of Charge II as finds the accused guilty of the lesser included offense of assault and battery in violation of Article of War 96, and only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for three years and two months, and as thus modified, ordered the sentence to be duly executed, but suspended that portion thereof adjudging dishonorable discharge until the soldier is released from confinement. The record of trial was examined in the Military Justice Division of the Branch Office of the Judge Advocate General, United States Forces, India Burma Theater. They were of the opinion that the record of trial was legally insufficient to support the finding of guilty of Specification 2 of Charge II as modified by the reviewing authority. The record of trial was forwarded to the Board of Review pursuant to Article of War 50 $\frac{1}{2}$.

4. The record of trial is considered legally sufficient to support the Specifications of Charge I and Charge I and Specifications 1 and 3 of Charge II and Charge II. We deem it necessary, therefore, only to discuss that part of the case pertaining to Specification 2 of Charge II and Specifications 1 and 2 of Charge III and Charge III.

5. The Military Justice Division, in their opinion, determined that Specification 2 of Charge II as approved by the reviewing authority was not supported by the

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allegations of the Specification nor by the proof thereof. The evidence pertaining to this Specification reveals that accused, while in the American R & E Office at the 20th General Hospital, picked up a chair and threw it at Captain Falkenau (R. 7, 12, 13). When the chair left accused's hands, Private Zolt jumped and caught it in the air (R. 8, 9). The Military Justice Division stated:

"The offer of violence alleged in the Specification is that accused threw a chair at Captain Falkenau. The alleged violence was assault only. No battery is alleged as a part of the violent act. Battery therefore was not an essential element of the alleged offense. Consequently, assault and battery is not a lesser included offense of the one charged.

"In addition to the fact that the offense that was approved was not included in the offense that was charged, the evidence does not sustain the finding as approved. The chair thrown at Captain Falkenau never hit him. While an assault was committed by the accused in throwing the chair, no battery resulted therefrom since the intended victim was not hit. A battery is an assault in which force is applied, by material agencies, to the person of another. Par. 149 l, MCM, 1928, p. 178."

The following quotations are deemed pertinent:

"The phrase 'offers any violence against him' comprises any form of battery or of mere assault not embraced in the preceding more specific terms 'strikes' and 'draws or lifts up'. But the violence where not executed must be physically attempted or menaced. A mere threatening in words would not be an offering of violence in the sense of the article: (Winthrop.)" (par. 134, MCM, 1928).

"It is deemed the preferable view to regard the phrase, as employed in our Article, as a general and comprehensive one, including violence proposed as well as violence committed--assault as well as battery, as indeed comprising any form of battery or of mere assault not embraced in the preceding more specific terms, 'strike' and 'draw or lift up'. But the violence, where not executed, must be physically attempted or menaced. A mere threatening in words would not be an offering of violence in the sense of the Article" (Winthrop's Mil. Law and Prec., 2nd Ed. 1920, p. 570).

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We do not feel constrained to determine whether assault and battery is a lesser included offense of the Specification under consideration in the absence of a specific allegation of a battery. It is unnecessary to make a determination of this as the proof clearly reveals that there was in fact no battery. The evidence does, however, prove an assault in violation of Article of War 96, which, in our opinion, is a lesser included offense of that alleged in the Specification and of that approved by the reviewing authority. Assault under Article of War 96 is punishable by confinement of not more than three months.

6. Specifications 1 and 2 of Charge III allege a violation of the 65th Article of War in that accused used certain threatening and insulting language toward noncommissioned officers in the execution of their office. After careful scrutiny of the record, we have been unable to find any evidence which upholds the burden placed upon the prosecution to prove that accused knew at the time of the offense that the threatening and insulting language was in fact toward a noncommissioned officer. In CM IBT 353, Stanya, we cited CM 196854, Snyder, and CM 211996, Giddens. The Snyder case held to the effect that to constitute a violation of Article of War 65 the offender must know at the time of the wrongful act that the person mal-treated is a warrant officer or noncommissioned officer as the case may be. The Giddens case stated that if an accused charged with violation of the 63rd, 64th or 65th Article of War does not know the officer or noncommissioned officer is such, there is no violation of any of those articles. We therefore are of the opinion that the two mentioned Specifications can not be sustained as violations of Article of War 65.

A board of review in the office of The Judge Advocate General in CM 211978, Riddle, was confronted with a similar problem based upon a specification alleging the use of threatening language toward a noncommissioned officer in the execution of his office. They indicated that unless it was proved that a noncommissioned officer was in the execution of his office, Article of War 65 was not violated and the offense would at most be a violation of the 90th Article of War. The facts in this case are comparable and we are of the opinion that having failed to prove that accused was aware the noncommissioned officers were in fact such, the proof is sufficient only to support a violation of Article of War 90 for which the maximum authorized confinement in each instance is three months.

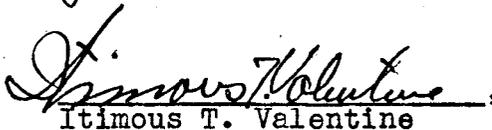
7. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally insufficient to support

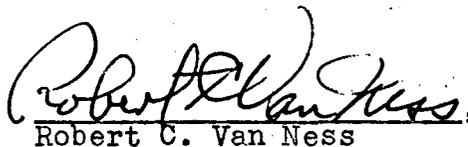
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the finding of guilty of Specification 2, Charge II, as modified by the reviewing authority, but legally sufficient to support a finding of guilty of assault in violation of Article of War 96. The Board of Review is further of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge III as violations of the 65th Article of War but legally sufficient to support findings of guilty as to each Specification under the 90th Article of War, legally sufficient to support the findings of guilty of the Specifications of Charge I and Charge I, and Specifications 1 and 3 of Charge II and Charge II as modified by the reviewing authority, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for 2 years and 9 months.


John G. O'Brien, Judge Advocate


Itimous T. Valentine, Judge Advocate


Robert C. Van Ness, Judge Advocate

CM IBT # 407 (McLeod, James F.) 1st Ind.

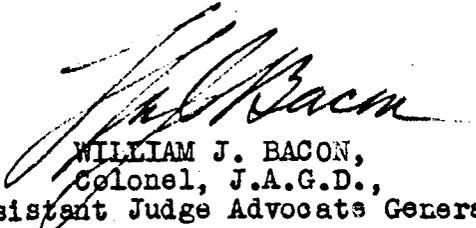
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, India Burma Theater, APO 885, New York, N. Y., 7 February 1945.

TO: The Commanding General, USF, India Burma Theater, APO 885, U. S. Army.

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 Private James F. McLeod, 3437803, 4276th Quartermaster Service Company, together with the foregoing opinion of the Board of Review constituted in the Branch Office of The Judge Advocate General with the United States Forces in India Burma.

2. I concur in the said opinion of the Board of Review that the record is legally insufficient to support the finding of guilty of Specification 2, Charge II, as modified by the reviewing authority, but legally sufficient to support a finding of guilty of assault in violation of Article of War 96, legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge III as violations of the 65th Article of War but legally sufficient to support findings of guilty as to each Specification under the 90th Article of War, legally sufficient to support the findings of guilty of the Specifications of Charge I and Charge I, and Specifications 1 and 3 of Charge II and Charge II as modified by the Reviewing Authority, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for 2 years and 9 months. It is my recommendation that, under the 5th paragraph of Article of War 50½, the sentence be reduced to 2 years and 9 months and the execution of the dishonorable discharge be suspended.

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


WILLIAM J. BACON,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

(Findings and sentence disapproved in part in accordance with recommendation of Assistant Judge Advocate General. Dishonorable discharge suspended.
CCMO 7, IBT, 8 Feb 1945)

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New Delhi, India
23 February 1945

Board of Review
CM IBT 419

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

NORTHERN COMBAT AREA COMMAND

v.

Private First Class Frank D.
Pratt, 38433739, Headquarters
Co., First Battalion, 475th
Infantry.

) Trial by GCM convened at APO 218,
) % Postmaster, New York, N.Y. on
) 11 December 1944. Dishonorable
) discharge, total forfeitures, con-
) finement at hard labor for 7 years.
) United States Correctional Insti-
) tution nearest the port of debarka-
) tion designated as place of con-
) finement.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Frank D. Pratt, Headquarters Company, First Battalion, 475th Infantry, did, in the vicinity of Myitkyina, Burma, on or about 16 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Captain Eugene P. Fields, Dental Corps, a human being, by shooting him with a rifle.

3. Accused pleaded not guilty to the Charge and Specification. The court found the accused guilty of the Specification except the

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words "with malice aforethought", "deliberately", "and with premeditation", and of the Charge, not guilty, but guilty of a violation of Article of War 93. 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 at such place as the reviewing authority may direct for 7 years. The reviewing authority approved the sentence and designated the United States Correctional Institution nearest the port of debarkation in the United States as the place of confinement. The order directing execution of the sentence was withheld and the record of trial forwarded for action under Article of War 50½.

EVIDENCE FOR THE PROSECUTION

4. At about 2030 hours, 16 November 1944 (R. 7), the deceased, together with First Lieutenant J. H. Ward, Captain Hawthorne Hughes (R. 10-11) and First Lieutenant J. S. Schweppe (R. 14), all of the 124th Cavalry (R. 7, 11) left Camp Landis in a jeep (R.7) for Myitkyina. As they went along the Sumprabum road at about 2100 or 2115 hours (R. 17), they passed five armed American soldiers who were standing by the roadside (R. 14). The jeep was going about 20 (R. 46) or 25 miles per hour (R. 7, 11, 16, 42). The road along where the jeep passed was slightly curved (R. 7, 13, 16) to the left (R. 12), was somewhat rough (R. 7, 16) and dusty (R. 17, 42, 49, 51). The jeep had no top up (R. 12). As it passed, its lights (R. 11, 36, 40, 51) fell on the soldiers so that they could be seen by the occupants of the jeep (R. 12). Some soldier among the group had an M-1 (R. 12) held in the position of port arms (R. 12-13). Some other weapons were observed being carried at slung positions (R. 7, 12-13). As the jeep passed, one of the soldiers attempted to thumb a ride (R. 7, 11, 13-14, 40, 42, 50), but the jeep failed to stop (R. 13-14). Nothing was said to the soldiers by any of the occupants of the jeep (R. 11, 34, 40, 42, 48). When the jeep had passed the soldiers a distance of about 50 (R. 12), 75 (R. 13), 100 (R. 40), 200 (R. 8, 40, 46), or 300 yards (R. 34, 40), a shot was heard (R. 50) which appeared to have been fired (R. 7) from an M-1 rifle (R. 11) behind the jeep (R. 18) by some one of the group of soldiers (R. 32), and something hit the jeep (R. 17, 43, 51). Captain Fields, who was riding in the back seat of the jeep (R.7), said he was shot (R. 7), or exclaimed, "Oh my God, I'm shot in the back" (R. 11). The jeep was then stopped as quickly as possible and first aid administered to the wounded man (R. 7, 11, 14). Lieutenant Ward then started to drive the jeep to the 44th Field Hospital, but Captain Fields lapsed into unconsciousness (R. 14) and within about five minutes died (R. 7, 14). He was examined by Major H. A. McConnell, MC, at the 44th Field Hospital (R. 15). This examination disclosed that Captain Fields had

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died from wounds in the right lumbar region, one of which wounds was a ragged circular wound two and a half or three centimeters in diameter, another one-half a centimeter in diameter, and the other about one inch in diameter. All were located about a hand's breadth above the hip bone behind and near the back and extended downward to the midline of the body. These wounds passed forward and went through the muscles of the back and tore up and injured the vertebrae (R. 18). Captain Fields died as a result of these wounds (R. 18-19). It was stipulated that three pieces of metal had been extracted from the body of the deceased and they were received in evidence as Prosecution's Exhibit 1 (R. 19). Three pieces of metal (presumably Exhibit 1) were subsequently described as a copper jacket from ball ammunition, lead filler from ball ammunition and a piece of cold-rolled steel such as is found in the back of an army jeep (R. 29).

The four companions of accused testified for the prosecution (R. 31-32, 38, 43, 49). It appears from their testimony that the accused, Peters, Humphrey, Kendricks and Bennett left Myitkyina on the night of 16 November 1944 (R. 33, 38, 44, 50) at about 2030 or 2100 hours. On the road they stopped, took a drink of "Fighter Brand" or "Bullfight" liquor (R. 44), and fired their weapons a few rounds (R. 33, 39, 50). In a short time they saw a jeep approaching along the road at about 20 or 25 miles an hour (R. 42, 46) and decided to thumb a ride (R. 33, 42, 44). The jeep failed to stop, some of the soldiers cursed (R. 44, 49, 51, 63), and Humphrey said, "Stop him" (R. 66). When the jeep had reached a point about 50, 75, 100 (R. 40), 200 (R. 8, 40, 46), 300 (R. 34, 40) or 400 (R. 50) yards, Pratt fired a shot from his M-1 rifle (R. 40, 45, 46, 55, 56, 58, 64). He had his gun in the crook of his left elbow with the butt resting on his right hip (R. 39, 45, 47, 48). Soon after the shot was fired someone said, "You have hit him" (R. 41). The five soldiers immediately ran (R. 57) and took refuge in the bushes (R. 41, 43, 50) or woods nearby (R. 43) where they attempted to make up a story (R. 32-33, 41, 43, 59) because they did not know whether the jeep was hit or not (R. 33). Peters asked who had fired the shot (R. 46) and somebody answered, "Pratt fired" (R. 34). Accused stated that he had fired the shot (R. 45, 51) and added, "I don't see how I could have", or "I guess I did" (R. 45, 49). Accused and his companions then started along the road where they were picked up in a passing weapons carrier (R. 51), the driver of which told them that a captain or somebody (R. 41), had been shot somewhere on that road. After leaving the weapons carrier they walked about a half mile along the road where they were

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picked up by the MP's (R. 41) and taken to the stockade. Accused was carrying the gun when the MP's picked him up (R. 34).

Shortly after his arrest, accused made an oral extra-judicial statement to an agent of the Criminal Investigation Division (R. 25). He accounted for his whereabouts up to the time of his arrest substantially as shown by the testimony but did not admit firing at the jeep (R. 25). Later in the day, and after being warned of his rights under the 24th Article of War, he made a further and fuller statement which was transcribed by the mentioned agent and signed by accused (R. 25-26, 30; Pros. Ex. 4). In this he stated that on 16 November 1944 at about 1400 hours he, in company with Privates Peters, Kendricks, Humphrey and Bennett, caught a ride on a truck which took them by a native village of Mankrin where they got off and traded cigarettes for two quarts and three beer bottles of saki. From there they went back to the 475th Infantry where they, in company with other enlisted men, drank all of the saki except a part of one bottle. After supper, at about 1730 hours, they left their company and walked to the second battalion where they caught a ride on a jeep to the crossroads on the way to the 44th Field Hospital. From there they went to Myitkyina. They finally purchased a quart of saki from one Chinese soldier and, from another, a quart of "Fighter Brand" liquor. Then they walked back to the main road in the direction of the 10th Air Force and on to the "Y", a distance of about a half mile from Myitkyina. From there they started toward the 475th Infantry and at a point about a half mile from Myitkyina they stopped and all took drinks. Accused fell asleep on the side of the road and was awakened by the firing of shots. He found that his M-1 rifle had been fired. Accused was pretty drunk by that time. One of his companions suggested that they stop a passing jeep to get a ride back to Myitkyina. It was further suggested that if the jeep failed to stop, that shots be fired over it. As the jeep passed, someone tried to thumb a ride and when the occupants failed to recognize this, Humphrey said "Somebody open up". When the jeep was several hundred yards down the road accused had a single round of ammunition in his breast pocket. After the shot was fired, he did not have this round of ammunition but he did not remember putting it in the rifle, but said he guessed he did and added "I raised my rifle and fired". Once he said he fired in the air and once he said he fired towards the jeep (R. 26). Accused did not remember aiming at the jeep with his weapon although he thought he heard the bullet hit the jeep and exclaimed, "I hit the jeep or somebody". He heard someone in the jeep yell just after the shot and could hear the jeep come to a stop. He and his companions then ran in the brush a distance

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of about 75 yards on the right side of the road. Somebody in the crowd asked, while they were in the brush, what they could do, and accused answered, "there was nothing we could do, but hope that no one was hit". Accused and his companions then decided to walk up the road toward the 475th Infantry and see what happened. When they had gone about a half mile, they were overtaken by a weapons carrier upon which they rode some distance toward the 44th Field Hospital. During this journey they were told by the driver of the weapons carrier that some one had been shot. They left the weapons carrier and were walking in the direction of the 475th Infantry when the MP's overtook and arrested them. The MP's told them about the shooting but did not ask questions at the time. They were taken to the 274th Military Police Company at Myitkyina. About a month previous to the shooting accused had been issued a United States Army, M-1 rifle, caliber .30, which was the same rifle he had with him at the time of the shooting (R. 25; Pros Ex. 4).

A search was conducted on the following day at the scene of the shooting. Several empty cartridge cases were found at one point and one empty brass casing from an M-1, .30 caliber rifle, was found in the center of the road about twenty-five feet away (R. 25).

EVIDENCE FOR THE DEFENSE

5. Accused, after being warned of his rights under the 24th Article of War, elected to remain silent (R. 69).

A part of accused's service record was, by stipulation, admitted into evidence for the purpose of showing the good character of accused (R. 54). The good character of accused was further testified to by some of his fellow soldiers (R. 55, 58, 60). Upon cross examination of Private Peters during his testimony for accused, he stated that when he asked accused who fired the shot, accused answered that he did (R. 58). Kendrick stated that the only persons in front of and between Kendrick and the jeep when the shot was fired was accused and Humphrey, and the shot came from that direction, and Humphrey did not fire the shot (R. 64). On 16 November 1944 the moon rose at 0636 hours and set at 1752 hours (R. 54).

6. The evidence does not disclose that accused was warned of his rights under Article of War 24 when he made his first statement to the agent of the Criminal Investigation Division. This statement was clearly no more than an admission against

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interest and was admissible without any showing that it was voluntarily made (par. 114b, MCM, 1928). It affirmatively appears that accused was warned of his rights before making the statement in which he acknowledged shooting at the jeep (Ex. 4). There is no indication that any improper inducements were made. It follows that Exhibit 4 was properly received in evidence.

7. The evidence in this case is abundantly sufficient to sustain the court's finding of the lesser included offense of voluntary manslaughter under Article of War 93. It shows that accused and his companions attempted to thumb a ride in a jeep in which Captain Fields was riding. When the jeep failed to stop, someone among accused and his friends became angry. It had been suggested by some of them that in case the jeep did not stop that one or more shots should be fired at or over it. When the jeep had passed by and on up the road a hundred yards or more, accused fired a shot from his M-1 rifle at or in the direction of the jeep with sufficient accuracy to hit the vehicle and mortally wound Captain Fields. This is supported by the position of accused on the road at the time the vehicle passed, the position in which he was holding his rifle, his statements made immediately after the incident, and the fact that he, with his friends, took refuge in the woods or bushes about 75 yards from the scene of the shooting and undertook to make up a story of explanation. They remained in their place of concealment without making their presence known while first aid was administered to the wounded man. Thus we have an excellent example of the age old legal expression:

"The guilty flee when no man pursueth" (16 C.J. 1363 (31A); CM CBI 177, Drayton).

From all the evidence, it appears clearly that accused either aimed his rifle directly at the jeep or fired intentionally in the general direction of it. In either event, he cannot escape responsibility for such conduct. The principle here involved is thus stated:

"If a person without lawful excuse intentionally fires a gun or pistol into a crowd of people, although not with the design of killing anyone, but for his own diversion merely, and kills one of the crowd, he is guilty of murder, since such conduct establishes general malignity and recklessness of human life" (26 Am. Jur. p. 178, par. 34).

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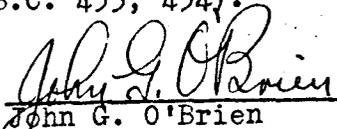
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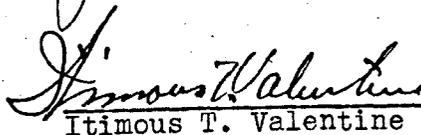
"* * * attempting to shoot over the head of another, knowing that thereby the life of such person was endangered, death resulting, the crime is voluntary manslaughter, although the act was simply a reckless one and without malice" (Wharton's Criminal Law, Vol. 1, p. 660).

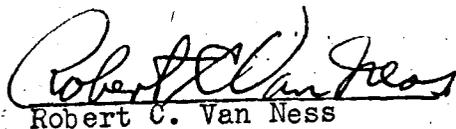
From evidence indicating that a pistol was fired for the purpose of frightening some natives and that the bullet ricocheted and killed a person about 100 yards away, it was held by a Board of Review that the person who fired the shot was guilty of voluntary manslaughter although he himself testified that he fired the shot into the air. The discharge of a deadly weapon under the circumstances and conditions shown was reckless or grossly careless and accused must be held to have intended the consequences of the act. The pistol was discharged in a manner predictably calculated to endanger life (NATO CM 2371, Newman).

8. The charge sheet shows that the accused was 21 years of age at the time charges were preferred and that he was inducted on 10 March 1943 with no prior service.

9. The court was legally constituted and had jurisdiction of the subject matter and of the person of the accused. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. Confinement in a federal correctional institution is authorized by Article of War 42 for the offense of voluntary manslaughter, recognized as an offense of a civil nature and punishable by penitentiary confinement for more than one year by Sections 275, 276 of the Criminal Code of the United States (18 U.S.C. 453, 454).


John G. O'Brien, Judge Advocate


Itimous T. Valentine, Judge Advocate


Robert C. Van Ness, Judge Advocate



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New Delhi, India
24 February 1945

Board of Review
CM IBT 430

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

v.

Private Andrew C. White, Jr.,
33853518, 1332nd Army Air Forces
Base Unit, Air Transport Command.

INDIA CHINA DIVISION, ATC

) Trial by GCM convened at Mohan-
) bari, India on 14 December 1944.
) Dishonorable Discharge, Total
) Forfeitures, Confinement at Hard
) Labor for 20 years. U. S.
) Penitentiary nearest port of de-
) barkation in US. designated as
) place of confinement.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

CHARGE I: Violation of the 86th Article of War.

Specification: In that Private Andrew C. White, Jr., 1332nd Army Air Forces Base Unit, Air Transport Command, being on guard and posted as a sentinel, at Mohanbari, India, on or about 8 November, 1944, was found sleeping upon his post.

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

Specification 1: In that Private Andrew C. White, Jr., 1332nd Army Air Forces Base Unit, Air Transport Command, did, at Mohanbari, India, on or about 18 November, 1944, commit the crime of sodomy by feloniously and against the order of nature having carnal

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connection, per anum, with Joy Ram Ahir, a male person.

Specification 2: In that Private Andrew C. White, Jr., 1332nd Army Air Forces Base Unit, Air Transport Command, did, at Mohanbari, India, on or about 18 November, 1944, with intent to commit a felony, viz, murder, commit an assault upon Joy Ram Ahir, by willfully and feloniously shooting him, the said Joy Ram Ahir, with a .45 caliber pistol.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 40 years. The reviewing authority approved the sentence, reduced the period of confinement to 20 years, designated the United States Penitentiary nearest the port of debarkation as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution:

The accused was posted as a sentinel at about 0001 hours, 8 November 1944, at Post No. 5, Mohanbari, India. His tour of duty was to extend from 0001 hours to 0600 hours (R. 5). Post No. 5 is located at a gasoline dump along the railroad track (R. 7, 13) and is a challenge post (R. 9). At about 0030 or 0045 hours the Sergeant of the Guard and the Officer of the Day inspected Post No. 5 (R. 8, 13). They slowly drove in a jeep to the end of the dump, played the lights of the jeep over the dump, turned around and returned to a tent at the entrance of the dump, where they stopped. They found the accused sitting on a chair inside the tent (R. 8, 13). He was slumped down in the chair, his head was leaning back, his hands were in his pockets, and his eyes were closed (R. 8, 13, 14). They played their flashlights over him, observed him for two or three minutes, and conversed in normal tones of voice. The Officer of the Day said, "Its no use to try to remove his pistol". During this time the accused did not move (R. 8, 13, 14). The Officer of the Day then shook the accused, who immediately came to attention and surrendered his weapon (R. 8, 13, 15). The Officer of the Day posted the Sergeant of the Guard and took the accused to the hospital for medical examination, after which he placed accused in arrest in quarters (R. 13).

On 18 November 1944, the accused was again posted as a sentinel on Post No. 5 (R. 5). His tour of duty began at 1800

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hours (R. 5, 6). At about 1830 hours Ramdas Ahis and Joyram Ahir, two Indian laborers, were walking along the railroad track on their way toward their camp (R. 17, 24). They were stopped by an American colored soldier who took them to a tent about five hundred feet away (R. 17, 21, 24). The soldier undressed Ramdas, examined him, pushed him out of the tent and indicated that he should leave, which he did (R. 17, 24). The soldier then caused Joyram to lean over a table on his stomach with his feet on the floor (R. 24). After endeavoring to spread Joyram's legs apart, the soldier pushed him prone on the ground and inserted his penis in Joyram's anus (R. 25, 27). Joyram "felt pain and began to cry" (R. 25), whereupon the soldier struck him on the shoulder and told him to be still (R. 25). The soldier also threatened Joyram with a gun (R. 27). On completing the act, the soldier pushed Joyram out of the tent and walked behind him, pushing him toward the gasoline dump (R. 25). After they had walked about ninety-six feet, Joyram heard three or four shots fired, was struck by a bullet and fell down unconscious (R. 26). The bullet entered his left buttock and came out on the inside front of his left thigh (R. 26). On regaining consciousness, Joyram walked to his camp (R. 26), where he arrived at about 1900 hours (R. 18). American authorities then took him to a hospital (R. 26).

There was offered in evidence a written confession made by accused on 20 November 1944 (R. 45). The defense objected to its admission on the grounds that the corpus delicti had not been established and that the statement was incomplete (R. 44). In this connection, the evidence shows that Agent Christopher T. Butler, Criminal Investigation Division, saw the accused at the hospital at Mohanbari on 19 November 1944 when the accused was receiving light treatments on his neck. He asked accused how he received the injury and accused told him that an Indian had hit him on 18 November (R. 31). This conversation lasted only a "couple of minutes" (R. 43). On 20 November Butler took the accused from the hospital to the provost marshal's office (R. 31). Agent Robert G. Chadd was present (R. 32). Butler first read to accused the 24th Article of War and told him that he did not have to make any statement if he did not want to do so (R. 32, 39). Accused said he understood fully (R. 33). No promises were made or any duress used (R. 33). Accused was then asked to relate what took place and Butler recorded his statement in longhand (R. 32). Accused would change certain portions of his account as he related it and the final statement sets out only what accused said he wanted in it (R. 40). The long-hand statement was then typed, accused read it and initialed

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corrections of clerical mistakes, and, having been sworn by a summary court officer, signed it in the presence of that officer and Agents Butler and Chadd (R. 37, 43)

Accused's mentioned statement was received in evidence as Prosecution's Exhibit A. It includes a separately signed acknowledgment by accused to the effect that he had been warned of his rights under Article of War 24 and that the statement was voluntary, and continues as follows:

"At about 5:30 PM when on guard walking my post 'till about 6:15 PM at which time I noticed a group about eight or nine men coolies walking past my Post No. 5 at the end of the air strip going towards a native village. At about 6:30 PM two men coolies came from the same direction as the first group came from. I was at my Post No. 5 at 6:30 PM when I noticed two coolies passing through my yard area. When these two coolies came within challenging distance, I halted them and asked them for their passes which would allow them to be in my area. They had no passes, these coolies so I brought them over to the tent near the railroad track by the road. I brought those two coolies in the tent.

"After they were in the tent, I let the old man go. The other coolie removed his garments and lean over the table in the tent. I was unable to have intercourse with him in this position so asked him to lay on the ground as I could not have intercourse with him leaning over the table. The coolie lay on the ground and I got on top of his body and placed my penis in his rectum and started pushing in and out until I had my discharge. I discharged in his rectum and then got up and buttoned my fly. I walk out of the tent with the coolie in front of me. After walking about forty yards from the tent, the coolie fell in a ditch. When he got up from the ditch, I fired my .45 pistol once at the coolie, striking him in the left thigh which knocked him to the ground. I then fired three shots in the air and then went to the highway to call for assistance. I stoped a truck and one of these men went to the Motor Pool to call the O.D. About ten minutes later the Corporal of the Guard came to my post and I told him I had trouble with a coolie on my post. This coolie I shot and left him lying where he fell. When we got to the spot where I left the coolie, he was gone. The

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Corporal of the Guard, William K. Williams, myself and a soldier I do not know started a search for the coolie, but was unable to find him. Sgt. Raymond, Sergeant of the guard came up to Corporal Williams and told the Corporal to relieve me of my post and go to the hospital as I had a sore neck. I went to the hospital base sick bay about 8:30 PM 18 November 1944 and was released from sick bay at 8:00 AM 20 November 1944.

Q. How long have you been guarding Post No. 5?
A. About three weeks.

Q. Have you received guard orders before going on post?
A. Yes.

Q. Then you are familiar with the duties of an Interior Guard?
A. Yes.

Q. What are your instructions to fire your pistol?
A. Three shots for trouble; five shots for fire.

Q. Has any other soldier told you about having intercourse in the rectum with a male coolie?
A. Yes.

Q. When?
A. About 22nd August 1944.

Q. Did they like it?
A. Yes

Q. Did you like it?
A. Yes.

Q. When you talked to the coolie, did you think it was a good time to try the rectum intercourse?
A. Yes.

Q. Did you think the tent was about the closest place to do it, as it was the nearest to your post?
A. Yes.

Q. Is there anything further you would like to say?
A. No."

4. Evidence for the defense:

Private Terrance V. Haggerty, the only witness for the defense, testified that he was on duty as a checker at the gasoline

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dump on 8 November 1944. He was lying on a cot in the tent at about 2330 hours when Harris came in and the witness spoke to him. The witness got up about twenty or thirty minutes later to check in a truck and when he re-entered the tent Harris was sitting in a chair. He asked Harris if he was sleepy and Harris said, "no". The witness then went to sleep. Another guard was there when he woke (R. 46, 47).

The accused, on being advised of his rights, elected to remain silent (R. 49).

5. It is believed the court properly admitted in evidence accused's confession (Ex. A). It is stated in paragraph 114 of the Manual for Courts-Martial that 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. It is sufficient that there is evidence that the offense charged has probably been committed. There is, manifestly, such evidence in this case. The defense objection to the effect that Exhibit "A" contains only a part of what was said by accused is considered to be without merit. The rule is that evidence of a confession can not be restricted to only a part thereof (Par. 114, MCM, 1928). The evidence in this case indicates that Exhibit "A" includes all the facts accused desired it to include and, in any event, the defense was in no way prevented from eliciting on cross examination whatever else the accused might have said.

6. There is, clearly, substantial evidence to support the findings of guilty (Pars. 146b, 149k, 149l, MCM, 1928).

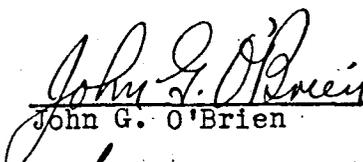
7. The charge sheet shows accused is 19-0/12 years of age, was inducted 18 January 1944 and had no prior service.

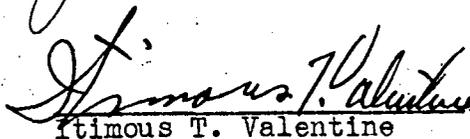
8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. The offenses

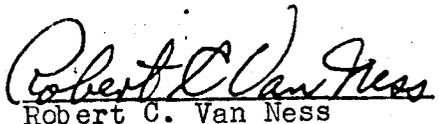
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of sodomy and assault with intent to commit murder are recognized as offenses of a civil nature for which penitentiary confinement is authorized within the meaning of Article of War 42 (see par. 90a, MCM, 1928, and sec. 276 U. S. Crim. Code).

John G. O'Brien, Judge Advocate

Titimous T. Valentine Judge Advocate

Robert C. Van Ness, Judge Advocate

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New Delhi, India
26 March 1945

Board of Review
CM IBT 434

UNITED STATES

INDIA CHINA DIVISION, ATC

v
Captain John L. Okenfus, O-905324,
Air Corps, 1330th Army Air Forces
Base Unit, Air Transport Command.

) Trial by GCM convened at
) Jorhat, India, 20-22 November
) 1944. Dismissal, total for-
) feitures, confinement at
) hard labor for 3 years.

HOLDING by the BOARD OF REVIEW
O'BRIEN, VALENTINE AND VAN NESS, Judge Advocates

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Captain John L. Okenfus, 1330th Army Air Forces Base Unit, Air Transport Command, having received a lawful command from Lieutenant Colonel William S. Barksdale, Junior, his superior officer, to proceed as a crew member of a military aircraft from Jorhat, India, to Chengtu, China, did at Jorhat, India, on or about 23 October, 1944, wilfully disobey the same.

3. The accused pleaded not guilty to and was found guilty of the Specification and 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 three years. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, United States Forces,

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India Burma Theater, for action under Article of War 48. The sentence was confirmed. Pursuant to Article of War 50 $\frac{1}{2}$, the confirming authority withheld the order directing the execution of the sentence and forwarded the record of trial to The Judge Advocate General's Branch Office.

4. The evidence shows that for about three months prior to 23 October 1944, the accused had been a member of the 1330th Army Air Forces Base Unit (R. 12, 13) stationed at Assam Field Jorhat (R. 89). On about 10 August, after he had made about six flights over the Hump (R. 127, 128), the accused came to Lieutenant Colonel Barksdale, the Commanding Officer, and said that while he was not afraid to fly the Hump, he wanted to quit flying (R. 130) "before it's too late" (R. 132, 179). Colonel Barksdale asked accused to think about it for a couple of days and then to return. Two or three days later the accused said that he wanted to get off flying status, at which time he was sent to the flight surgeon for examination (R. 132) as a result of which he was given fifteen days leave (R. 134). On return from leave the accused returned to flying (R. 135). About 10-15 September, the accused told Colonel Barksdale over the phone that he did not want to fly the Hump anymore and was advised that he would be on flying status like any other pilot (R. 135). On 11 September accused submitted a Request for Removal from Flying Status (R. 18, Def. Ex. "C") to which Colonel Barksdale replied by indorsement on 13 September removing accused from flying status (R. 18, Def. Ex. "D"). On 23 September Colonel Barksdale wrote accused that reclassification proceedings were being instigated and advised accused of his rights (Def. Ex. "E"). By first indorsement dated 26 September, the accused tendered his resignation (Def. Ex. "F"). On 28 September, by second indorsement, Colonel Barksdale advised accused that since undesirable traits of character were involved his resignation would have to be "for the good of the service" (Def. Ex. "G"). Accused submitted his resignation for the good of the service on 29 September (Def. Ex. "H"). The entire file was transmitted to India China Division Headquarters, after which the Commanding General verbally directed that no action would be taken thereon and that accused be restored to flying status (R. 179, 180, 181, 183). Thereupon the accused was advised by letter of 4 October that he was restored to flying status (Def. Ex. "I"). At this time the accused inquired what would be the consequences if he refused to fly and was advised in detail by the legal officer (R. 184). Accused thereafter made three flights (R. 140). After the third flight the accused verbally requested to transfer to the western sector or some other type of flying (R. 181). Upon being refused,

accused told Colonel Barksdale that he would fly the Hump in daytime but not at night (R. 179, 181) indicating as his reason that he had seen two C-46 planes crash and catch fire in mid air (R. 181). The accused also told the operations officer that he would fly the Hump all day, but not at night (R. 186).

On about 20 August 1944 in Calcutta (R. 159) accused had stated to an acquaintance that he was not going to fly the Hump as co-pilot (R. 164) as he was fully qualified to fly as a pilot and wanted to fly as such (R. 165). On another occasion during the same month he stated to another friend that he did not wish to fly anymore, but wanted to get out of the army and stop flying (R. 166, 167). Some time during September the accused told one of the pilots at the base that only kids out of school who did not know any better and fools flew the Hump (R. 171, 172, 173) and that he would not fly the Hump any more himself (R.173).

On the morning of 22 October, subsequent to a failure to report for a scheduled flight (R. 49, 189), accused was called by Colonel Barksdale to his office and told that he would be expected to fly like any other pilot in the command (R. 13,14). Colonel Barksdale then called Major Thornquest, the operations officer, and ordered him to issue written operations orders, in his (Colonel Barksdale's) name and by his command (R. 15), directing accused (R. 14, 25) to proceed at the proper time on a flight to Chengtu, China (R. 14, 19, 25). These directions were repeated by Colonel Barksdale later that day and on the day following (R. 15, 16). Colonel Barksdale did not specify the time of the flight (R. 16), what plane was to be used, or the crew with which accused was to fly (R. 17). The operations officer sets the flights and operational procedures (R. 19, 20). At about 1500 hours on 23 October the accused was placed on the flight schedule for that day (R. 65, 67). The published flight schedule for that day had been prepared earlier in the day and had been posted in various places including the area in which accused was quartered. On this published schedule, the name of accused did not appear (R. 70). At the operations office in a ledger kept there (R.40) the accused's name was substituted for that of Lieutenant Pecukonis on a crew of which Lieutenant Dobie was pilot (R. 66, 82). This crew was assigned to Plane No. 268 (R. 39, 42) whose manifested destination was the Chengtu area (R. 43). Consolidated Operations Order No. 296 dated 23 October 1943 (R. 26, Pros. Ex. 1, admitted at R. 35) was prepared between 1600 and 1700 (R. 189) and signed by Major Thornquest at about 1700 (R. 26). This directed that the following named personnel would proceed to Chengtu, China and return at the proper time, and was "by order of Lieutenant

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Colonel Barksdale". No specific time was set therein and no specific plan designated. The personnel named therein was Lieutenant Dobie, the accused, and two enlisted men. That part of the order listing the personnel was designated "extract" but was not in fact an extract copy of any official document (R. 41). Consolidated Operations Orders were prepared each day covering the operations of the preceding day including the flights made and the crews involved (R. 60). These bore date and covered the operations of the preceding day. Prosecution's Exhibit 1 was not an extract of either Consolidated Operations Order No. 296, dated 22 October, or of Consolidated Operations Order No. 297, dated 23 October, both of which are attached to the record as parts of Defense Exhibit "B". Four or five copies of Prosecution's Exhibit 1 were prepared (R. 26, 60) and Major Thornquest, in company with two other officers, took them to the accused who at that time was in Major McCain's tent. Major Thornquest either held out the operations order to accused (R. 27), or handed it to him (R. 59), or laid it on his lap or stomach in such position that accused could not see what it included (R. 148, 149) and asked "are you going to go or are you not going to go" (R. 27) to which accused replied, "Hell, no, I'm not going to go". Shortly thereafter accused asked to read the paper, whereupon it was handed him by the Major, was read by accused and handed back to Major Thornquest without comment (R. 27). A few minutes thereafter Major Thornquest left the tent (R. 27). Accused did not report to the operations office that day nor the next and made no flight since then (R. 49, 50, 62).

Lieutenant Dobie, having been called by the charge of quarters and by the billeting office (R. 77, 78), reported to operations about 1730, accompanied by Lieutenant Pecukonis (R. 72) who had been called as a substitute, as it had been anticipated that the accused would refuse (R. 39, 48, 188). When the accused did not show up, his name was taken off the crew list in the operations office and Lieutenant Pecukonis was substituted for him. However, had the accused subsequently appeared, his name would have been re-substituted and he would have been sent out on the flight (R. 83, 84, 85, 86). Crews were interchangeable and could be assigned to other ships (R. 64, 65). Either the commanding officer or the operations officer have authority to put a man on a flight after the schedule for the day had been published without changing the schedule (88). Lieutenant Dobie and Lieutenant Pecukonis waited at operations for four hours and then returned to their quarters where they were subject to call after eight hours, which was normal procedure (R. 38, 39, 51, 73). Ship No. 268, to which Lieutenant Dobie's crew was originally assigned, left the field

at about 2346 hours that night, 23 October, with an entirely different crew (R. 42, 43). The following day, 24 October, at about 0930 hours, Lieutenant Dobie, Lieutenant Pecukonis and two enlisted men, neither of whom were listed on Prosecution's Exhibit 1, left on a flight in Ship No. 44-39241 (R. 46, 73). Accused was not called for this flight (R. 39) but would have been, along with Lieutenant Dobie, had he reported for flight the previous evening (R. 57). The destination of this flight is shown on Consolidated Operations Order No. 298 (Def. Ex. "B") as Kwanghan, China. Accused is not shown as a member of this crew since he had not made the flight (R. 61).

Crews were ordinarily alerted by a call from the charge of quarters to those who were listed on the published flight schedule for the day. Notice was given one and one-half hours before the Plane was to leave, and those who were notified were to report to operations in time to obtain their clearance, be briefed, get their weather and be at the plane one-half hour before takeoff (R. 24, 25, 68). No time was designated, but the men were to go to operations as soon as possible (R. 190). Accused knew the procedure and had reported in compliance therewith on previous occasions (R. 68, 69). Major Thornquest considered the presentation of the operations order (Pros. Ex. 1) a notification, and accused should have reported to operations as soon as he could (R. 190, 191). Preparation of a written order putting a pilot on flight was not usual, having been done only twice including this time (R. 182). The order was in writing on this occasion to make it official (R. 187) because the accused had not reported at a prior time (R. 189) and it was felt that he might respond to it since on a former flight he had obeyed a similar written order served on him at the operations office where he had reported for flight after having been given the customary notice by the charge of quarters (R. 69, 70, 183, 186). The flight of 23 October had been planned as a night operation to see if accused would make a night flight (R. 187, 189, 190). However, due to the fact that no plane was in commission, the flight which accused would actually have made had he reported would have been a day flight (R. 190).

The accused made an unsworn statement through his counsel (R. 157) which revealed that he is twenty-nine years old, married, and has one child. He completed grammar school and two years of prep school. He had been a civilian pilot with the ferry command for six months, then being commissioned as a first lieutenant. He has been flying as a Service pilot for about two and one-half years, has quite a number of hours as a pilot and has a letter of recommendation as to his accomplishments and duties (R. 158).

5. The material evidence shows, in substance, that accused frequently had expressed his aversion to flying the Hump and had requested removal from flying status; that his commanding officer

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and higher authority had determined that he should continue to fly; and that accused had been advised accordingly but continued to manifest his unwillingness to fly and his intent not to perform night missions. It may well be gathered that accused's commanding officer deemed it necessary to bring the matter to a head by ordering accused to perform a scheduled mission. Such an order was delivered to him on 23 October 1944 by the operations officer. It directed accused to proceed "at the proper time" on a flight from Jorhat, India, to Chengtu, China. The order did not specifically designate the time the accused was to proceed on the flight or the airplane to be used. However, there is evidence that the exigencies surrounding operations at the field were such that it was impractical to notify flying personnel in advance as to the time of departure of a flight or the designation of the airplane. Instead, the customary method of calling flight personnel for flight was by verbal notice from the charge of quarters or, occasionally, from the operations officer, and the operating procedure at the field required that the persons so notified report to operations as soon as possible for further instructions. Accused was familiar with this procedure and, it may be assumed, with the reasons therefor, and he had reported to operations on previous occasions when notified by the charge of quarters. On one occasion he performed a flight when a written order similar to the one herein involved was delivered to him at operations office. When the order of 23 October was delivered to accused the operations officer asked him if he intended to go, and although accused had not yet read the order, he unequivocally stated that he was not going, and after reading the order he failed to retract or correct the implication of this statement. He did not report to operations on 23 or 24 October and did not thereafter fly an operational mission.

6. There can be no doubt under the foregoing evidence that the court was justified in concluding that there was a meeting of minds between the accused and his commanding officer and that accused was fully aware that the order of 23 October called for in praesenti compliance, that is, that he report to operations without delay, and that it was not, as urged by the defense, simply an authorization to fly. The words "will proceed", as used in the order, are not susceptible of the latter interpretation. Furthermore, accused's familiarity with the method of operations at the field precluded him from so construing the order. It contained as much information as the customary verbal notices from the charge of quarters, which accused knew required immediate compliance, and, because of its mandatory character, manifestly imposed a positive duty. Also his knowledge of its meaning may be inferred from the fact that he had recently flown pursuant to a similar written order. In any event, having deliberately precipitated the issue by persistently indicating his intent not

to continue flying, and having been advised by his commanding officer that he would be expected to fly, he was hardly in a position to split hairs as to the meaning of the order. If there was any doubt in his mind as to its meaning, it became his duty to clear such doubt by proper inquiry, and the fact that he failed to make such inquiry reasonably gives rise to an inference that he either understood the order or was indifferent to its meaning. The declaration made by accused to the operations officer at the time of delivery of the order, to the effect that he did not intend to fly, likewise indicates that although he had not read the order, he was aware of its purport and that it called for immediate compliance.

7. The defense contended that when the accused's commanding officer removed the accused from flying status he thereafter was powerless under pertinent rules and regulations to restore the accused to flying status; that, consequently, the commanding officer's subsequent action in purporting to return the accused to flying status was of no force and effect; and that as only officers on flying status are permitted or authorized to fly by controlling regulations, the order of 23 October was illegal and accused's disobedience thereof did not constitute an offense. In support of this contention the defense counsel cited, inter alia, Army Regulation 35-1480 and Army Air Force Regulation 35-16.

A comprehensive discussion of the regulations in question is deemed unnecessary in determining the legality of the order. It suffices to observe that the regulations, together with Executive Order 9195, implement the statutes granting additional pay to certain flying personnel and pertain exclusively to administrative considerations and procedures incident to the entitlement of such personnel to such pay. Under these regulations, the facts with reference to accused's suspension from and purported reinstatement to flying status might be pertinent to accused's right to draw flying pay but are immaterial so far as accused's obligation to fly when ordered to do so is concerned. This is well brought out in the following excerpt from the Theater Judge Advocate's review:

"Only by this interpretation can any logical meaning be given to Par. 4b AR 95-15, 'Flying; General', which in part states:

'Who may be ordered to make flights.

(1) All members of the Army of the United States on active duty may be ordered in time of war to make flights, by any person having command jurisdiction over the individual concerned. Such personnel are not entitled to flying pay unless placed on duty requiring participation in regular and frequent aerial flights by competent authority' (Emphasis Supplied).

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"Paragraph 6a of AR 95-15 in part states:

'Station commanders or higher authority may authorize the following personnel to pilot Army aircraft under their control:

(1) Members of the Army of the United States who are professionally and physically qualified and who hold appropriate and duly authorized aeronautical ratings'.

"Even if Par. 6a is a limitation upon Par. 4b, its only effect is that before a person may be ordered to pilot government aircraft, such person must be professionally and physically qualified and must hold an 'appropriate and duly authorized aeronautical rating'. In any case, the 'command jurisdiction' here referred to, is separate and apart from the 'competent authority' who, for purposes of flying pay, can place a person on duty requiring participation in regular and frequent aerial flights (Flying status). It is thus noted that in no case is the fact of being on 'flying status' a condition precedent to a lawful order to a pilot to fly. As such, the question of whether the accused was rightfully returned to flying status by competent authority is immaterial to the issue of the legality of the order to fly".

A different but equally convincing approach to the question of the legality of the order to fly appears in the Staff Judge Advocate's review, as follows:

"This reviewer has found no authority to support the proposition that a superior officer, especially in time of war, may not lawfully order a member of his command to fly an aeroplane or to proceed as a crew member thereof, if the subordinate is, through training, physically and mentally capable of so doing, even though such subordinate may not at the time hold an aeronautical rating, or even though he may have been temporarily or indefinitely suspended from flying status. An opinion reported on page 539 of the Digest of Opinions of the Judge Advocate General (1912) reads as follows:

'To justify, from a military point of view, a military inferior in disobeying the order of a superior the order must be one requiring something to be done which is palpably a breach of law and a crime or an injury to a third person, or is of a serious character (not involving unimportant consequences only) and, if done, would not be susceptible of being righted. An order requiring the performance of a military duty or act can not be disobeyed with impunity unless it had one of these characters'.

"In the same opinion it is further stated that:

'There could be no more dangerous principle in the government of the army than that each soldier should determine for himself whether an order requiring a military duty to be performed is * * * in accordance with * * * regulations * * * and may disobey the order if in his judgement * * * it should * * * be at variance with orders, regulations, decision circulars, or customs. It is his duty to obey such orders first, and if he should be aggrieved thereby, he can seek redress afterwards'.

"Under the foregoing authority the order in the instant case was legal, even if it be assumed for the sake of argument that the same was contrary to regulations. For the order obviously did not require an act which was 'palpably a breach of law and a crime or an injury to a third person', or of such a 'serious character' that 'if done, would not be susceptible of being righted'.

"On page 572 of Winthrop's Military Law and Precedents (1920, Reprint) appears the following:

'The obligation to obey is one to be fulfilled without hesitation, with alacrity, and to the full; nothing short of a physical impossibility ordinarily excusing a complete performance * * * Even where the order is arbitrary or unwise, and its effect must be injurious to the subordinate, he should first obey, postponing til after compliance his complaint and application for redress'.

"On pages 575 and 576 of the same text the following appears:

'But to justify an inferior in disobeying an order as illegal, the case must be an extreme one and the illegality not doubtful. The order must be clearly repugnant to some specific statute, to the law or usage of the military service, or to the general law of the land. The unlawfulness of the command must thus be a fact, and, in view of the general presumption of law in favour of the authority of military orders emanating from official superiors, the onus of establishing this fact will, in all cases--except where the order is palpably illegal upon its face--devolve upon the defense, and clear and convincing evidence will be required to rebut the presumption'.

"Under the quoted authorities, since the order, even assuming it to have been contrary to flying regulations, was not manifestly illegal or contrary to statute, and since nothing short of physical incapacity to comply therewith would constitute a defense to the accused, and since the accused had the burden, and made no effort, to show an inability upon his part to comply therewith, the accused's

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contention in this respect is believed to be without merit".

For the foregoing reasons, the Board concludes that the order was legal. The additional contention of the defense that an officer pilot may not under any circumstances be ordered to fly is to frivolous to warrant discussion.

8. As indicated by the foregoing discussion, the Board of Review is of the opinion that the evidence amply justified the court in concluding that the order delivered to accused on 23 October was legal and carried with it as an implied integral part thereof an order that accused report to operations as soon as possible. The fact that accused had previously been delivered a similar order, and had been more recently told that he would be expected to fly, when considered in connection with the inquiry addressed to the accused by the operations officer at the time of delivery of the order, is substantial evidence from which the court might reasonably have inferred that accused knew the general purport of the order and that his statement, "Hell, no, I'm not going to go", manifested a refusal to obey the in praesenti aspects of the order. In any event, the evidence is uncontradicted that accused did not report to operations on 23 or 24 October. His conduct as a whole shows that his failure to report was not due to heedlessness, remissness or forgetfulness, but, instead, was an intentional defiance of authority constituting the willful disobedience contemplated by the 64th Article of War. Whether the flight was actually flown is immaterial as accused's guilt was complete when he failed to report to operations (CM ETO 2469, Tibi;Mil. Justice Dig., BOTJAG-E, Sec. 422 (5)). In the final analysis the issues in this case are not as complex or difficult as the length of the record of trial might seem to indicate. The evidence as a whole points clearly to the ultimate truth, that is, that the accused, having determined to quit flying, deliberately defied the order of his superior officer and now seeks, by spurious defenses, to escape the penalty. His mental state was clearly one wherein:

"Inclination snatches argument
To make indulgence seem judicious choice;"

9. Over strenuous objection by the defense, and on cross-examination of one of the defense witnesses and on direct examination of the prosecution's rebuttal witnesses, the prosecution elicited evidence to the effect that accused, during a period of about three months prior to the commission of the offense alleged, had expressed to his commanding officer and others his intent not to fly the Hump and had failed to report to operations when notified by the charge of quarters. This evidence was admissible as an exception to the so-called "character rule" as it manifested the willful nature of accused's disobedience (Par. 112b, MCM, 1928). Further, it was admissible under the theory that it served to present to the court the entire picture of a series of virtually inseparable acts and transactions which culminated in the offense alleged and which, when considered as a whole, tended to show accused's understanding of the order of 23 October, that is to say, that he knew the order was intended as a "put up or shut up" proposition and called for in praesenti compliance (see Sec. 301, 305, 306 (3), Wigmore on Evidence, 3rd Ed.).

10. Numerous errors were made in the admission of evidence. These

for the most part inured to the benefit of the accused and none affected the substantial rights of the accused.

11. The court was legally constituted. The sentence which it adjudged was authorized by law. The court had jurisdiction of the subject matter of the offense charged and of the person of the accused. No errors injuriously affecting the substantial rights of the accused intervened 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 findings of guilty and the sentence.

/s/ John G. O'Brien , Judge Advocate

/s/ Itimous T. Valentine , Judge Advocate

/s/ Robert C. Van Ness , Judge Advocate

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CM IBT #434 (Okenfus, John L.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885,
New York, N.Y., 31 March 1945.

TO: The Commanding General, USF, India Burma Theater, APO 885,
U.S. Army.

1. In the case of Captain John L. Okenfus, O-905324, Air Corps, 1330th Army Air Forces Base Unit, 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 of guilty and the 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 IBT 434).

/s/ William J. Bacon
/t/ WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 10, IBT, 31 Mar 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(351)

New Delhi, India,
1 March 1945.

Board of Review
CM IBT 436

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

SERVICES OF SUPPLY

v

Private Wallace (nmi) Nory,
38262505; Private Joseph (nmi)
Madise, 38262451; Private Aaron
(nmi) Morrison, 38262499; all of
Company B, 849th Engineer Avia-
tion Battalion; and Private Lloyd
G. Hickey, 38245074, Headquarters
and Service Company, 849th Engineer
Aviation Battalion.

) Trial by GCM convened at APO
) 689 % Postmaster, New York,
) N.Y. on 16 January 1945. Each
) accused was sentenced to be
) dishonorably discharged the ser-
) vice, to forfeit all pay and
) allowances due or to become due,
) to be confined at hard labor for
) 5 years. United States Dis-
) ciplinary Barracks nearest port
) of debarkation in United States
) was designated as place of con-
) finement.

HOLDING by the BOARD OF REVIEW
O'BRIEN, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldiers above named has been examined by the Board of Review which submits this, its holding, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private (then Technician, Fifth Grade) Lloyd G. Hickey, Headquarters and Service Company, 849th Engineer Aviation Battalion, Private (then Technician, Fifth Grade) Wallace (nmi) Nory, Company "B", 849th Engineer Aviation Battalion, Private (then Technician, Fifth Grade) Joseph (nmi) Madise, Company "B", 849th Engineer Aviation Battalion, and Private (then Private First Class) Aaron (nmi)

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Morrison, acting jointly and in pursuance of a common intent, did, at Chinglow, Burma (approximately mile 95.6, Ledo Road), on or about October 28, 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anum with Private First Class Hamilton H. Rachal of Company "B", 849th Engineer Aviation Battalion.

3. Each accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced as to any of the accused. The court sentenced each 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 for 5 years. The reviewing authority approved the sentence as to each accused, designated the United States Disciplinary Barracks nearest the port of debarkation in the United States as the place of confinement as to each accused and forwarded the record of trial for action under Article of War 50½.

4. Evidence for the prosecution:

On the night of 28 October 1944, the four accused and about fifty other soldiers were attending a birthday party in the tent of Technician Fifth Grade William A. Rasmus (R. 8, 9, 11, 14; Pros. Exs. 2 and 3). The party was apparently a rather gay affair as there was considerable drinking, singing and fun-making. Between 2130 and 2200 hours Private First Class Hamilton H. Rachal, who had become very drunk, walked out of the tent (R. 9, 11). According to Rachal the last thing he remembered was that two of the accused, Madise and Nory, took him by the arm and led him out of the tent saying, "We are going to take him out to get some air" (R. 8).

Private Darling saw Rachal walk out of the tent alone. He was followed by Madise and Nory. Darling then left the tent and saw Rachal, Madise and Nory standing in the sidewalk. He stopped and Nory said, "What do you want, we don't want any company". Darling then went to his tent and while there heard something pass which appeared to be dragging. He then walked out of his tent and met accused Morrison who asked if he had seen accused Nory. Darling said, "He went that way", and pointed in the direction of the latrine (R. 11).

Private Holloman left the same party during the evening and went to the latrine. When he got there accused Nory said, "Don't

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come in here. Do that much for me". Before leaving he heard Rachal coughing in the latrine (R. 14). Holloman had known Rachal since 1943 as a member of the same outfit and was familiar with his cough which he described as a peculiar one (R. 17). He then reported what he had learned to Corporal Higgins (R. 14).

Corporal Higgins went to the latrine at approximately 2300 hours. When he got there he was stopped by accused Morrison and Nory who said that "they were pulling M. P. duty". Corporal Higgins heard someone groaning inside the latrine and asked who it was. Nory said "it was Rachal". Higgins then asked who was with him and "they said 'Lloyd'". At that time Technician Fourth Grade Calvin Jackson and Al Cochrane walked up (R. 18). According to Corporal Higgins, he, Jackson and Cochrane then used force to get into the latrine (R. 18, 20).

Technician Fourth Grade Calvin Jackson testified that he went down to the latrine on the night of 28 October 1944 and was told by accused Morrison that he could not use the latrine. Then accused Madise called him off to the side and told him, "You look like you are a pretty wise man, come here, I want to talk to you. He told you you can't use the latrine, you can't use it". At that time "Somebody hollered in there and said, 'Bring a flashlight, this man is gagging,' or something" (R. 24). Al Cochrane, Higgins and Jackson then went into the latrine in the order named (R. 19, 26). Higgins said they forced their way into the latrine (R. 18, 20), but Jackson testified that no force was used (R. 26). Corporal Higgins flashed his light and saw a man who accused Nory told him was "Lloyd" (R. 22), and Rachal (R. 19). Rachal was lying on his side and Lloyd was behind him with his penis in one hand and the other around Rachal's neck. Rachal had no clothes on from his waist down (R. 19). Lloyd's penis was approximately one foot distance from and in front of Rachal's rectum (R. 20). Corporal Higgins testified that "We tried to break them up and couldn't break them up". Higgins started to get an officer but decided to tell Sergeant Robinson instead (R. 19).

When Jackson got into the latrine he saw accused Wallace Nory, accused Lloyd Hickey and Rachal (R. 24). Rachal was lying on the floor apparently unconscious and the man standing beside him was fully dressed and did not have his penis out. No one other than Rachal was undressed or partially undressed (Pros. Ex. 1; R. 26). Because of the darkness Jackson was not able to positively swear that accused Lloyd Hickey was one of the persons in the latrine at the time (R. 27). In a sworn statement made

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two days after the alleged offense Jackson stated that he positively recognized Nory and Hickey when he entered the latrine (Pros. Ex. 1).

Cochrane and Jackson left the latrine when Corporal Higgins said he was going to tell Captain Jenkins (R. 25; Pros. Ex. 1). Higgins reported the matter to Sergeant Robinson and they started back to the latrine and on their way they found Rachal lying in the road (R. 19). He was sitting alongside the road in a crouched-forward position, face down. The road was a gravel road (R. 16). When Rachal was found he was dressed only in his O.D. shirt and one shoe. In other words, he was sitting with his bare "fanny" on the gravel road (R. 16). The body of Rachal was dirty and there was a skin bruise on his hip (R. 15). They carried him to his tent, put him on his bed and sent for medical assistance. One of Rachal's shoes was missing and Private Holloman and Corporal Higgins went back to the latrine to look for it. They found some spots that they thought were blood on the toilet stool in the latrine (R. 19, 20, 21).

When Rachal recovered consciousness he was lying on his bunk and Sergeant Curry was washing his face. His left side was bruised and his rectum was sore. When he left the party earlier in the evening with accused Madise and Nory the condition of his body was all right (R. 8).

The following morning Rachal was examined by a medical officer, Captain E. L. Turner, who made the following findings: "Superficial lacerations at 6 and 9 o'clock at ano-cutaneous junction. Minor contusion left anterior chest wall. Minor abrasion and contusion over left iliac crest" (R. 6, 7).

Accused Lloyd Hickey, after having been warned by an agent of the Criminal Investigation Division, admitted that he had attended the birthday party for Rasmus and that at about 2100 or 2130 hours he went with others to get a case of beer which they drank. A little later he went to the latrine by himself. Rachal was sitting on a seat and appeared to be conscious. Neither spoke to the other. Accused Hickey urinated in one of the holes close to the door and Rachal was sitting at the far end of the latrine. Accused immediately left the latrine and went over to a command car where he met Private Gilmore and they drove back to Kumkido arriving at 2400 hours (Pros. Ex. 3).

5. Evidence for the defense:

Technician Fifth Grade Fred Powell, Medical Detachment, testified that he went to the latrine in question about midnight

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of 28 October 1944 and saw on the seat of the latrine in the space between the holes a clear liquid mixed with blood. The clear liquid appeared to be sputum and the blood in it was streaked (R. 37).

Private Gilmore testified that he and Lloyd Hickey left B Company area around 2015 hours on the night of 28 October 1944 in a command car. They arrived at Headquarters Company at about 2100 hours and after talking a few minutes Hickey went to his tent. Gilmore did not see accused Hickey any more that night (R. 41).

6. The offense of sodomy, including penetration, requires strict proof; but circumstantial evidence may be sufficient (CM 191413, 1 B.R. 251). The circumstances herein pointing toward penetration are that Rachal, who was apparently unconscious, was seen in the latrine lying on his side and unclothed from the waist down; that the accused Hickey was behind Rachal with one hand holding his exposed penis and the other around Rachal's neck; that Rachal found his rectum was sore after he regained consciousness and that a medical examination of Rachal the following morning disclosed superficial lacerations at the ano-cutaneous junction. Such evidence of an opportunity and apparent attempt to accomplish penetration and of soreness and injuries likely to have been caused thereby is sufficient, it is believed, to have justified the court in determining that penetration was effected.

7. Although the evidence indicates that only the accused Hickey actually committed sodomy on Rachal, there is substantial evidence from which the court might reasonably have inferred that the other accused actively aided and participated in the offense by taking Rachal to the latrine and by attempting to prevent others from entering while the act was being committed (CM 115127, CM 145106; Sec. 451(64), Dig. Op. JAG, 1912-40). The court was, therefore, justified in finding all the accused guilty as principals.

8. The papers accompanying the record of trial include separate reports of investigation under Article of War 70 as to Madise, Morrison and Hickey but no similar report is included as to Nory. However, the report of the staff judge advocate made prior to reference for trial and other accompanying papers indicate that a report of investigation as to Nory was included and forwarded by the investigating officer with the other mentioned reports and it may be gathered, therefore, that the missing report

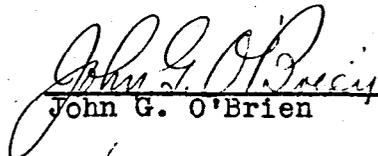
WAR DEPARTMENT
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subsequently became detached. Under these circumstances, it is believed that it may be presumed that the responsible officers performed their duties and that a pre-trial investigation was in fact conducted as to Nory (par. 112a, MCM, 1928). Furthermore, under the circumstances of this case, it is considered that any failure to conduct an investigation as to Nory would not injuriously affect his substantial rights (CM 229477, 17 B.R. 149).

9. The charge sheet shows that at the time charges were preferred the accused Nory, Madise, Morrison and Hickey were, respectively, 23, 20, 23 and 26 years of age; that the first three named were inducted on 30 October 1942 and Hickey on 2 November 1942, and that none had prior service.

10. The court was legally constituted and no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and the sentence as to each accused.


John G. O'Brien, Judge Advocate


Itimous T. Valentine, Judge Advocate


Robert C. Van Ness, Judge Advocate

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(357)

New Delhi, India,
20 March 1945.

Board of Review
CM IBT 447

UNITED STATES

SERVICES OF SUPPLY

v.

Private Coleman B. Miles, Jr.,
33137147, Company B, 352d En-
gineer General Service Regiment.

) Trial by GCM convened at APO
) 689 ½ Postmaster, New York, N.Y.,
) 24 January 1945. Dishonorable
) discharge, total forfeitures,
) confinement at hard labor for
) 12 years. United States Dis-
)ciplinary Barracks nearest port
) of debarkation in United States
) designated as place of confine-
)ment.

HOLDING by the BOARD OF REVIEW
O'BRIEN, 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 which submits this, its holding, to the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, United States Forces, India Burma Theater.

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

CHARGE: Violation of the 64th Article of War.

Specification 1: In that Private Coleman B Miles Jr, Company B 352d Engineer General Service Regiment, did, at Advance Section 3, Staging Area, on or about 21 November 1944 strike First Lieutenant Marion C Retter, Corps of Engineers, his superior officer, who was then in the execution of his office, on the face with his fist.

Specification 2: In that Private Coleman B Miles Jr, Company B 352d Engineer General Service Regiment, having received a lawful command from First Lieutenant Marion C Retter, Corps of Engineers, his superior officer, to

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answer his question, did, at Advance Section 3, Staging Area, on or about 20 November 1944, willfully disobey same.

3. Accused pleaded not guilty to Specifications 1 and 2 of the Charge and to the Charge and was found guilty of both Specifications and the Charge. 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 12 years. The reviewing authority approved the sentence and forwarded the record of trial to the Branch Office of the Judge Advocate General, United States Forces, India Burma Theater pursuant to Article of War 50½. The United States Disciplinary Barracks nearest port of debarkation in the United States was designated as the place of confinement.

4. Evidence for the prosecution:

On or about 20 November 1944 Lieutenant Retter, 352nd Engineer General Service Regiment, in addition to his duties as platoon commander, was Company B Mess Officer at the staging area of Advance Section 3 (R. 5, 6, 7, 9). Accused, who was in headquarters platoon, was a member of a detail cleaning up around Company B mess hall (R. 5, 9). Accused was not in Lieutenant Retter's platoon but the officers had not actually been assigned to any particular platoons and were more or less working as a group (R. 7). Lieutenant Retter had been watching the detail for "some time" and saw that accused was not working. He called the attention of accused to that fact and told him, "Get both hands on that shovel and start cutting weeds" (R. 5, 8, 9). Accused did not come to attention nor did he look at or answer the lieutenant. Lieutenant Retter then asked him if he understood, but accused did not answer. He was ordered to "Straighten up, look at me, and answer my question", and again ordered to "Look me in the eye and answer yes or no, either you do or do not understand the order I gave you". Accused still looked in another direction and refused to answer. Lieutenant Retter "repeated again the order" I gave him, and said, "Do you or do you not understand that order?" Accused still did not answer and was then told "he could consider that as a direct order, and if he did not answer it I would consider it as refusing to obey a direct order". Accused did not say a word (R. 5, 6). Lieutenant Retter testified on cross examination that "sometime or other during the conversation he did make a statement, 'I am taking orders from my sergeant'" (R. 9). Lieutenant Retter denied accused ever

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told him he was ill (R. 8). Sergeant Hall testified on rebuttal that accused came down by the mess hall and when he saw accused, he told him to help carry grass away. Accused did and when he came back Lieutenant Retter told the sergeant to give accused a shovel and let him do some work. The sergeant gave him a shovel and sent him over to Corporal Finley (R. 16, 17).

About 0830 hours, 21 November 1944, Lieutenant Retter and Staff Sergeant Hopkins were behind A Company mess hall checking bamboo poles. Accused walked up and said, "Lieutenant Retter, is it true that you are going to have me put in the guardhouse?" Lieutenant Retter told him that it was up to the company commander, whereupon accused struck Lieutenant Retter with his fist just above the right eye knocking him back a step and a half or two steps and knocking off his cap (R. 6). Sergeant Hopkins stepped between them (R. 6, 10), grabbed accused by the arm and said, "Come on, man, you get in a lot of trouble here" (R. 10). As the lieutenant was dusting off his cap accused struck him on the jaw with his fist (R. 6). He hit him around the face with his fist (R. 11). Lieutenant Retter then told the sergeant to take accused (R. 6) to the company area (R. 10). When the three of them were between Company A and Company B mess halls accused again hit Lieutenant Retter (R. 7, 11) in the chest (R. 7). Sergeant Hopkins did not see the first blow but heard accused address the lieutenant and as he looked around saw the latter picking up his cap (R. 10).

5. Evidence for the accused:

Accused, having had his rights explained, was sworn and testified as to Specification 2 of the Charge. On 20 November he was told to report to Lieutenant Retter and upon doing so was told to report to Sergeant Hall. Then Sergeant Hall told him to start carrying grass. He and Private Parker carried grass on a long tin until Parker left for the latrine. Lieutenant Retter at this time came up and asked accused, "What you doing standing here?" and accused replied, "I'm waiting on my partner, he went to the latrine". Lieutenant Retter then talked to Sergeant Hall and the latter told accused to take a rake and start raking grass with the other men. Accused picked up a rake and the sergeant then told him to grab a shovel. Accused did so and started to cut grass. At the time accused was swinging the shovel Lieutenant Retter again walked up and said, "I want to see you do some work". Accused stopped, came to attention and said, "I'm feeling ill". The lieutenant said he didn't care

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about accused's condition and when he said that accused said nothing more to him as he was afraid if he said anything there would be an argument (R. 13). Accused was asked on cross examination why he didn't answer when Lieutenant Retter told him to answer a question. The accused stated, "I told him I was feeling ill at that time" (R. 13). Accused further testified there was an order in the regiment that day that all orders were to be carried out by the noncoms and that a corporal told them that if an officer came up and asked what one was doing or why one was not working he was to be told to see the noncom in charge of the detail. "That order had been passed out that morning or the morning before that". Accused was asked, "* * *you didn't answer Lieutenant Retter because there was an order out that you should talk to non-coms and not officers* * *", and he replied, "That's right" (R. 14). Accused did not recall Lieutenant Retter asking a question which accused was expected to answer at that time (R. 14).

6. In order to make out the offense alleged in Specification 1 it is necessary that the prosecution prove; (a) that the accused struck a certain officer as alleged; (b) that such officer was the accused's superior officer at the time; and (c) that such superior officer was in the execution of his office at the time (see MCM 1928, par. 134a). The record reveals that while Lieutenant Retter was checking bamboo poles behind one of the mess halls, accused, an enlisted man, walked up to him, addressed him by name and rank and then struck him three times: once above the right eye, once on the jaw, and again on the chest. There can be no question that accused was not aware that the person assaulted by him was a superior officer. By the term "superior officer" is meant an officer of rank superior to that of the offender and, where an enlisted man is the offender, any commissioned officer. (see Winthrop's Mil. Law & Prec. 2nd Ed. p. 570). We believe that all the elements of the offense charged have been adequately proved by substantial competent evidence.

7. As to Specification 2 of the Charge, the record clearly reveals that Lieutenant Retter ordered accused to answer his question whether accused understood a previous order to cut weeds. The accused did not answer. Winthrop's Military Law and Precedents, 2nd Edition, page 573, states:

"It is agreed by the authorities that the offence specified in this part of the Article is a disobedience of a positive and deliberate character. However it may be

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exhibited,--whether in the form of an open and express refusal to do what is ordered, or in a simple not doing it, or in a doing of the opposite, or in a doing of something which has been expressly forbidden to be done,--the disobedience must be wilful and intentional".

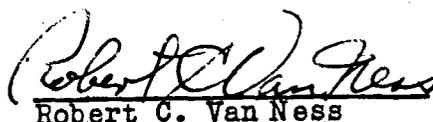
We believe that accused's willful disobedience of the specific command of his superior officer is well evidenced by his silence and indifference.

8. The charge sheet shows that accused was, at the time charges were preferred, 28-7/12 years of age. He had no prior service and was inducted into the Army of the United States on 3 February 1942 to serve the duration plus six months.

9. The court was legally constituted and had jurisdiction of the subject matter of the offense and of the person of the accused. No errors injuriously affecting the substantial rights of accused were committed during the trial. The sentence 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 findings and the sentence.

 , Judge Advocate
John G. O'Brien

 , Judge Advocate
Itimous T. Valentine

 , Judge Advocate
Robert C. Van Ness

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(363)

New Delhi, India
9 March 1945

Board of Review
CM IBT 467

UNITED STATES

AIR SERVICE COMMAND

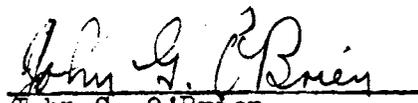
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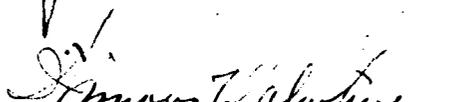
Private Lesley O. Satterfield,
42058344, 456th Aviation
Squadron, 5317th Air Depot (Prov),

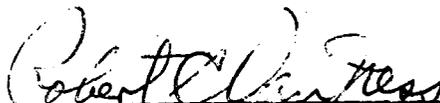
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) Trial by GCM convened at APO 671,
) % Postmaster, New York, N.Y. on
) 24 February 1945. Dishonorable
) discharge, forfeiture of all pay
) and allowances due or to become
) due, confinement at hard labor
) for 5 years. United States Dis-
) ciplinary Barracks nearest port
) of debarkation in United States
) designated as place of confine-
) ment.

HOLDING by the BOARD OF REVIEW
O'BRIEN, VALENTINE and VAN NESS, Judge Advocates

The record of trial in the case of the soldier above named has been examined by the Board of Review established in the office of the Assistant Judge Advocate General in charge of the Judge Advocate General's Branch Office, India Burma Theater, and the Board finds the same to be legally sufficient to support the sentence.


John G. O'Brien, Judge Advocate


Itimous T. Valentine, Judge Advocate


Robert C. Van Ness, Judge Advocate

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CM IBT 467 (Satterfield, Lesley O.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, New York,
N. Y., 17 March 1945.

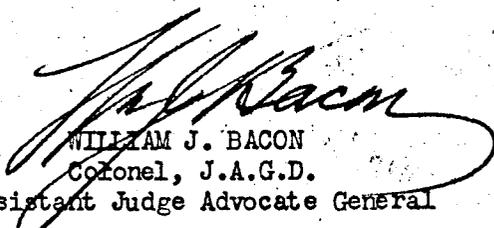
To: The Commanding General, India Burma Air Service Command, APO 671, U.S. Army.

1. In the case of Private Lesley O. Satterfield, 42058344, 456th Aviation Squadron, 5317th Air Depot (Prov.), 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 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 IBT 467).

3. The punishment of confinement at hard labor for 5 years imposed by the court is believed to be unnecessarily severe. The accused was found guilty of wilful disobedience of a lawful command of his superior officer in violation of Article of War 64. Accused had refused to obey an order from a non-commissioned officer who was then in the execution of his office "to sweep out the orderly room". The squadron commander, on being informed of the accused's refusal, sent for the accused and he then gave the accused a direct order "to sweep out the orderly room". The accused refused to obey same. The language of the squadron commander "God damn it, I have had enough trouble with you in the States and I don't intend to have it over here" is language not expected of a commanding officer when addressing men under him. It unquestionably gave the court the impression that the accused was a trouble-maker who should be eliminated from the service and, no doubt, influenced the court in the imposition of an unnecessarily severe sentence.

4. The file indicates that this soldier has had, in addition to his current service (4 December 1943 to date), 9 continuous years enlisted service, having been discharged honorably after the expiration of each 3 year enlistment period as private, corporal, and private first class. No evidence of previous convictions was submitted to the court. In view of the foregoing, it is recommended, pursuant to note 5 of Article of War 50 $\frac{1}{2}$, that so much of the confinement at hard labor as is in excess of 18 months be remitted, the dishonorable discharge suspended, and the I.B. Stockade Number 1, Kanchrapara, (Calcutta) India, designated as the place of confinement.


WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

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New Delhi, India
31 March 1945

Board of Review
CM IBT # 485

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

v.

Private B. L. (I.O.) Dillon,
34874317, 60th Ordnance Com-
pany (Am).

SERVICES OF SUPPLY

Trial by GCM convened at APO
689, % Postmaster, New York,
N.Y., 28 February 1945. Dis-
honorably discharged (suspended
until soldier's release from
confinement), total forfeitures,
confinement at hard labor for
one year and six months. India
Burma Stockade No. 1, Kanchra-
para, India, designated as
place of confinement.

OPINION by the BOARD OF REVIEW
O'BRIEN, 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 which submits this, its opinion, to the Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office, United States Forces India Burma Theater.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Pvt. B.L. Dillon, 60th Ordnance Co (Am) did at Shingbwiyang, Burma, on or about 0735, 20 Jan. 1945, unlawfully kill Rapchang Lama, an Indian, by shooting him with a carbine.

3. Accused pleaded not guilty to the Specification and to the Charge and was found guilty of both of them. 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 two years. The reviewing authority approved the sentence but remitted that portion thereof imposing confinement at hard labor in excess of

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one year and six months, and suspended until the soldier's release from confinement that portion thereof adjudging dishonorable discharge. The I. B. Stockade No: 1, Kanchrapara, India, was designated as the place of confinement. The record of trial was examined in the Military Justice Division in the Branch Office of The Judge Advocate General, United States Forces, India Burma Theater, The Military Justice Division was of the opinion that the record of trial was legally insufficient to support the finding of guilty of the Specification and of the Charge. Pursuant to Article of War 50½ the record of trial was referred to the Board of Review for its opinion.

4. The evidence discloses that, on 20 January 1945, the accused's organization was stationed at Shingbwiyang, Burma (R. 11, 13). At about 0735 that day the accused was detailed to load ten native laborers in a truck (R. 19; Pros. Ex. 2). One of them refused to go. The accused grabbed him by the arm and attempted to pull or push him up. As the laborer persisted in his refusal to get in the truck, the accused, who was holding his carbine by his side pointing toward the laborer, thought he would scare the native and therefore pulled the bolt of the weapon back and let it go forward. The weapon was accidentally discharged, the bullet hitting the laborer (R. 8, 19, 20; Pros. Ex. 2). At the time the gun was discharged, the accused was facing the native but was turning around (R. 8). The Indian was placed in the truck and rushed to the hospital (R. 9). The accused did not know the native's name, but he had been working around the ammunition dump for about three months (R. 18; Pros. Ex. 2). One of the witnesses referred to the native as "Ahmed" (R. 8). The senior medical officer of the Saltsprings Hospital near Shingbwiyang, who was employed by the Central Government through the Assam Government, examined the body of an Indian on 20 January 1945. There were two holes in the body, one in the right and the other in the left axillary space. Death was due to internal hemorrhage caused by a bullet wound. In the pocket of the dead man was found an Assam Civil Porter's identification card bearing the name "Rapchang Lama" (Pros. Ex. 1), which was turned over to the OC, Second Nepalese Corps. The doctor did not know the native's name but had seen him previously when people came to repair locks etc. (R. 5, 6, 7). Carbines were carried by the men on order of higher authority (R. 10).

No evidence was offered by the defense.

5. The Military Justice Division in their opinion stated:

"There is a total failure of proof to establish that the native Indian who was shot by the accused was Rapchang Lama whom the Specification alleges was killed. Assuming that the body examined by the doctor was properly identified as that of Rapchang Lama; there is nevertheless no evidence that it was the body of the person struck by the bullet fired from the carbine of the accused. No one identified it as such and no facts were proved from which such fact might legally be inferred. True, the Indian was rushed to a hospital, but to what hospital is not shown. The Saltsprings Hospital to which the examining doctor was attached is apparently a civil hospital. There might well have been, indeed probably was, a military hospital nearby, and perhaps other civil hospitals were in the area, to any of which the injured laborer might have been taken. There is nothing in the location of the wound to indicate that the man who was shot by accused was the man whose body was examined. It is not even shown that the wound was or could have been caused by a .30 caliber bullet. Nor is the clothing worn by the man shot by the accused shown similar to that on the body examined at the hospital. Neither the time of day at which the body of Rapchang Lama reached the hospital, nor whether it was alive at the time, nor who brought it in can be found in the record. The case clearly falls within the principles enunciated in CM 202359, 6 BR 87. Indeed it is even stronger. In the cited case it was shown that a man in a white shirt was struck by an automobile driven by the accused. Before being removed he was identified as Private Rutan by some soldiers who were not produced at the trial. (This was held to be hearsay and thus incompetent.) The injured man was then taken to the station hospital. The evidence showed that on the night of the accident Private Rutan was in that same hospital with compound fractures of both bones of each leg, abrasions about the face, jaw and one ear, and a severe head injury, and that he died as a result thereof. The evidence further disclosed that the man struck by the automobile sustained a fracture of one leg and that his face was bloody. The Judge Advocate General, on pp. 122-3, held that there was no competent evidence to prove that Private Rutan and the man struck by the automobile was one and the same person; that the mere fact that the latter sustained injuries vaguely similar to those suffered by Private Rutan did not prove him to be Rutan; and that from all that appeared the man injured by the automobile might still be alive and well. So in this case there is nothing to prove that the native who was shot by the accused is now dead. It is not entirely improbable

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that the dead native, even though he was Rapchang Lama, had been shot by someone else. There is no evidence that only one native was shot on that date in that area-- perhaps several were. That American soldiers were under orders to carry carbines is indication that the area was not considered safe and that sudden death might erupt from several directions. Two other bits of evidence, considered in conjunction with the nature of the area in which the shooting took place, give weight to the possibility that the so-called Rapchang Lama was not the Indian shot by the accused. That Indian was called Ahmed by one witness. He had also been working around the ammunition dump for about three months, while the dead man had previously been seen working around the hospital on locks and things. It is therefore not pure fantasy to conjecture that the Indian shot by the accused was not Rapchang Lama at all, even though the dead man was properly identified as such. In any event, failure to prove that the accused shot the man shown to be dead was a fatal omission (CM CBI 49)".

6. We deem it unnecessary to discuss the question as to the sufficiency of the proof of the dead native being Rapchang Lama. Insofar as the opinion of the Military Justice Division points out that the prosecution has failed to prove that the native at the hospital and the one called Ahmed whom accused shot were one and the same person, we agree. We cannot overlook the fact that the rights of the accused demand that there be proof that accused shot the particular victim named in the Specification and that he died as a result of such wound (CM CBI 49). There being no proof that the person shot by accused died as a result thereof, the prosecution has failed in a necessary vital element of its case.

7. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Specification and of the Charge, and legally insufficient to support the sentence.

/s/ John G. O'Brien , Judge Advocate

/s/ Itimous T. Valentine, Judge Advocate

/s/ Robert C. Van Ness , Judge Advocate

CM IBT # 485 (Dillon, B. L. (I.O.)) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, INDIA BURMA THEATER, APO 885, New York, N.Y., 2 April 1945.

To: The Commanding General, USF, India Burma Theater, APO 885, U. S. Army.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, 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 Private B.L. (I.O.) Dillon, 34874317, 60th Ordnance Company (Am), together with the foregoing opinion of the Board of Review constituted in the Branch Office of The Judge Advocate General with the United States Forces in India Burma.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

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

/s/ William J. Bacon
/t/ WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

2 Incls.
Record of Trial
Action Sheet

(Findings and sentence vacated. GCMO 11, IBT, 17 Apr 1945)